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No. ICC-02/11-01/15 A
Date: 31 March 2021

THE APPEALS CHAMBER

Before: **Judge Chile Eboe-Osuji, Presiding**
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

Public

Judgment
in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions

Received 31 March 2021 and notified 1 April 2021

Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Mr Gbagbo
Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Legal Representative of Victims
Ms Paolina Massidda

Counsel for Charles Blé Goudé
Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

REGISTRY

Registrar
Mr Peter Lewis

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber I of 15 January 2019 (ICC-02/11-01/15-T-232-ENG), with reasons issued on 16 July 2019 (ICC-02/11-01/15-1263 and its annexes),

After deliberation,

By majority, Judge Ibáñez and Judge Bossa dissenting,

Delivers the following

JUDGMENT

1) The decision of Trial Chamber I of 15 January 2019 (ICC-02/11-01/15-T-232-ENG), with reasons issued on 16 July 2019 (ICC-02/11-01/15-1263 and its annexes) is confirmed.

2) The conditions on the release of Mr Gbagbo and Mr Blé Goudé, stemming from the decision of the Appeals Chamber of 28 May 2020 (ICC-02/11-01/15-1355-Conf), are revoked.

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

4) Any existing judicial requests for the cooperation of States pursuant to article 57(3)(e) of the Statute are hereby rescinded.

The Appeals Chamber further finds unanimously that

5) The Registrar is directed to facilitate the review of the official French translations of filings in this appeal that include quotations taken from the draft French translation of Judge Henderson's Reasons and, if necessary, the filing of corrected versions thereof, replacing them with the relevant text contained in

the revised French translation of that document (ICC-02/11-01/15-1263-Conf-AnxB-tFRA).

6) Any additional observations made by counsel for Mr Gbagbo in document ICC-02/11-01/15-1378-tENG, on the merits of the appeal, are disregarded.

7) The request of the Prosecutor in document ICC-02/11-01/15-1381 concerning the corrigendum to counsel for Mr Gbagbo's response to the Prosecutor's Appeal Brief is rejected.

8) The Registrar is directed to reclassify the following documents as public:
   a. CIV-OTP-0018-0039;
   b. CIV-OTP-0018-0069;
   c. CIV-OTP-0018-0564;
   d. CIV-OTP-0018-0567;
   e. CIV-OTP-0018-0590;
   f. CIV-OTP-0018-0599;
   g. CIV-OTP-0028-0004;
   h. CIV-OTP-0035-1279; and
   i. CIV-OTP-0021-8027.

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REASONS

I. KEY FINDINGS

1. Article 74 of the Statute applies to decisions granting motions for no case to answer which result in the acquittal of the accused. Article 81 is the provision that governs an appeal by the Prosecutor against such decisions.

2. The separation of verdict and reasons does not entail a violation of article 74(5) of the Statute. There may, on the contrary, be clear justification for such separation in the particular circumstances of a case; most obviously in this regard is when the liberty of the person in question is at stake.

3. Release must necessarily follow a definitive decision to acquit as such a decision means that the reason for detention has fallen away and, subject to exceptional circumstances being established, as referred to in article 81(3)(c)(i) of the Statute, acquitted persons shall be released immediately.

4. Article 74(5) of the Statute clearly requires that decisions issued pursuant to article 74 should be in writing. All components of this decision must be issued in writing – both the operative part (the verdict) and the reasons.

5. In the event of a motion for a finding of no case to answer, the test that guides the trial chamber's decision may be expressed as follows: upon the conclusion of the evidence presented by the prosecution (and on behalf of the victims, as appropriate), the trial chamber shall acquit the defendant or, as the case may be, dismiss one or more of the charges, where the evidence thus far presented is insufficient in law to sustain a conviction on one or more of the charges.

6. It is only when the evidence has satisfied the standard of proof beyond reasonable doubt that it can be said to have been 'sufficient to sustain a conviction', or 'capable of supporting a conviction'.

7. In the assessment of the evidence for purposes of a no case to answer motion, the trial chamber is not precluded from sensibly weighing credibility and reliability of the evidence thus far presented, in order to satisfy the applicable standard of proof.

II. INTRODUCTION

8. This judgment concerns an appeal filed by the Prosecutor against the acquittal by a majority of Trial Chamber I, on 15 January 2019, of Mr Laurent Gbagbo and Mr Charles Blé Goudé. The Prosecutor's appeal, comprised of two grounds, alleges that the Trial Chamber committed both errors of law and procedure; it is supported by the victims participating in this appeal and it is contested in full by both acquitted persons.

9. The Trial Chamber's decision to acquit Mr Gbagbo and Mr Blé Goudé came after completion of the Prosecutor's case, and following motions by both persons that there was no case to answer based on the Prosecutor's evidence presented to the Trial Chamber, and, therefore, no need for the case to proceed further.

10. Mr Gbagbo and Mr Blé Goudé were both released from detention in February 2019, the Appeals Chamber having attached conditions to their release. Substantive filings in this appeal were made in the course of 2019 and 2020 and a partially virtual appeal hearing was held between 22 and 24 June 2020.

11. The Prosecutor raises two grounds of appeal:

First ground of appeal:[1] The Majority erred by acquitting Mr Gbagbo and Mr Blé Goudé in violation of the mandatory requirements of article 74(5) of the Statute, or alternatively erred in the exercise of its discretion by doing so;

Second ground of appeal:[2] The Majority erred in law and/or procedure by acquitting Mr Gbagbo and Mr Blé Goudé without properly articulating and consistently applying a clearly defined standard of proof and/or approach to assessing the sufficiency of evidence.

[1] Prosecutor's Appeal Brief, paras 6-121.
[2] Prosecutor's Appeal Brief, paras 122-263.

III. PROCEDURAL BACKGROUND AND DISPOSAL OF PROCEDURAL APPLICATIONS

A. Proceedings before the Pre-Trial and Trial Chambers

12. On 23 November 2011, Pre-Trial Chamber III issued a warrant of arrest for Mr Gbagbo[3] and, on 30 November 2011, he was surrendered into ICC custody.[4] On 21 December 2011, Pre-Trial Chamber III issued a warrant of arrest for Mr Blé Goudé[5] and he was surrendered into ICC custody on 22 March 2014.[6]

13. On 12 June 2014, Pre-Trial Chamber I, by majority, Judge Van den Wyngaert dissenting, confirmed the charges against Mr Gbagbo.[7] On 11 December 2014, Pre-Trial Chamber I confirmed the charges against Mr Blé Goudé.[8] Judge Van den Wyngaert appended a partly dissenting opinion.[9]

14. On 11 March 2015, the Trial Chamber joined the cases against Mr Gbagbo and Mr Blé Goudé,[10] and their trial commenced on 28 January 2016.[11]

15. On 19 January 2018, the Trial Chamber held the last hearing in the Prosecutor's presentation of evidence against Mr Gbagbo and Mr Blé Goudé.[12]

16. On 9 February 2018, the Trial Chamber issued an order on the further conduct of the proceedings, inviting the Prosecutor to file 'a trial brief illustrating her case and detailing the evidence in support of the charges'.[13] It also directed the Defence teams to indicate 'whether or not they wish to make any submission of a no case to answer motion or, in any event, whether they intend to present any evidence'.[14]

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[3] Arrest Warrant for Mr Gbagbo, p. 7.
[4] Reasons for the 15 January 2019 Decision, para. 6.
[5] Arrest Warrant for Mr Blé Goudé, p. 8.
[6] Reasons for the 15 January 2019 Decision, para. 14.
[7] Decision on Confirmation of Charges against Mr Gbagbo, p. 131. *See also* Dissenting Opinion of Judge Van den Wyngaert.
[8] Decision on Confirmation of Charges against Mr Blé Goudé, p. 90.
[9] Partly Dissenting Opinion of Judge Van den Wyngaert.
[10] Decision on Joinder, p. 33.
[11] Transcript of 28 January 2016, p. 4, line 1.
[12] Reasons for the 15 January 2019 Decision, para. 20.
[13] First Order on the Conduct of the Proceedings, p. 8.
[14] First Order on the Conduct of the Proceedings, para. 14 and p. 8.

17. On 19 March 2018, the Prosecutor filed her mid-trial brief (the 'Mid-Trial Brief')[15] and, on 23 April 2018, counsel for Mr Gbagbo and Mr Blé Goudé filed their observations, indicating, *inter alia*, the suitability of no case to answer proceedings and their intention to trigger such proceedings.[16]

18. On 4 June 2018, the Trial Chamber issued a second order on the conduct of the proceedings, ordering counsel for Mr Gbagbo and Mr Blé Goudé to file submissions 'addressing the issues for which, in their view, the evidence presented by the Prosecutor is not sufficient to sustain a conviction'.[17] The Trial Chamber declared that the presentation of the evidence by the Prosecutor was closed.[18] Deadlines were given for the filing of the submissions and responses thereto, and a hearing on the issue was scheduled to start in September 2018.[19]

19. On 8 June 2018, the Prosecutor filed a motion requesting that the Trial Chamber 'clarify the Order with respect to the applicable standard at the "no case to answer" stage'.[20]

20. On 13 June 2018, Judge Tarfusser, acting as the Single Judge, issued a decision rejecting the Prosecutor's request for additional guidance on the 'no case to answer' proceedings.[21]

21. On 23 July 2018, counsel for Mr Gbagbo and Mr Blé Goudé filed their no case to answer motions,[22] and on 10 September 2018, the Prosecutor and the OPCV filed their responses.[23]

22. The Trial Chamber held hearings on the issue in October and November 2018.[24]

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[15] Prosecutor's Mid-Trial Brief.
[16] Mr Gbagbo's Observations on the Further Conduct of the Proceedings, *see in particular* paras 11-16; Mr Blé Goudé's Observations on the Continuation of the Trial Proceedings, *see in particular* para. 3.
[17] Second Order on the Conduct of the Proceedings, p. 7.
[18] Second Order on the Conduct of the Proceedings, p. 7.
[19] Second Order on the Conduct of the Proceedings, p. 7.
[20] Prosecutor's Motion Seeking Clarification, para. 31.
[21] Decision on Prosecutor's Motion Seeking Clarification, p. 8.
[22] Mr Gbagbo's No Case to Answer Motion; Mr Blé Goudé's No Case to Answer Motion.
[23] Prosecutor's Response to No Case to Answer Motions; Annex to Prosecutor's Response to No Case to Answer Motions; OPCV's Response to No Case to Answer Motions.
[24] Transcript of 1 October 2018; Transcript of 2 October 2018; Transcript of 3 October 2018; Transcript of 12 November 2018; Transcript of 13 November 2018; Transcript of 14 November 2018; Transcript of

23. On 10 December 2018, the Trial Chamber, by majority, scheduled a hearing on the continued detention of the accused.[25] The Trial Chamber stated that it had 'the statutory duty and responsibility to ensure that the duration of the detention of an accused shall not be unreasonable'.[26] It noted the various filings received as to no case to answer and that no date had yet been set for the Defence case; it noted that the presentation of the evidence by the Prosecutor had been declared closed and considered it necessary to review whether detention remained necessary.[27] It stated that, '[i]n light of the current calendar, and the imminence of the winter recess and the festive period, the Chamber considers it necessary to convene such hearing at a short notice'.[28] The hearing on the continued detention of the accused took place on 13 December 2018.[29]

24. On 15 January 2019, the Trial Chamber, by majority, rendered a decision in open court, acquitting Mr Gbagbo and Mr Blé Goudé of all charges,[30] and indicated that it would provide its 'full and detailed reasoned decision as soon as possible' (the '15 January 2019 Decision').[31] On the same day, Judge Herrera Carbuccia filed her dissenting opinion.[32]

25. Also on 15 January 2019, the Prosecutor filed an application, under article 81(3)(c) of the Statute, requesting that the Trial Chamber find that there were exceptional circumstances to maintain the detention of Mr Gbagbo and Mr Blé Goudé and that conditions be placed on their release unless no State willing and able to enforce such conditions could be found; should the application be denied, she requested the stay of the unconditional release of the accused, pending the Appeals Chamber's decision on the suspensive effect of any forthcoming appeal by the Prosecutor.[33] On 16 January 2019, this application was rejected and the Trial Chamber ordered that both persons be

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19 November 2018; Transcript of 20 November 2018; Transcript of 21 November 2018; Transcript of 22 November 2018.
[25] Order Convening a Hearing on Detention. *See* Judge Herrera Carbuccia's Dissent to the Order Convening a Hearing on Detention.
[26] Order Convening a Hearing on Detention, para. 9.
[27] Order Convening a Hearing on Detention, paras 9-10.
[28] Order Convening a Hearing on Detention, para. 12.
[29] *See* Prosecutor's Request for Conditional Release, para. 8.
[30] 15 January 2019 Decision, p. 1, line 15 to p. 5, line 7.
[31] 15 January 2019 Decision, p. 3, line 18.
[32] Judge Herrera Carbuccia's Dissent to the 15 January 2019 Decision.
[33] Prosecutor's Request for Conditional Release, paras 21-26, 31.

unconditionally released from detention.[34] Proceedings on the release of Mr Gbagbo and Mr Blé Goudé continued before the Appeals Chamber.

26. On 16 July 2019, the written reasons for the 15 January 2019 Decision were filed ('Reasons for the 15 January 2019 Decision'),[35] appended to which were the 'Reasons of Judge Geoffrey Henderson' ('Judge Henderson's Reasons'),[36] the 'Opinion of Judge Cuno Tarfusser' ('Judge Tarfusser's Opinion'),[37] and the 'Dissenting Opinion [of] Judge Herrera Carbuccia ('Judge Herrera Carbuccia's Dissent to the Reasons for the 15 January 2019 Decision').[38]

B. Proceedings before the Appeals Chamber and disposal of procedural applications pending before the Appeals Chamber

27. On 16 January 2019, the Prosecutor appealed the 16 January 2019 Decision. She requested that the Appeals Chamber find that exceptional circumstances within the meaning of article 81(3)(c)(i) of the Statute existed to justify the continued detention of Mr Gbagbo and Mr Blé Goudé pending appeal, but that in lieu of detention, the Appeals Chamber should order that Mr Gbagbo and Mr Blé Goudé be released with conditions (only maintaining their detention in the event that no State could be found to accept them subject to the proposed conditions).[39]

28. On 1 February 2019, the Appeals Chamber allowed the Prosecutor's appeal of 16 January 2019 and imposed conditions on the release of Mr Gbagbo and Mr Blé Goudé.[40]

29. The Prosecutor filed her notice of appeal on 16 September 2019,[41] with her appeal brief following on 15 October 2019 ('Prosecutor's Appeal Brief').[42]

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[34] 16 January 2019 Decision, p. 6, lines 9-14.
[35] Reasons for the 15 January 2019 Decision.
[36] Judge Henderson's Reasons.
[37] Judge Tarfusser's Opinion.
[38] Judge Herrera Carbuccia's Dissent to the Reasons for the 15 January 2019 Decision.
[39] Conditional Release Appeal.
[40] Judgment on Conditional Release, para. 60.
[41] Prosecutor's Notice of Appeal. On 19 July 2019, the Appeals Chamber issued a decision granting an extension of time of 30 days for the filing of the Prosecutor's notice of appeal. *See* Decision on Prosecutor's Request for Extension of Time, p. 3.
[42] *See* Prosecutor's Appeal Brief.

30. On 26 November 2019, following a request by counsel for Mr Gbagbo, the Appeals Chamber set a time limit of 14 days from receipt of the full draft French translation of Judge Henderson's Reasons for the filing of responses to the Prosecutor's Appeal Brief,[43] and stated that counsel for Mr Gbagbo, '[o]n receipt of the revised French translation of this document, which is expected in July 2020, […] may file a request to supplement his response to the Prosecutor's Appeal Brief, if necessary'.[44]

31. On the same day, the Appeals Chamber issued a decision on victim participation, permitting the victims who participated in the trial proceedings in the present case to participate in this appeal, and also setting the time and page limits in respect of their observations.[45]

32. On 5 February 2020, the Appeals Chamber granted counsel for Mr Gbagbo's request for an extension of the time limit,[46] extending it to 6 March 2020, for both his, and counsel for Mr Blé Goudé's, responses to the Prosecutor's Appeal Brief.[47] On 2 March 2020, the Appeals Chamber, also on counsel for Mr Gbagbo's request,[48] issued a decision extending the page limit for both responses and for the OPCV's observations to the Prosecutor's Appeal Brief.[49]

33. On 6 March 2020, counsel for Mr Gbagbo and Mr Blé Goudé filed their responses to the Prosecutor's Appeal Brief.[50]

34. On 8 April 2020, the OPCV filed its observations on the issues on appeal.[51] On 14 April 2020, the Prosecutor advised that she would not be filing a response to the

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[43] Decision on Mr Gbagbo's Request for Extension of Time, Translations and Correction of Transcripts, p. 3.
[44] Decision on Mr Gbagbo's Request for Extension of Time, Translations and Correction of Transcripts, para. 25.
[45] Decision on Victim Participation, p. 3. *See also* Decision on the Registry's Transmission of Applications for Victim Participation.
[46] On 30 January 2020, counsel for Mr Gbagbo filed a request for extension of the time limit to file his response, arguing that he had not received, prior to 29 January 2020, rolling draft translations of Judge Henderson's Reasons. *See* Mr Gbagbo's Request for Extension of Time. On 31 January 2020, the Prosecutor filed her response to counsel for Mr Gbagbo's request: Prosecutor's Response to Mr Gbagbo's Request for Extension of Time.
[47] Decision on Mr Gbagbo's Request for Extension of Time to File a Response, para. 9.
[48] Mr Gbagbo's Request for Extension of Page Limit.
[49] Decision on Mr Gbagbo's Request for Extension of Page Limit, p. 3.
[50] Mr Gbagbo's Response; Mr Blé Goudé's Response.
[51] OPCV's Observations. *See also* Decision on OPCV's Request for Extension of Page Limit.

OPCV's Observations.[52] On 11 May 2020, counsel for Mr Gbagbo and Mr Blé Goudé filed their responses to the OPCV's Observations.[53]

35. On 30 April 2020, the Appeals Chamber invited written submissions on a list of issues related to the appeal.[54] Filings thereon were received from the parties and the OPCV on 22 May 2020.[55]

36. On 28 May 2020, the Appeals Chamber reviewed and revised the conditions on the release of Mr Gbagbo and Mr Blé Goudé, as set out in its Judgment on Conditional Release; revoking some conditions and maintaining others.[56]

37. A semi-virtual hearing was held between 22 and 24 June 2020,[57] having been postponed several times as a result of the COVID-19 crisis and issues related to the physical holding of the hearing.[58]

38. On 6 July 2020, counsel for Mr Gbagbo submitted a request seeking copies of draft English translations of his filings that the Registry had completed; he also requested that he be provided with any such future draft translations.[59] This request was dismissed by the Appeals Chamber on 22 September 2020.[60]

39. On 24 July 2020, the Prosecutor, referring to the Decision on Mr Gbagbo's Request for Extension of Time,[61] requested that the Appeals Chamber, given that the translation of Judge Henderson's Reasons was complete, 'fix a reasonable date by which Mr Gbagbo is to file any request for leave to supplement his Response' and 'to direct Mr Gbagbo to concretely identify and explain why the arguments in his Response

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[52] Prosecution's Provision of Information, para. 5.
[53] Mr Gbagbo's Response to the OPCV's Observations; Mr Blé Goudé's Response to the OPCV's Observations.
[54] Decision Rescheduling and Directions on the Hearing before the Appeals Chamber.
[55] Mr Blé Goudé's Response to the Appeals Chamber's Questions; Prosecutor's Response to the Appeals Chamber's Questions; Mr Gbagbo's Response to the Appeals Chamber's Questions; OPCV's Response to the Appeals Chamber's Questions.
[56] Decision on Mr Gbagbo's Request for Reconsideration, para. 66.
[57] 22 June 2020 Appeal Hearing; 23 June 2020 Appeal Hearing; 24 June 2020 Appeal Hearing.
[58] Order Scheduling a Hearing before the Appeals Chamber; Decision Rescheduling and Directions on the Hearing before the Appeals Chamber; Decision Vacating the Hearing before the Appeals Chamber; Decision Rescheduling the Hearing before the Appeals Chamber.
[59] Mr Gbagbo's Request for Transmission of Draft English Translations, para. 10 and p. 6.
[60] Decision on Mr Gbagbo's Request for Transmission of Draft English Translations.
[61] Prosecution Request for Mr Gbagbo's Potential Request for Leave to Supplement His Response, para. 1.

may need to be supplemented, if at all'.[62] Counsel for Mr Gbagbo responded to this request on 6 August 2020, stating that, in order for him to be in a position to know if his response to the appeal required modification, the comparison of the revised translation of Judge Henderson's Reasons with the draft would require detailed work which could only be done with maximum efficiency when all members of the Defence team returned after the court recess.[63] On 2 September 2020, the Appeals Chamber granted the Prosecutor's request and fixed 17 September 2020 as the date by which counsel for Mr Gbagbo should file any request for leave to supplement his response.[64]

40. On 17 September 2020, counsel for Mr Gbagbo advised the Appeals Chamber that he did not intend to seek leave to supplement his response,[65] stating that 'it is clear that submissions supplementary to the Defence's response to the Prosecutor's appeal brief need not be filed'.[66] He also filed, at the same time, a corrigendum to his response to the appeal brief; this was filed together with an annex containing an explanatory note, stating that he had substituted wording that he had used from the draft French translation of Judge Henderson's Reasons, with that from the final revised version thereof and also pointing out three minor editorial corrections that had been made.[67] He then went on to 'draw[] the attention of the Appeals Chamber to [several] points'[68] related to the final revised French translation: he raised issues as to the accuracy of some of the French translation;[69] he advised that the French translation of the Prosecutor's Appeal Brief should be revised to correct quotations the Prosecutor used from Judge Henderson's Reasons (which would have been taken from the draft French translation of Judge Henderson's Reasons);[70] and he stated that the revised French translation, '[g]enerally speaking […] makes Judge Henderson's thinking more

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[62] Prosecution Request for Mr Gbagbo's Potential Request for Leave to Supplement His Response, para. 4.
[63] Mr Gbagbo's Observations on the Prosecution Request for Mr Gbagbo's Potential Request for Leave to Supplement His Response, paras 10-12.
[64] Decision on the Prosecutor's Request to Set a Time Limit, p. 3.
[65] Mr Gbagbo's Information.
[66] Mr Gbagbo's Information, para. 11; *see also* paras 20, 31.
[67] Mr Gbagbo's Information, paras 9, 18; Corrigendum to Mr Gbagbo's Response; Annex 1 of the Corrigendum to Mr Gbagbo's Response.
[68] Mr Gbagbo's Information, para. 12.
[69] Mr Gbagbo's Information, paras 13-17.
[70] Mr Gbagbo's Information, paras 18-19.

apparent than the previous version and lends support to the Defence's arguments as set forth in its response to the Prosecutor's appeal brief'.[71]

41. On 22 September 2020, the Prosecutor objected to the above submissions by counsel for Mr Gbagbo,[72] stating that he 'impermissibly uses the opportunity to advance additional substantive submissions on the appeal, unrelated to the availability of the revised French translation of Judge Henderson's reasons, and without seeking leave to do so', and asking that the Appeals Chamber 'disregard them'.[73] She also states that counsel for Mr Gbagbo has not provided an 'accurate or exhaustive' list of the changes made to his response, in his corrigendum, and asks that he be requested to do so, or alternatively that he be required to file an accurate corrigendum.[74]

42. Counsel for Mr Gbagbo filed a response to this filing on 24 September 2020.[75] He explains the changes made to his substantive appellate response, and how they were reflected in the corrigendum he filed, stating that all he did 'was to act upon the new French version of Judge Henderson's Reasons' and that the Prosecutor's criticism was 'baseless'.[76] Regarding the accuracy of the French translation of Judge Henderson's Reasons, and the fact that errors may remain, he saw it as his 'duty' to point this out to the Appeals Chamber, stating that 'it is in the interests of all – the Prosecution included – but, above all, in the interests of justice, for the most faithful possible French translation of Judge Henderson's Reasons to be made available'.[77] Regarding the impact of the changes made to the revised French version of the reasons, he argues that he needed to show the Appeals Chamber how he had proceeded and 'to explain that much of the wording in the final translation was more in keeping than the previous wording with the line of reasoning which the Defence had adopted in its response to the Prosecutor's appeal brief and lent support to its arguments'.[78] He asks that the Prosecutor's requests be denied.[79]

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[71] Mr Gbagbo's Information, para. 30 and those preceding.
[72] Prosecutor's Response to Mr Gbagbo's Information.
[73] Prosecutor's Response to Mr Gbagbo's Information, para. 2.
[74] Prosecutor's Response to Mr Gbagbo's Information, para. 3.
[75] Mr Gbagbo's Further Submissions on the Information.
[76] Mr Gbagbo's Further Submissions on the Information, para. 14 and those preceding.
[77] Mr Gbagbo's Further Submissions on the Information, para. 19.
[78] Mr Gbagbo's Further Submissions on the Information, para. 22.
[79] Mr Gbagbo's Further Submissions on the Information, p. 8.

43. The Appeals Chamber notes that, in the annex to the corrigendum to his response to the Prosecutor's Appeal Brief, counsel for Mr Gbagbo pointed out where he had substituted wording that he had used from the draft French translation of Judge Henderson's Reasons, with that from the final French revised version; and he identified three minor editorial corrections that had been made. However, he did not make reference to certain changes that had been made solely to the footnotes (but where the main text had not changed) in which, when citing passages of Judge Henderson's Reasons, he had deleted the words 'draft French translation of' as part of the citation to the relevant document number and referred instead to the final revised French translation of that document, with the rest of the footnote remaining the same.[80] While he should have done so, as any change made in a corrigendum should be expressly referenced, the Appeals Chamber notes that, in response to the submissions of the Prosecutor on this issue, counsel for Mr Gbagbo explains the nature of the aforementioned changes that were made and avers that no other changes were made in the corrigendum.[81] The Prosecutor has not further contested his submissions on this point. Therefore, in the particular circumstances of this case, and given the minor nature of the changes made, which have now been explained as set out above, the Appeals Chamber does not deem it necessary to order the filing of an amended annex to the corrigendum or the refiling of the corrigendum and rejects the Prosecutor's request.

44. The Appeals Chamber accepts that quotations taken from the draft French translation of Judge Henderson's Reasons and included in the French translation of the Prosecutor's Appeal Brief, or of other filings in this appeal, should be corrected based on the final revised version of those reasons. The Registrar is directed to facilitate any such necessary correction. The Appeals Chamber notes the dispute between counsel for Mr Gbagbo and the Prosecutor as to the substantive remarks he included regarding the Prosecutor's appeal in the Information. However, bearing in mind that counsel for Mr Gbagbo specifically states that he does not seek leave to supplement his response, and that he had the opportunity to do so, these submissions have been disregarded. Regarding counsel for Mr Gbagbo's remarks as to possible inaccuracies in the revised French translation of Judge Henderson's Reasons more generally, the Appeals

[80] *See* Prosecutor's Response to Mr Gbagbo's Information, para. 3 and, in particular, the references in n. 9 thereof; Mr Gbagbo's Further Submissions on the Information, paras 9, 12-13.
[81] Mr Gbagbo's Further Submissions on the Information, paras 7-15.

Chamber notes that this document was issued originally in English (with a short French summary at the start) and that the French translation followed later. The Appeals Chamber also notes that counsel for Mr Gbagbo has not argued that any such inaccuracies require the filing of further submissions in this appeal. If he believes that issues of translation merit drawing to the attention of the Registry, he is free to do so. Otherwise, his general issues as to this translation are now a matter of public record and the Registry, and specifically the translation unit, may decide what to do with this information.

45. On 15 March 2021, counsel for Mr Gbagbo sought the reclassification as public of nine documents classified as confidential.[82] In his request, counsel for Mr Gbagbo noted that, on 8 March 2021, the Prosecutor had indicated that she did not oppose the reclassification of those documents.[83] Subsequently, neither the Prosecutor nor the OPCV filed a response to this request. Noting, *inter alia*, that these documents are evidence emanating from the Prosecutor, that the Prosecutor has not opposed counsel for Mr Gbagbo's request, and that the OPCV has likewise not made any filing opposing the request, the Appeals Chamber does not find any basis to maintain the current classification of these documents and therefore directs the Registrar to reclassify them as public.

IV. PRELIMINARY ISSUE: DEFENCE ALLEGATIONS AS TO SCOPE OF OPCV'S OBSERVATIONS

46. In their responses to the observations filed by the OPCV,[84] counsel for both Mr Gbagbo and Mr Blé Goudé argue, *inter alia*, that the OPCV failed to show any link between its submissions and the victims' personal interests and, by merely agreeing with or repeating arguments presented by the Prosecutor, or by raising additional arguments, exceeded the scope of its mandate and acted as a 'second prosecutor'.

A. Counsel for Mr Gbagbo's submissions

47. Counsel for Mr Gbagbo argues that '[i]t was […] evident that the Appeals Chamber considered that the [OPCV] was to file observations on the responses filed by

[82] Mr Gbagbo's Request for Reclassification, p. 4.
[83] Mr Gbagbo's Request for Reclassification, para. 3.
[84] Mr Gbagbo's Response to the OPCV's Observations; Mr Blé Goudé's Response to the OPCV's Observations.

the Defence […]'.[85] However, in his view, the OPCV 'only very seldom responds to the arguments raised by the Defence and, for the most part, merely echoes the Prosecutor's arguments, sometimes elaborating on them, acting thereby as a second prosecutor'.[86] Accordingly, he argues that 'in [its] observations the [OPCV] departs from the parameters set by the Appeals Chamber'.[87]

48. Counsel for Mr Gbagbo also argues that, by 'failing to present in concrete terms how the interests of victims are affected and to establish any form of prejudice […] the [OPCV] oversteps by far her role as legal representative of victims by acting as a second Prosecutor'.[88] He asserts that 'it disrupts the fairness of the proceedings' and 'destroys the equality of arms to the detriment of the Defence'.[89]

49. Lastly, counsel for Mr Gbagbo argues that the OPCV 'exceeded the scope of the present appeal as delineated by the Appellant' by raising points of law, procedure or fact not addressed by the Prosecutor.[90]

50. In relation to the first ground of appeal, counsel for Mr Gbagbo notes that the OPCV 'merely rehashes the Prosecutor's argumentation in broad strokes'.[91] In relation to the second ground of appeal, counsel for Mr Gbagbo alleges that the OPCV 'puts forward new examples in addition to elaborating upon some of the examples given by the Prosecutor in her Appeal Brief' and 'thereby exceeds the ambit of the appeal as delineated by the Prosecutor'.[92] Counsel for Mr Gbagbo argues that the fact that the Prosecutor selected examples to reflect an error of law or procedure 'does not give the [OPCV] free rein to raise every example that comes to her mind: to do so would extend the ambit of the appeal'.[93] He further adds that, by adding its 'own examples and [its]

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[85] Mr Gbagbo's Response to the OPCV's Observations, para. 16.
[86] Mr Gbagbo's Response to the OPCV's Observations, para. 17.
[87] Mr Gbagbo's Response to the OPCV's Observations, para. 16.
[88] Mr Gbagbo's Response to the OPCV's Observations, para. 40.
[89] Mr Gbagbo's Response to the OPCV's Observations, paras 41-42.
[90] Mr Gbagbo's Response to the OPCV's Observations, paras 18, 20, 40. *See also* para. 21 (In addition to exceeding the scope of the appeal, counsel for Mr Gbagbo argues that the OPCV's observations may even have exceeded the scope of the decision under appeal).
[91] Mr Gbagbo's Response to the OPCV's Observations, para. 80.
[92] Mr Gbagbo's Response to the OPCV's Observations, para. 134.
[93] Mr Gbagbo's Response to the OPCV's Observations, para. 134.

own arguments to what the Prosecutor has said, the [OPCV] mounts a covert appeal under the cloak of "observations"'.[94]

51. In addition, counsel for Mr Gbagbo asserts that the OPCV goes further than the Prosecutor as it 'calls into question in general terms the conduct of the trial by the Chamber, maintains that the Chamber failed in its duty to reason the acquittal, and claims that the Chamber violated the Prosecutor's right to appeal'.[95] He argues that '[b]y raising points of law and of fact not addressed by the Prosecutor, the [OPCV] has in effect mounted an appeal of the decision, a covert appeal'.[96]

B. Counsel for Mr Blé Goudé's submissions

52. Counsel for Mr Blé Goudé argues that the OPCV 'exceeded the scope of its mandate under the Statute and the Chamber's order to present victims' "views and concerns in respect of their personal interests in the issues on appeal"'.[97] In particular, he submits that the OPCV failed to demonstrate the link between its arguments and the personal interests of the victims and has, 'to a large extent, acted as a "second prosecutor" by merely concurring or repeating arguments put forward by the Prosecution',[98] or by raising additional errors or new arguments in relation to the Prosecutor's grounds of appeal.[99]

53. With respect to the latter allegation, counsel for Mr Blé Goudé argues that, in relation to the first ground of appeal, the OPCV raised the following new arguments: (a) that deferral of reasons is contrary to article 81(3)(c) of the Statute,[100] (b) that the Reasons for the 15 January 2019 Decision should have been delivered in open court,[101] (c) that the Trial Chamber failed to provide a summary in open court pursuant to article

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[94] Mr Gbagbo's Response to the OPCV's Observations, para. 134.
[95] Mr Gbagbo's Response to the OPCV's Observations, para. 18, *see also* paras 20, 23-39, 100-105, 128, 134.
[96] Mr Gbagbo's Response to the OPCV's Observations, para. 20.
[97] Mr Blé Goudé's Response to the OPCV's Observations, para. 2 and p. 4, heading I.
[98] Mr Blé Goudé's Response to the OPCV's Observations, paras 11-19. In particular, counsel for Mr Blé Goudé asserts that the '[OPCV] has failed to present a concrete, express or convincing statement of fact to support the link between its observations and the personal interests of victims' and fails 'to convincingly show, concretely, how those victims' interests are affected in the context of the issues on appeal'. *See* para. 14. *See also* Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 13.
[99] Mr Blé Goudé's Response to the OPCV's Observations, paras 22, 24.
[100] Mr Blé Goudé's Response to the OPCV's Observations, paras 25-33.
[101] Mr Blé Goudé's Response to the OPCV's Observations, paras 34-41.

74(5) of the Statute,[102] (d) that the hearing on continued detention[103] was a sign that the majority did not analyse all the evidence before issuing the 15 January 2019 Decision,[104] (e) that an acquittal grounded on different legal bases breaches the principle of legality,[105] (f) that the 15 January 2019 Decision triggers an automatic right to an appeal,[106] and (g) that the Trial Chamber's rendering of its written reasons six months after the 15 January 2019 Decision is incompatible with internationally recognised human rights.[107]

54. In relation to the second ground of appeal, counsel for Mr Blé Goudé argues that the OPCV's observations 'consist, almost in their entirety, of mere disagreements with the factual findings of the Trial Chamber and are thus unrelated to the Prosecution's second ground of appeal'.[108] In particular, he argues that the OPCV's arguments 'should not be considered since they go beyond the issues that are on the appeal, and thus are outside the scope of the [OPCV]'s views and concerns on the issues on appeal in the present case'.[109] Additionally, counsel for Mr Blé Goudé argues, the OPCV puts forward alleged errors of fact that the Prosecutor did not raise and thus her submissions fall clearly outside the scope of 'views and concerns' of victims on the issues on appeal.[110]

C. Determination of the Appeals Chamber

55. The Appeals Chamber notes that the arguments raised by counsel for Mr Gbagbo and Mr Blé Goudé are two-fold: the OPCV, without showing any link to the personal interests of the victims, (i) merely agrees with or repeats arguments already presented by the Prosecutor, and (ii) raises additional arguments not addressed by the Prosecutor. By doing so, it is alleged that the OPCV exceeded the scope of its mandate and acted as a 'second prosecutor'.

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[102] Mr Blé Goudé's Response to the OPCV's Observations, paras 42-44.
[103] Transcript of 13 December 2018.
[104] Mr Blé Goudé's Response to the OPCV's Observations, paras 45-48.
[105] Mr Blé Goudé's Response to the OPCV's Observations, paras 49-50.
[106] Mr Blé Goudé's Response to the OPCV's Observations, para. 51.
[107] Mr Blé Goudé's Response to the OPCV's Observations, paras 52-60.
[108] Mr Blé Goudé's Response to the OPCV's Observations, p. 25, Section B, heading *ix*. *See also* paras 66-67.
[109] Mr Blé Goudé's Response to the OPCV's Observations, para. 66.
[110] Mr Blé Goudé's Response to the OPCV's Observations, paras 66-68.

56. The Appeals Chamber recalls its Decision on Victim Participation, wherein it determined that 'the victims who participated in the trial proceedings may participate in the appeals against the Impugned Decision as, in principle, their personal interests are affected by the appeals in the same way as during trial.'[111] The Appeals Chamber determined that the OPCV 'may file consolidated observations, to the responses of both Mr Gbagbo and Mr Blé Goudé', stating later in the decision that 'the legal representative of victims may file observations presenting the victims' views and concerns with respect to the issues on appeal, insofar as their personal interests are affected'.[112]

57. To the extent that counsel for Mr Gbagbo and Mr Blé Goudé argue that the submissions of the OPCV go beyond its mandate, the Appeals Chamber recalls its decision in the *Ngudjolo* final appeal, where the victims 'allege[d] errors in the Acquittal Decision that were not specifically raised by the Prosecutor'.[113] The Appeals Chamber stated the following:

> 41. The Appeals Chamber observes that pursuant to article 81 (1) (a) and (b) of the Statute, only the Prosecutor and the convicted person, or the Prosecutor "on that person's behalf" may appeal a decision pursuant to article 74 of the Statute. It follows that victims are not entitled to bring an appeal against such a decision. The Appeals Chamber recalls that in its Decision on Victim Participation, it decided that the victims "may, through their legal representatives, participate in the present appeal proceedings for the purpose of presenting their views and concerns in respect of their personal interests in the issues on appeal". The Appeals Chamber considers that in presenting their views and concerns, the participating victims may make observations as to alleged errors in the Acquittal Decision, even if these alleged errors were not specifically raised by the Prosecutor, as long as they affect the victims' personal interests and remain within the ambit of the Prosecutor's grounds of appeal. Accordingly, the Appeals Chamber will address the submissions of Victim Group I and II to the extent that they comply with these criteria.[114]

58. Similarly, the Appeals Chamber recalls its decision in the *Lubanga* final appeal, where counsel for Mr Lubanga requested the dismissal *in limine* of the victims' observations in that case insofar as they concerned grounds of appeal that did not affect the victims' personal interests. The Appeals Chamber found the following:

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[111] Decision on Victim Participation, para. 8.
[112] Decision on Victim Participation, p. 3 and para. 9.
[113] *Ngudjolo* Appeal Judgment, para. 40.
[114] *Ngudjolo* Appeal Judgment, para. 41.

> 36. With respect to the observations of the legal representatives of victims, the Appeals Chamber recalls that, in the decision authorising victims to participate in the present final appeal, it held that victims could present their views and concerns "in respect of their personal interests affected by the issues raised". The Appeals Chamber has therefore taken into account the observations of the legal representatives of victims, regardless of whether they are explicitly referenced in this judgment, only to the extent that the issue under consideration affects the victims' personal interests. The Appeals Chamber does not consider it necessary to formally dismiss any observations for exceeding the personal interests of the victims and therefore will not address Mr Lubanga's request further.[115]

59. The Appeals Chamber has not been presented with any 'convincing reasons' to depart from its previous jurisprudence.[116] In light of the foregoing, the Appeals Chamber considers that the OPCV can raise arguments that may or may not have been raised by the Prosecutor as long as they relate to issues that affect the victims' personal interests and, importantly, remain within the ambit of the Prosecutor's grounds of appeal. Accordingly, the Appeals Chamber will take into consideration the OPCV's observations to the extent that they comply with these criteria.

V. STANDARD OF REVIEW ON APPEAL AND SUBSTANTIATION OF ARGUMENTS

60. Article 81(1)(a) of the Statute provides that the Prosecutor may appeal on grounds of a procedural error, error of fact or error of law. According to article 83(2) of the Statute, the Appeals Chamber may intervene only if it 'finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error'.

61. The Prosecutor frames her allegations of errors as ones of law and procedure.[117] She specifically states, in relation to the second ground of appeal, that she does not allege errors of fact.[118] She argues that the errors alleged had a material effect on the decision of the Trial Chamber.[119] As the Prosecutor has challenged the manner in which the Appeals Chamber should approach the issue of the material effect of errors found on appeal, this will be addressed later in this judgment when considering her arguments

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[115] *Lubanga* Appeal Judgment, para. 36.
[116] *See* *Bemba* OA2 Judgment, para. 16.
[117] Prosecutor's Appeal Brief, paras 6-7, 122-125.
[118] Prosecutor's Appeal Brief, paras 126-130.
[119] Prosecutor's Appeal Brief, paras 115-121, 253-263.

on that issue;[120] this current section is limited to addressing the Appeals Chamber's standard of review in the assessment of errors of law, procedure and fact and the issue of substantiation of arguments on appeal.

A. Errors of Law

62. Regarding errors of law, the Appeals Chamber has previously found that:

> [it] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.[121]

B. Procedural Errors

63. Regarding procedural errors, the Appeals Chamber has found that:

> an allegation of a procedural error may be based on events which occurred during the trial proceedings and pre-trial proceedings. However, as with errors of law, the Appeals Chamber will only reverse a […] decision if it is materially affected by the procedural error.[122]

64. Having previously found that procedural errors 'often relate to alleged errors in a Trial Chamber's exercise of its discretion',[123] the Appeals Chamber has established that:

> […] it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber

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[120] *See below* paras 255-269.
[121] *Lubanga* Appeal Judgment, para. 18 *referring to* *Banda and Jerbo* OA2 Judgment, para. 20. *See also* *Ngudjolo* Appeal Judgment, para. 20; *Bemba* Appeal Judgment, para. 36; *Bemba et al.* Appeal Judgment, para. 99.
[122] *Lubanga* Appeal Judgment, para. 20. *See also* *Ngudjolo* Appeal Judgment, para. 21; *Bemba* Appeal Judgment, para. 47; *Bemba et al.* Appeal Judgment, para. 99.
[123] *Ngudjolo* Appeal Judgment, para. 21. *See also* *Bemba* Appeal Judgment, para. 48; *Bemba et al.* Appeal Judgment, para. 100.

> has to be satisfied that the improper exercise of discretion materially affected the impugned decision. [Footnotes omitted].[124]

65. With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law or an alleged incorrect conclusion of fact, the Appeals Chamber will apply the standard of review with respect to errors of law as set out above and errors of fact as set out below.[125] Where a discretionary decision allegedly amounts to an abuse of discretion, the Appeals Chamber has stated the following:

> Even if an error […] has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously". The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.[126] [Footnotes omitted.]

C. Errors of Fact

66. At the outset, the Appeals Chamber recalls that by the terms of article 66(3) of the Statute an accused may only be convicted if a trial chamber is convinced of the guilt of the accused beyond reasonable doubt. Consequently, a trial chamber is required to enter findings to the standard of proof of 'beyond reasonable doubt' in relation to those findings that underpin the charges and upon which a conviction depends. In reviewing factual findings by the trial chamber, the Appeals Chamber will apply the standard of reasonableness as explained below.

67. In the appellate process, it is the role of the Appeals Chamber to review the conviction or acquittal and to ensure that, in arriving at its conclusion, the trial chamber correctly appreciated and applied the standard of beyond reasonable doubt. The Appeals Chamber must ensure that, when making factual findings, the trial chamber carried out a holistic evaluation of the evidence. This is in the sense of assessing in a connected way and weighing of all the relevant evidence taken together, in relation to the fact at issue; rather than evaluating items of evidence without regard to other related

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[124] *Bemba* Appeal Judgment, para. 48. *See also* *Bemba et al.* Appeal Judgment, para. 100; *Ngudjolo* Appeal Judgment, para. 21; *Kenyatta* OA5 Judgment, para. 22; *See also* *Kony* OA3 Judgment, paras 79-80; *Ruto and Sang* OA Judgment, paras 89-90; *Lubanga* Sentencing Judgment, para. 41.
[125] *Kenyatta* OA5 Judgment, paras 23-24; *Bemba et al.* Appeal Judgment, para. 101.
[126] *Kenyatta* OA5 Judgment, para. 25. *See also*, *Bemba et al.* Appeal Judgment, para. 101.

evidence. Furthermore, the Appeals Chamber must be satisfied that the trial chamber assessed all factual findings in deciding, pursuant to the applicable law, that the accused person's guilt was established beyond reasonable doubt or that he or she should be acquitted.

68. With these principles in mind, when a factual error is alleged, the Appeals Chamber will determine whether a trial chamber's factual findings were reasonable in the particular circumstances of the case. In assessing the reasonableness of factual findings, the Appeals Chamber will consider whether the trial chamber's evaluation was consistent with logic, common sense, scientific knowledge and experience,[127] and whether the trial chamber took into account all relevant and connected evidence, and was mindful of the pertinent principles of law (including, as applicable, the standard of proof beyond reasonable doubt). Beyond the foregoing considerations, the Appeals Chamber will not disturb a trial chamber's factual finding only because it would have come to a different conclusion.[128]

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[127] The obligation of a trier of fact in this regard finds expression in the law and jurisprudence of various national legal systems. **Argentina**: article 398 of the Argentinean Penal Procedural Code: 'The court will pass sentence by majority vote, assessing the evidence received and the acts of the debate in accordance with the rules of *sana crítica*' ('*El tribunal dictará sentencia por mayoría de votos, valorando las pruebas recibidas y los actos del debate conforme a las reglas de la sana crítica'*); National Chamber of Criminal Cassation (Argentina), 10 May 2018: 'The system of *sana crítica* requires the foundation of the decision, that is, the expression of the reasons why it is decided in one way or another. It also requires that the critical evaluation of the evidence be carried out in accordance with the rules of logic, experience and scientific knowledge'; **Peru**: article 393 of the Peruvian Penal Procedural Code: 'The evidentiary evaluation will respect the rules of *sana crítica*, especially in accordance with the principles of logic, the maxims of experience and scientific knowledge' ('*La valoración probatoria respetará las reglas de la sana crítica, especialmente conforme a los principios de la lógica, las máximas de la experiencia y los conocimientos científicos*'); **Poland**: article 7 of the Polish Code of Criminal Procedure provides that the organs in charge of the proceedings shall form their view on the basis of all evidence led, assessed freely taking into account the principles of sound reasoning and indications of knowledge and life experience; **Canada**: *R. v. François*, [1994] 2 S.C.R. 827 (S.C.C.), para. 23: It was open to the jury, with the knowledge of human nature that it is presumed to possess, to determine on the basis of common sense and experience whether they believed the complainant's story of repressed and recovered memory, and whether the recollection she experienced in 1990 was the truth. To do so cannot be characterized as unreasonable; **Spain:** Susana Polo Garcia, 12 April 2018, STSJ M 3980/2018, 44/2018, p. 4: In relation to the review of convictions based on circumstantial evidence, the Criminal Chamber of the Superior Court of Justice of Madrid has held that these could be sustained if: (i) the facts or the basic facts are fully proven; (ii) the facts constituting the offence are deduced precisely from the proven basic facts; and (iii) the reasonableness of the inference can be checked in the sense that the first instance chamber has identified the findings of fact or evidence and explained the reasoning or logical link between the basic facts and the inferred facts; and (iv) that this reasoning is based on the rules of human judgment or common experience or on a reasonable understanding of the reality normally lived and appreciated in accordance with the collective criteria in force.

[128] *Lubanga* Appeal Judgment, para. 21.

69. When considering alleged factual errors, the Appeals Chamber will allow the deference considered necessary and appropriate to the factual findings of the trial chamber. Such deference is justified by certain considerations that inescapably result from the construction of the Statute. The first consideration is that the Statute has vested the trial chamber with the specific function of conducting the trial. As part of that function and in light of the principle of immediacy, the trial chamber has the primary responsibility to determine the reliability and credibility of the evidence received in the course of the trial and then comprehensively assess the weight of the evidence.[129] In turn, this entails that the trial chamber has the primary responsibility to evaluate the connections and fairly resolve any inconsistencies between the items of evidence received at trial. The trial chamber's function of conducting the trial warrants the presumption that this function has been properly performed, unless and until the contrary is shown. The second consideration is that the Statute requires the appellant to raise specific errors on appeal and the Appeals Chamber reviews the trial chamber's decision through the lens of the errors raised. Nothing in the Statute suggests that an appeal under article 81 in which an error of fact is alleged should contemplate a trial *de novo* in the Appeals Chamber, in total disregard of the trial conducted by the trial chamber.

70. Nevertheless, the Appeals Chamber's deference to the factual findings of the trial chamber is not without qualification. The Appeals Chamber may interfere with a trial chamber's factual finding if it is shown to be attended by errors including the following: insufficient support by evidence; reliance on irrelevant evidence; failure to take into account relevant evidentiary considerations and facts; failure properly to appreciate the significance of the evidence on record; or failure to evaluate and weigh properly the relevant evidence and facts. The Appeals Chamber may interfere where it is unable to discern objectively how the trial chamber's conclusion could have reasonably been reached from the evidence on the record.

71. The Appeals Chamber will consider the validity of the challenged factual finding *vis-à-vis* other relevant factual findings in a holistic manner. However, this does not mean that the Appeals Chamber will review the entirety of the evidentiary record. The

[129] The principle of immediacy recognises the primary role of the trial chamber in the context of the unfolding dynamics of any given trial.

Appeals Chamber will have regard not only to the arguments put forward by the appellant, but also to the evidence relied upon by the trial chamber and the arguments of all other parties and participants on the point in issue. In assessing the correctness of a factual finding, the trial chamber's reasoning in support thereof is of great significance. In particular, if the supporting evidence appears weak, or if there are significant contradictions in the evidence, deficiencies in the trial chamber's reasoning as to why it found that evidence persuasive may lead the Appeals Chamber to conclude that the finding in question was unreasonable.

72. Where an error of fact is established, the material effect of this error on the trial chamber's decision will have to be assessed, pursuant to article 83(2) of the Statute. Importantly, an error and its materiality must not be assessed in isolation; rather the Appeals Chamber must consider the impact of the error in light of the other relevant factual findings relied upon by the trial chamber for its decision on conviction or acquittal. A trial chamber's decision is materially affected by a factual error if the Appeals Chamber is persuaded that the trial chamber, had it not so erred, would have convicted rather than acquitted the person or *vice versa* in whole or in part.

D. Substantiation of arguments

73. As to the issue of substantiation of arguments, regulation 58(2) of the Regulations requires the appellant to refer to 'the relevant part of the record or any other document or source of information as regards any factual issue' and 'to any relevant article, rule, regulation or other applicable law, and any authority cited in support thereof' as regards any legal issue. It also stipulates that the appellant must, where applicable, identify the finding or ruling challenged in the decision with specific reference to the page and paragraph number.

74. In addition to these formal requirements, an appellant is obliged to present cogent arguments that set out the alleged error and explain how the trial chamber erred.[130] In alleging that a factual finding is unreasonable, an appellant must explain why this is the case, for example, by showing that it was contrary to logic, common sense, scientific knowledge and experience. In their submissions on appeal, it will be for the parties and participants to draw the attention of the Appeals Chamber to all the relevant aspects of

[130] *Lubanga* Appeal Judgment, para. 30; *Kony* OA3 Judgment, para. 48.

the record or evidence in support of their respective submissions relating to the impugned factual finding. Furthermore, in light of article 83(2) of the Statute an appellant is required to demonstrate how the error materially affected the impugned decision. Whether an error or the material effect of that error has been sufficiently substantiated will be determined on a case by case basis.[131]

VI. FIRST GROUND OF APPEAL

A. Introduction

75. The first ground of appeal is the following:

> The Majority erred by acquitting Mr Gbagbo and Mr Blé Goudé in violation of the mandatory requirements of article 74(5) of the Statute, or alternatively erred in the exercise of its discretion by doing so.[132]

76. The Prosecutor alleges that the 15 January 2019 Decision failed to comply with the requirements of article 74(5) of the Statute and that these deficiencies were not cured by the written reasons which were provided six months later.[133] She also argues that the manner of issuance of the reasons, consisting of three separate opinions, in July 2019, breached article 74(5).[134] The Prosecutor argues that the errors under the first ground of appeal had a material effect on the 15 January 2019 Decision, 'read together with' the Reasons for the 15 January 2019 Decision.[135]

77. In addressing this ground of appeal, the Appeals Chamber will first consider the Prosecutor's arguments as to the applicability of article 74 (and its sub-paragraph (5)) to the Trial Chamber's decision. If applicable, it will thereafter consider her arguments as to the Trial Chamber's alleged breach of the requirements of article 74(5) and her arguments that the Trial Chamber's decision was not fully informed.

B. Applicability of article 74 of the Statute, in particular its paragraph (5), to this case

78. In alleging that the Trial Chamber failed to comply with the mandatory requirements of article 74(5), the Prosecutor's first argument is that the Trial Chamber

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[131] *Lubanga* Appeal Judgment, para. 31.
[132] Prosecutor's Appeal Brief, p. 7.
[133] Prosecutor's Appeal Brief, para. 2.
[134] Prosecutor's Appeal Brief, para. 52.
[135] Prosecutor's Appeal Brief, para. 115; *see also* paras 116-121.

failed to enter a formal decision under article 74 of the Statute. Counsel for Mr Blé Goudé argues that article 74 did not apply to this situation and that, as a result, the Prosecutor's appeal should be dismissed *in limine* because the Prosecutor failed to seek leave to appeal within the correct time frame. Moreover, counsel for both Mr Gbagbo and Mr Blé Goudé dispute that article 74(5) was applicable, but argue that, even if it is found to apply, its requirements were complied with. The Appeals Chamber will, therefore, first address whether article 74(5) was applicable to the Trial Chamber's decision.

1. Relevant statements by the Trial Chamber

(a) The 15 January 2019 Decision and the Trial Chamber's Decision on Release

79. In the 15 January 2019 Decision, the Trial Chamber stated that it had been 'seized of requests for the acquittal and immediate release of both accused'[136] and found, by majority, that there was 'no need for the Defence to submit further evidence as the Prosecutor has not satisfied the burden of proof in relation to several core constitutive elements of the crimes as charged'.[137]

80. In its operative findings, the 15 January 2019 Decision states, in relevant part, that, by majority, it:

> Decides that the Prosecutor has failed to satisfy the burden of proof to the requisite standard as foreseen in Article 66 of the Rome Statute.
>
> Grants the Defence motions for acquittal from all charges against Mr Laurent Gbagbo and Mr Charles Blé Goudé.
>
> […]
>
> Orders the immediate release of both accused pursuant to Article 81(3)(c) of the Statute, subject to any request by the Prosecutor under subparagraph (i) of this Article.[138]

81. There is no reference in the 15 January 2019 Decision to article 74 of the Statute. There is reference to rule 144(2) of the Rules of Procedure and Evidence (which relates, among other things, to the delivery of decisions on the criminal responsibility of an

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[136] 15 January 2019 Decision, p. 2, lines 20-21.
[137] 15 January 2019 Decision, p. 3, lines 2-4.
[138] 15 January 2019 Decision, p. 4, lines 15-18; p. 4 line 24 to p. 5, line 1.

accused) in the context of the Trial Chamber explaining why it would 'provide its full and detailed reasoned decision as soon as possible' rather than immediately.[139] Conversely, Judge Herrera Carbuccia's Dissent to the 15 January 2019 Decision is unequivocal that article 74(5) applied to the decision in the present case.[140] She also found that any appeal of that decision would be pursuant to article 81 of the Statute.[141]

82. In the Trial Chamber's Decision on Release, pronounced the next day, the Trial Chamber rejected the Prosecutor's request to maintain Mr Gbagbo and Mr Blé Goudé in detention pursuant to article 81(3)(c)(i) of the Statute, with Judge Herrera Carbuccia dissenting.[142] In coming to that conclusion, and by reference to its decision to acquit the accused of the previous day, the Trial Chamber stated the following:

> The majority also strongly reject the suggestion in paragraph 47 of Judge Herrera's dissenting opinion [of the previous day] that the majority had a duty to consider the relevance, probative value and potential prejudice of each item of evidence for the purpose of this decision. This only arises in the context of admissibility rulings when giving the Chamber's decision pursuant to Article 74. This is not now relevant given the Chamber's direction to the parties and participants that for the purpose of this procedure, all evidence submitted is to be considered.[143]

83. At the end of its decision, the Trial Chamber stated the following: 'This concludes the trial as far as this Chamber is concerned […]'.[144]

(b) The Reasons for the 15 January 2019 Decision

84. The Reasons for the 15 January 2019 Decision refer, in the opening paragraph, to the provisions of the ICC texts to which regard had been had in issuing the majority and minority reasons for the 15 January 2019 Decision. Article 74 of the Statute is listed as one of those provisions.[145] The procedural history of the case is set out and the 15

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[139] 15 January 2019 Decision, p. 3, line 18 to p. 4, line 9.
[140] Judge Herrera Carbuccia's Dissent to the 15 January 2019 Decision, para. 21.
[141] Judge Herrera Carbuccia's Dissent to the 15 January 2019 Decision, para. 23.
[142] 16 January 2019 Decision, p. 6, lines 9-17.
[143] 16 January 2019 Decision, p. 4, lines 17-23.
[144] 16 January 2019 Decision, p. 6, line 20.
[145] The opening paragraph of the Reasons for the 15 January 2019 Decision reads as follows: 'Trial Chamber I of the International Criminal Court, in the case of The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, having regard to Articles 64, 66, 67, 69, and 74 of the Statute of the Court; Rules 134(3), 140, 142, 144 of the Rules of Procedure and Evidence of the Court; Regulation 55 of the Regulation of the Court; and paragraphs 1, 43 and 44 of the Directions on the conduct of the proceedings ("Directions"), hereby issues the reasons for the Majority's oral decision and Judge Herrera Carbuccia's dissenting opinion dated 15 January 2019' (footnote omitted).

January 2019 Decision is reproduced, including its operative part which, as set out above, did not refer to article 74, whereas Judge Herrera Carbuccia's Dissent to the 15 January 2019 Decision did so refer.

85. At the outset of his opinion attached thereto, Judge Tarfusser stated that he neither considered it necessary nor wise to discuss the nature of the decision, which he appeared to regard as 'to a large extent a purely theoretical debate'.[146] He noted the view of Judge Henderson that article 74 was not the appropriate legal basis for the decision, but stressed that what was of crucial importance for him was what Judge Henderson referred to as the practical and legal effect of the decision, namely that the accused had been formally cleared of all charges and could not be tried again for the same facts and circumstances; and that the accused had been acquitted because those charges had not been sustained by the evidence.[147]

86. Later in his opinion, in the context of discussing the applicable evidentiary standard in no case to answer proceedings, Judge Tarfusser stated that his views on such proceedings were well-known. He continued by stating that

> they have no place in the statutory framework of the Court and are unnecessary as a tool to preserve the interests and rights they are meant to serve. There is only one evidentiary standard and there is only one way to terminate trial proceedings. 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). Trial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81. Both concepts, acquittal and beyond reasonable doubt, are indeed mentioned in the oral decision issued on 15 January 2019.[148]

87. At the beginning of his reasons, Judge Henderson explained why, in his opinion, article 74 was not applicable to the decision entered further to no case to answer proceedings.[149]

88. Judge Henderson pointed out that, unlike at the *ad hoc* tribunals, the Court's underlying texts did not expressly provide for no case to answer proceedings.[150]

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[146] Judge Tarfusser's Opinion, para. 2.
[147] Judge Tarfusser's Opinion, para. 2.
[148] Judge Tarfusser's Opinion, para. 65.
[149] Judge Henderson's Reasons, paras 1-17.
[150] Judge Henderson's Reasons, para. 10.

However, he noted that the Appeals Chamber had confirmed that there was a legal basis to conduct such proceedings, pursuant to article 64(6)(f) of the Statute and rule 134(3) of the Rules.[151] Yet, he considered that a question still arose as to the legal basis for a decision which found that there was no case to answer.[152]

89. Judge Henderson stated that judgments on acquittals and convictions are ordinarily rendered pursuant to article 74 and can thereby result in appeals under article 81(1).[153] However, he referred to trial chambers having ordinarily used article 74 as a legal basis for rendering judgments on the criminal responsibility of an accused rather than in relation to decisions resulting from no case to answer proceedings.[154] In respect of those proceedings, Judge Henderson pointed out that the key question to be determined was whether the Prosecutor had submitted sufficient evidence 'such that a reasonable chamber could convict'.[155] If so, the trial must continue; but, if not, the chamber should halt the trial proceedings and enter a formal acquittal.[156] In the latter circumstances, article 74 was not the appropriate basis for the decision, even though its practical effect was that of an acquittal.[157]

90. Judge Henderson explained his reasons for that conclusion as follows:

> In the context of a trial conducted within an adversarial framework, a decision that there is 'no case' is made where a trial chamber concludes that the Prosecutor, having presented all her evidence, has not discharged her evidential burden by submitting sufficient evidence capable of supporting a conviction with respect to one or more of the charges. In essence, the issue to be decided is whether the Prosecutor has discharged that burden. It is possible for an accused to be convicted on the basis of evidence that was adduced by victims, by a co-accused, at the request of the Trial Chamber or even evidence that was submitted by the accused himself. However, given that the onus is on the Prosecutor to prove the guilt of the accused, in deciding whether to give a statement or to submit evidence in his defence, an accused may ask the Trial Chamber to determine whether the Prosecutor has submitted sufficient evidence capable of supporting a conviction, and as such justifying the continuation of the trial. If at this stage, there is insufficient evidence capable of supporting a conviction on a charge or charges, it is incompatible with the presumption of innocence to continue the trial with the

[151] Judge Henderson's Reasons, para. 10.
[152] Judge Henderson's Reasons, para. 10.
[153] Judge Henderson's Reasons, para. 12.
[154] Judge Henderson's Reasons, para. 12.
[155] Judge Henderson's Reasons, para. 2.
[156] Judge Henderson's Reasons, para. 2.
[157] Judge Henderson's Reasons, para. 13.

hope that the only incriminating evidence capable of supporting a conviction would be supplied by the accused.

The legal basis for the decision that the accused has no case to answer is thus article 66(2) of the Statute, which places the onus of proving the guilt of the accused squarely on the Prosecutor. This burden never shifts.

The legal effect of the decision that the Prosecutor has submitted insufficient evidence to support a conviction on a charge, results in the discontinuation of the proceedings with respect to that charge and the acquittal of the accused on that or those evidentially unsupported charges. On the other hand, should the Trial Chamber find that the Prosecutor has submitted sufficient evidence capable of supporting a conviction, the trial continues on that or those charges, with the accused deciding whether he elects to make a statement and/or submit evidence in his own defence. After the accused presents his defence, the Trial Chamber acts in accordance with rules 141 and 142 of the Rules, deliberates on all of the evidence and at that stage, it issues its decision in accordance with article 74 of the Statute.

Accordingly, even though a decision that there is no case to answer is not a formal judgment of acquittal on the basis of the application of the beyond reasonable doubt standard in accordance with article 74 of the Statute, it has an equivalent legal effect in that the accused is formally cleared of all charges and cannot be tried again for the same facts and circumstances. The only possible exception to this is when the Prosecutor has not been able to present her case fully due to significant interference *during* the trial proceedings.[158]

2. Summary of submissions

(a) The Prosecutor's submissions

91. The Prosecutor submits that a formal decision under article 74 of the Statute, which applies to decisions concerning acquittal, should have been entered in the present case.[159] She argues that article 74 is the only provision pursuant to which a trial chamber may acquit an accused and that it therefore applies if no case to answer proceedings result in an acquittal,[160] submitting that both the nature and the effect of the decision in the present case was that of an acquittal, which was the outcome sought by the accused.[161] The Prosecutor avers that, at the time of issuing the 15 January 2019 Decision, the Trial Chamber's view was that it was not a decision under article 74 – a position which she states was taken in Judge Henderson's Reasons, in July 2019, where

[158] Judge Henderson's Reasons, paras 14-17 (footnotes omitted).
[159] *See, inter alia*, Prosecutor's Appeal Brief, paras 2, 6-7, 22, 34-39.
[160] Prosecutor's Appeal Brief, paras 34-35.
[161] 22 June 2020 Appeal Hearing, p. 12, line 22 to p. 13, line 9.

he stated that article 66(2), and not article 74, was the legal basis for the decision; she also submits that, by July 2019, Judge Tarfusser had changed his position on this, stating then that 'trial proceedings could only end in acquittal or conviction, as emerging from article 74, read together with article 81'.[162] However, the Prosecutor submits that the essential safeguards of article 74(5) apply to the ultimate decision of a trial chamber, whether the acquittal is entered further to no case to answer proceedings or at the conclusion of the Defence case, 'irrespective of the provision under which an acquittal is entered'.[163] It is submitted that article 66(2) could neither be the procedural basis for a decision of acquittal nor for the requirements that govern such a decision, as article 66(2) merely provides that the Prosecutor must establish the guilt of the accused and, like certain other provisions, such as article 67, it applies throughout the entire trial.[164]

92. In the Prosecutor's Response to the Appeals Chamber's Questions, it is submitted that the legal basis for the decision further to no case to answer proceedings depends upon whether it results in the trial continuing or in the acquittal of the accused.[165] In the latter scenario, it is averred that only a decision complying with article 74(5) can dismiss the charges and acquit the accused, thereby triggering both *ne bis in idem* and appeals under article 81.[166] With the exception of admissions of guilt, the Prosecutor submits that article 74 applies to all decisions that finally determine the criminal responsibility of the accused.[167] The Prosecutor argues that the case-law of the ICTY supports her position.[168] She further submits that, even if it is found that article 74(5) does not apparently apply, it should be deemed to apply.[169]

(b) The OPCV's observations

93. The OPCV agrees with the Prosecutor that a decision of acquittal can only be entered under article 74, with the correct legal basis for an appeal therefrom being

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[162] Prosecutor's Appeal Brief, paras 36-37, 39.
[163] Prosecutor's Appeal Brief, para. 38.
[164] 22 June 2020 Appeal Hearing, p. 11, lines 18-23 and p. 12, lines 2-4.
[165] Prosecutor's Response to the Appeals Chamber's Questions, para. 2.
[166] Prosecutor's Response to the Appeals Chamber's Questions, para. 2.
[167] Prosecutor's Response to the Appeals Chamber's Questions, paras 3-8, 13.
[168] Prosecutor's Response to the Appeals Chamber's Questions, paras 10-11.
[169] Prosecutor's Response to the Appeals Chamber's Questions, para. 12.

article 81,[170] contrasting this with a decision dismissing a motion for no case to answer, which is interlocutory in nature.[171] It argues that this position is consistent with the case-law of the ICTY.[172] It emphasises that an acquittal at the no case to answer stage has the same practical effect as an acquittal at the end of the trial and that article 74 must therefore apply.[173] It also highlights what it submits was the disagreement between Judge Henderson and Judge Tarfusser about the legal basis for the 15 January 2019 Decision, arguing that a decision to acquit founded upon two different legal bases was in breach of the principle of legality.[174]

(c) Counsel for Mr Gbagbo's submissions

94. Counsel for Mr Gbagbo submits that the Statute does not provide for no case to answer proceedings and that therefore the judges need to draw upon other provisions by analogy, such as article 74(5) or article 81, in determining the procedure to be followed.[175] However, he argues that, in so doing, those provisions do not become directly applicable and do not need to be applied to the letter.[176] Counsel for Mr Gbagbo argues that the Prosecutor fails to demonstrate that article 74 is directly applicable in its entirety and fails to recognise that the spirit of article 74 was applied and respected in this case.[177]

95. Counsel for Mr Gbagbo avers that both Judge Henderson and Judge Tarfusser agreed that their decision was not formally taken under article 74.[178] He also points out that in the *Ruto and Sang* case the judges based their decision upon article 64(2) and not article 74 and that there is nothing to indicate that the decision would have been based on that latter article had that case resulted in an acquittal; and he argues that it

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[170] OPCV's Observations, para. 25.
[171] OPCV's Observations, paras 28-31. *See also* OPCV's Response to the Appeals Chamber's Questions, paras 14-20.
[172] OPCV's Observations, paras 29, 31; OPCV's Response to the Appeals Chamber's Questions, paras 14-18, 20; 22 June 2020 Appeal Hearing, p. 26, line 16 to p. 28, line 4.
[173] OPCV's Observations, para. 29; OPCV's Response to the Appeals Chamber's Questions, para. 14; 22 June 2020 Appeal Hearing, p. 26, lines 10-15.
[174] OPCV's Observations, paras 26-27.
[175] Mr Gbagbo's Response, para. 13.
[176] Mr Gbagbo's Response, para. 13. *See also* 22 June 2020 Appeal Hearing, p. 39, lines 14-20, in which counsel for Mr Gbagbo submits that it was logical that, having entered an acquittal, the Trial Chamber sought inspiration from article 81 in ordering the immediate release of Mr Gbagbo; but that does not mean that article 81 was formally applicable.
[177] Mr Gbagbo's Response, paras 29, 33-34. *See generally*, Mr Gbagbo's Response, paras 33-146.
[178] Mr Gbagbo's Response, paras 35-40.

would be illogical for the legal basis of the decision further to no case to answer proceedings to change depending upon the result of those proceedings.[179] In that latter regard, counsel for Mr Gbagbo argues that if the legal basis for the decision further to no case to answer proceedings changes depending upon the result, an appeal would be available as of right pursuant to articles 74 and 81 if the proceedings end in an acquittal, whereas, should they result in a 'mistrial' or in the trial continuing, any appeal of the decision would require leave under article 82(1)(d);[180] and this would also mean that, in the case of a partial acquittal, within the same decision different rules would apply to whether the judges need to determine the admissibility of every piece of evidence before announcing their decision, depending upon whether the relevant part of the decision related to the (partial) acquittal under article 74 or to that part of the decision that determined that the remainder of the proceedings should continue.[181] Counsel for Mr Gbagbo submits that one sole regime should apply to the assessment of evidence and to procedural remedies available to the parties in relation to the same set of proceedings.[182]

96. Counsel for Mr Gbagbo submits that the Appeals Chamber decided that the basis for no case to answer proceedings was article 64 of the Statute, without mentioning article 74, in the *Ntaganda* case.[183] He further submits that, at the ICTY, there is one provision that regulates final judgments of conviction or acquittal rendered at the end of the trial (article 23(2) of the ICTY Statute) and a separate procedure that applies to decisions pursuant to no case to answer proceedings (rule 98*bis* of the ICTY Rules) – and that there has never been any objection to different rules applying to these two different types of decision.[184]

97. In responding to the written questions posed by the Appeals Chamber, counsel for Mr Gbagbo submits that the starting point for determining the legal framework that applies to no case to answer proceedings is the recognition that the purpose of such proceedings is to safeguard the rights of the person charged: namely, that it would be

[179] Mr Gbagbo's Response, paras 41-48; 54-61.
[180] Mr Gbagbo's Response, paras 58-59.
[181] Mr Gbagbo's Response, para. 60.
[182] Mr Gbagbo's Response, para. 61.
[183] Mr Gbagbo's Response, para. 52.
[184] Mr Gbagbo's Response, para. 53.

unfair to require the Defence to present a case in circumstances in which the Prosecutor has failed to put forward sufficiently sound evidence to sustain a conviction by the end of her case.[185] No case to answer proceedings thereby reaffirm that the burden of proof rests upon the Prosecutor, protect the presumption of innocence and the right to a fair and expeditious trial and ensure that the person charged is not subject to a needlessly protracted trial and consequent continued detention.[186] From that standpoint, counsel for Mr Gbagbo reaffirms that no provision of the Statute applies directly to no case to answer proceedings, as they are not provided for therein; and that what is therefore necessary is for the substance of article 74(5) to be applied so as to ensure that any decision further to such proceedings is reasoned, clear and public and that the issue in this case is therefore whether the Trial Chamber acted consistently with those principles, which reflect the underlying intentions of the drafters of the Statute, rather than whether article 74(5) was adhered to in every detail.[187] He proceeds to argue that the Trial Chamber complied with the spirit of article 74(5) in following those principles in the present case.[188]

(d) Counsel for Mr Blé Goudé's submissions

98. Counsel for Mr Blé Goudé submits that article 74 was not applicable, that the 15 January 2019 Decision was correctly based upon article 66(2) and that the appeal is therefore inadmissible as it does not fulfil the requirements of article 82(1)(d) of the Statute and that it should consequently be dismissed *in limine*.[189]

99. In arguing that the appeal is inadmissible and should be dismissed *in limine*, counsel for Mr Blé Goudé avers that the Trial Chamber stated that the legal basis for the 15 January 2019 Decision was article 66(2), and not article 74, with there being no clear contradiction between Judges Tarfusser and Henderson in that regard.[190] It is

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[185] Mr Gbagbo's Response to the Appeals Chamber's Questions, para. 4. *See also* 22 June 2020 Appeal Hearing, p. 36, lines 17-21; 23 June 2020 Appeal Hearing, p. 52, line 22 to p. 53, line 5.
[186] Mr Gbagbo's Response to the Appeals Chamber's Questions, paras 4-10. *See also* 22 June 2020 Appeal Hearing, p. 36, line 22 to p. 37, line 2.
[187] Mr Gbagbo's Response to the Appeals Chamber's Questions, paras 11-16. *See also* 22 June 2020 Appeal Hearing, p. 38, lines 18-21, p. 39, line 21 to p. 40, line 7; and 23 June 2020 Appeal Hearing, p. 53, lines 11-21, p. 55, lines 2-6, p. 55, line 13 to p. 56, line 1.
[188] Mr Gbagbo's Response to the Appeals Chamber's Questions, paras 17-31.
[189] Mr Blé Goudé's Response, paras 2-3, 11, 13-16.
[190] Mr Blé Goudé's Response, paras 18-21. *See also* Mr Blé Goudé's Response to the OPCV's Observations, paras 49-50.

submitted that no case to answer proceedings are interlocutory in nature and do not trigger an automatic right to appeal, as they take place at the half-way stage of the trial and may result either in the trial continuing or in an acquittal; they thereby differ from the ultimate decision on the guilt of the accused to be made at the end of the trial under article 74.[191] It is further argued that the distinct nature of a decision following no case to answer proceedings is reflected in the Court's jurisprudence in the *Ruto and Sang* case, in which Judge Fremr held that the legal basis for the decision was articles 64, 66 and 67, and not article 74, and in which Judge Herrera Carbuccia opined in her dissent that article 74 was not applicable to decisions at the half-way stage.[192] Counsel for Mr Blé Goudé also avers that the distinction between acquittals further to no case to answer proceedings and those at the end of the trial had also been emphasised by the ICTY, which required leave to be granted for appeals further to no case to answer proceedings under its rule 98*bis*.[193] Furthermore, it is argued that the 15 January 2019 Decision was distinct in nature from an article 74 decision, notwithstanding that it had the same legal effect: by reference to jurisprudence of the Appeals Chamber, counsel for Mr Blé Goudé submits that the legal effect of a decision does not qualify its character.[194] Counsel for Mr Blé Goudé further submits that it would breach the right to a fair trial and equality of arms if the Prosecutor were able to appeal a decision further to no case to answer proceedings automatically, whereas the Defence would require leave to appeal the same decision, arguing that rights of appeal cannot be determined by the outcome of the proceedings.[195]

100. Counsel for Mr Blé Goudé further submits that the Trial Chamber was not bound by the requirements of article 74(5) as there was no legal requirement to enter the 15 January 2019 Decision under article 74.[196] Reference is made to decisions on admissions of guilt, which are averred to be governed by the formal requirements of

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[191] Mr Blé Goudé's Response, para. 22.
[192] Mr Blé Goudé's Response, para. 23; Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 7; 22 June 2020 Appeal Hearing, p. 53, line 18 to p. 54, line 9.
[193] Mr Blé Goudé's Response, para. 23; Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 7.
[194] Mr Blé Goudé's Response, paras 24-25. *See also* Mr Blé Goudé's Response to the OPCV's Observations, para. 51; Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 10; 22 June 2020 Appeal Hearing, p. 51, line 16 to p. 52, line 21.
[195] Mr Blé Goudé's Response, paras 27-31.
[196] Mr Blé Goudé's Response, paras 32-37.

rule 139 rather than article 74, notwithstanding their finality,[197] as well as to the *Ruto and Sang* case which, it is submitted, was not based on article 74 and is similar to the present case in that the trial chamber in that case decided in its discretion to entertain no case to answer proceedings, which resulted in a final decision on the case at the half-way stage.[198] Counsel for Mr Blé Goudé further argues that the reliance on article 81(3)(c) in the Trial Chamber's Decision on Release does not mean that the 15 January 2019 Decision was one under article 74, as article 81(3)(c) – unlike article 81(1) – is not limited to acquittals or convictions pursuant to article 74 but can also apply to decisions of acquittal further to no case to answer proceedings.[199] Counsel for Mr Blé Goudé submits that a plain reading of article 74 suggests that it applies to decisions taken at the end of trial proceedings, pointing out that article 74(2), referring to an 'evaluation of the evidence and the entire proceedings', does not apply to decisions taken at the half-way stage further to no case to answer proceedings.[200]

101. In responding to the written questions posed by the Appeals Chamber, counsel for Mr Blé Goudé reaffirms that article 66(2) is the correct legal basis for the decision, emphasising that the decision's rationale is that an accused should not be required to respond to a charge if there is insufficient evidence upon which a chamber could convict at the end of the Prosecutor's case, the assessment of which is intrinsic to the burden of proof upon the Prosecutor provided for in article 66(2); and that article 64(2) provides an additional legal basis.[201] It is argued that a textual and purposive interpretation of article 74 demonstrates that it applies exclusively to the final judgment on guilt or innocence, as also reflected in the Court's jurisprudence, the provision's drafting history and academic commentaries; whereas decisions further to no case to answer proceedings at the half-way stage entail an entirely different legal test.[202] It is submitted that the standard that applies to the latter proceedings – whether a reasonable trial chamber could convict – is lower than that which applies to final decisions on guilt or innocence under article 74 which, unlike decisions in the present case, carry an equal

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[197] Mr Blé Goudé's Response, para. 32; Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 17; 22 June 2020 Appeal Hearing, p. 52, line 22 to p. 53, line 5.
[198] Mr Blé Goudé's Response, para. 33.
[199] Mr Blé Goudé's Response, para. 34.
[200] Mr Blé Goudé's Response, para. 36.
[201] Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 2.
[202] Mr Blé Goudé's Response to the Appeals Chamber's Questions, paras 3-6, 12. *See also* 22 June 2020 Appeal Hearing, p. 51, lines 10-12, p. 52, lines 17-21.

possibility of a conviction as an acquittal, are assessed by reference to a beyond reasonable doubt standard and are based upon the totality of the evidence and after the Defence has had the opportunity to present its case.[203] It is also pointed out that, in line with jurisprudence of the Appeals Chamber, whether a trial chamber should entertain no case to answer proceedings is a matter for its discretion, whereas the rendering of the final decision at the end of the trial pursuant to article 74 is mandatory.[204] Counsel for Mr Blé Goudé avers that ICTY jurisprudence does not provide authoritative guidance on the appropriate appellate regime for no case to answer proceedings at the Court, given the clarity of the Statute that article 81(1) excludes decisions rendered further to those proceedings, which are instead governed by article 82(1)(d); and reiterates the fundamental unfairness of having different avenues of appeal open to the Prosecutor and the Defence based upon the outcome of the proceedings.[205] It is further submitted that neither the finality of the proceedings nor the principle of *ne bis in idem* means that article 74 either is, or should be deemed to be, applicable to the present decision.[206]

3. Determination of the Appeals Chamber

102. The question arising out of this first argument raised by the Prosecutor, related to alleged breaches of the article 74(5) requirements, is whether article 74 of the Statute applies to the decision taken further to no case to answer proceedings in this case which resulted in the acquittal of both accused.

103. Counsel for both of the acquitted persons dispute that this provision applies. The Appeals Chamber notes that counsel for Mr Blé Goudé emphasises that there are two consequences of his argument that the Trial Chamber was not bound by the requirements of article 74(5). First, he argues that this appeal is inadmissible and should be dismissed *in limine* because it cannot be brought pursuant to article 81, given that the decision to acquit does not constitute one which falls under article 74. The Appeals Chamber recalls in this context that article 81(1) provides that an appeal may be brought

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[203] Mr Blé Goudé's Response to the Appeals Chamber's Questions, paras 7-10.
[204] Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 11; 22 June 2020 Appeal Hearing, p. 54, line 23 to p. 55, line 7.
[205] Mr Blé Goudé's Response to the Appeals Chamber's Questions, paras 14-16. *See also* 22 June 2020 Appeal Hearing, p. 56, lines 14-20.
[206] Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 17. *See also* 22 June 2020 Appeal Hearing, p. 56, line 21 to p. 57, line 4.

as of right against a decision under article 74 of the Statute. The Prosecutor has brought this appeal under article 81(1). In the circumstances of the present case, if the 15 January 2019 Decision was not a decision under article 74, any appeal thereof would have therefore required the leave of the Trial Chamber under article 82(1)(d) in order for it to be brought before the Appeals Chamber. Yet the Prosecutor did not seek any such leave to appeal in the present case. Second, counsel for Mr Blé Goudé argues that, as there was no legal requirement for the Trial Chamber to render its decision under article 74, the requirements of article 74(5) could not have been breached because those requirements were not binding upon it; and ground one of the appeal could be dismissed on that basis. The Appeals Chamber will address both of these issues in this section.

104. It is recalled that, in a 2017 judgment in the *Ntaganda* case, the Appeals Chamber specifically took up the fundamental question as to 'whether the Court's legal framework permits a "no case to answer" procedure'.[207] And, just as specifically, the Appeals Chamber answered that question in the affirmative. As the Appeals Chamber put it on that occasion:

> 42. As a prerequisite to assessing Mr Ntaganda's grounds of appeal, the Appeals Chamber must first consider whether a 'no case to answer' procedure is permissible under the legal framework of the Court.
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> 43. In this regard, the Appeals Chamber observes that the Court's legal texts do not expressly provide for a 'no case to answer' procedure. Moreover, the Appeals Chamber is not aware of any proposals made or discussions held during the drafting of the Statute or Rules of Procedure and Evidence ("Rules") in relation to such a procedure.
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> 44. Nevertheless, in the view of the Appeals Chamber, a 'no case to answer' procedure is not inherently incompatible with the legal framework of the Court. A Trial Chamber may decide to conduct such a procedure based on its power to rule on relevant matters pursuant to article 64(6)(f) of the Statute and rule 134(3) of the Rules. A decision on whether or not to conduct a 'no case to answer' procedure is thus discretionary in nature and must be exercised on a case-by-case basis in a manner that ensures that the trial proceedings are fair and expeditious pursuant to article 64.
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> 45. In view of the foregoing, the Appeals Chamber finds that while the Court's legal texts do not explicitly provide for a 'no case to answer' procedure in the trial proceedings before the Court, it nevertheless is permissible. A Trial Chamber

[207] *Ntaganda* OA6 Judgment.

may, in principle, decide to conduct or decline to conduct such a procedure in the exercise of its discretion.

105. For present purposes, the Appeals Chamber reiterates the judicial precedent set so clearly in the foregoing pronouncements. The institution of 'no case to answer' is a common feature of criminal procedural law at international courts and tribunals.[208] One may also note that, indeed, it is also not disputed between the parties that (1) it was, in principle, open to the Trial Chamber to allow for a no case to answer procedure, before the presentation of evidence by the Defence, and (2) such a procedure could result in the acquittal of the accused.

106. The no case to answer procedure is a necessary adjunct to two of the most fundamental principles of criminal law. One is that the defendant enjoys a presumption of innocence. The other is that the burden of proof in displacement of that presumption always rests on the prosecution, to be discharged on a standard of proof beyond reasonable doubt. As is developed further within the second ground of appeal below,[209] that burden must be seen to have been discharged by the close of the prosecution case – on the basis of evidence presented up until that stage – in order to justify putting the defendant to his or her own case, the purpose of which is to raise or reveal reasonable doubt relative to the case presented by the prosecution.

107. In this appeal, the pronouncements in *Ntaganda* do not fall for reconsideration.[210] What falls for consideration here is whether article 74 applies to decisions of acquittal further to no case to answer proceedings.

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[208] There has been a general recognition of the 'no case to answer' institution as a proper feature of the conduct of international criminal proceedings. The procedure is evident in rule 98*bis* of the ICTY Rules, rule 98*bis* of the ICTR Rules, rule 98 of the SCSL Rules, rule 167 of the STL Rules, rule 130 of the KSC Rules and rule 121 of the IRMCT Rules. All of them provide(d) for the no case to answer procedure.
[209] *See* paras 301-317 below.
[210] The Appeals Chamber notes that, in her dissenting opinion, Judge Ibáñez refers to paragraph 43 of the *Ntaganda* OA6 Judgment stating, as set out above, that the Appeals Chamber was not aware of any proposals made or discussions held during the drafting of the Statute or the Rules in relation to no case to answer proceedings. Judge Ibáñez proceeds to refer to one proposed draft rule (draft rule 95) within a document containing 137 draft rules entitled 'Draft Rules of Procedure and Evidence for the International Criminal Court'. That document was submitted by a Working Group of the American Bar Association in February 1999 to the delegates to the Preparatory Commission. Rule 95 was a draft provision which proposed to introduce the no case to answer procedure into the draft Rules of Procedure and Evidence for this Court. It was based upon rule 98*bis* of the ICTY Rules of Procedure and Evidence. From the fact that this draft rule was not adopted, Judge Ibáñez concludes that this means that the no case to answer procedure was considered and rejected by the drafters of the Rules of Procedure and Evidence – and that

108. The above-mentioned *Ntaganda* judgment determined that article 64 was the legal basis for deciding to conduct no case to answer proceedings. However, it does not address which of the Court's provisions apply to a decision that acquits the accused further to such proceedings. As seen above, this issue gave rise to different views within the Trial Chamber; and it is central to the arguments that have been raised in relation to the admissibility of the appeal as a whole and the merits of its first ground.

109. The Appeals Chamber finds that judgments of trial chambers for full acquittal of a defendant – following a no case to answer motion – fall entirely within the purview of article 74 of the Statute. This is primarily because that provision is intended to regulate the Trial Chamber's final judgment that puts an end to the trial – either by way of a conviction or by way of an acquittal. It is true that an unsuccessful no case to answer motion does not, as such, contemplate a conviction of the defendant, and thus does not bring a case to a final conclusion. However, the incident of the motion is different in the event of a full acquittal of the defendant, following a successful no case to answer motion. The case is brought to conclusion, and the plea of double jeopardy – or *ne bis in idem* – fully attaches. For that reason, such judgments of acquittal fall entirely within the ambit of article 74. And they are to be fully regulated accordingly, in the same manner as a judgment resulting from a plenary trial. The Appeals Chamber is persuaded by the pronouncement of the ICTY Appeals Chamber to the same effect.[211]

110. It is particularly to be stressed that nothing in the text of article 74 of the Statute precludes or obstructs its application to no case to answer judgments that bring finality to the proceedings. More specifically, article 74(2) does not result inevitably in that

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this could lead the Appeals Chamber to change its jurisprudence in respect of the acceptability of no case to answer proceedings. The Appeals Chamber cannot agree. The Appeals Chamber is not aware of any documentary or other evidence that this draft rule was discussed and specifically rejected by the States who were responsible for drafting and adopting the Rules of Procedure and Evidence. The Appeals Chamber therefore neither sees any need to modify its previous jurisprudence as a result of this aspect of the drafting history referred to by Judge Ibáñez; nor would it wish to do so in light of the importance of the no case to answer procedure to international criminal proceedings for the reasons elaborated upon in the above two paragraphs of this judgment. In any event, article 21(1)(b) of the Rome Statute permits the Court to apply 'principles and rules of international law […]'. These would include principles and rules of international law of a procedural nature, which has demonstrably assisted in the administration of justice at other international courts and tribunals whose prior work should furnish the ICC with sensible practices and precedents.

[211] *See* *Karadžić* Appeal Judgement, para. 9: 'The Appeals Chamber recalls that an appeal against an acquittal entered at the Rule 98*bis* stage of a case [judgement of acquittal at the close of the Prosecutor's case] is an appeal against a judgement. Thus, in an appeal of a Rule 98*bis* judgement of acquittal, the proceedings are governed by Article 25 of the Statute and by the standards of appellate review for alleged errors of law and alleged errors of fact' (footnotes omitted).

preclusion, when it provides that the Trial Chamber's judgment 'shall be based on its evaluation of the evidence and the entire proceedings'. In the context of a no case to answer motion, that injunction acquires a relative sense pertaining to the need to evaluate all the evidence presented in the 'entire proceedings' up to that point. The administration of justice has perennially been troubled by a judicial tendency to rely either upon what is not 'evidence' at all, by reliance on evidence that was not on the record or by reliance upon selective aspects of the evidence. It is those concerns that animate article 74(2). But the provision neither serves to require the trial chamber to put the Defence to its case (when the prosecution evidence has proved too weak to justify such continuation), nor to preclude judgments of full acquittal resulting from no case to answer motions from the same strictures that regulate a judgment of acquittal that may be made after the conclusion of the case for the Defence.

111. The Appeals Chamber further emphasises that, where no case to answer proceedings result in an acquittal, article 74 applies to the decision notwithstanding that there are differences between those proceedings and the ultimate decision taken at the end of the trial. Those differences are not such as to make article 74 inapplicable in the present circumstances. As is fully explained within the second ground of appeal below,[212] the Trial Chamber is ultimately determining that an accused should be acquitted because the evidence presented up until the no case to answer proceedings is insufficient in law to sustain a conviction to the beyond reasonable doubt standard of proof; and the Trial Chamber is not precluded from sensibly weighing the credibility and reliability of that evidence in reaching that conclusion. Where an acquittal results on the basis that there is insufficient evidence to sustain a conviction to the beyond reasonable doubt standard, there is nothing that precludes the application of article 74 to that decision.

112. A further reason that it is clear that article 74 regulates the type of decision under consideration in this appeal is the wording of article 81 of the Statute. That provision regulates appeals of decisions taken under article 74 and is entitled 'Appeal against decision of acquittal or conviction or against sentence'. As such, it is clear from the express wording of that heading that article 74 applies, *inter alia*, to decisions of acquittal. The decision in the present case resulted in the acquittal of the accused. And

[212] *See* paras 301-317 below.

the practical effect of the acquittal (the triggering of *ne bis in idem* and the finality of the proceedings) is the same as it would be if the acquittal had been entered at the end of the trial. As such, it is precisely the type of decision to which article 74 applies. Indeed, there is no other provision in the Court's legal texts pursuant to which a trial chamber may acquit an accused; and the requirements of article 74(5) are intended to regulate a decision of this significance and finality. The 15 January 2019 Decision brought the trial proceedings against the two accused to an end, with a formal decision entered that they had been acquitted and could not be tried again for the very serious crimes with which they had been charged (subject only to a successful appeal). Any such final verdict of the Trial Chamber is the ultimate decision to which all of the proceedings up until that point have led. It is the final first instance decision in a case involving 'the most serious crimes of international concern' which this Court was established to try.[213] As such, it is essential that a decision of acquittal meets certain pre-established requirements so as to ensure that each party and participant to the case is fully apprised of the outcome in a predictable manner, which must be public and reasoned. The Appeals Chamber fails to see any merit in the argument that denies the direct applicability of article 74(5) to an acquittal of the nature under consideration in this appeal.

113. The Appeals Chamber accepts, noting arguments made by counsel for both Mr Gbagbo and Mr Blé Goudé in this regard, that at first sight it appears unusual for a decision resulting from the same set of proceedings to be based upon two different provisions, and to have two different potential avenues of appeal, depending upon the result of the motion for no case to answer. The formality of logic may make that argument seductive, but practical wisdom does not. It is not in dispute that article 64 is the basis upon which the proceedings are commenced and conducted.[214] However, on closer examination, it is entirely appropriate that article 64 continues to be the basis for a decision dismissing a motion for no case to answer and is interlocutory in nature, whereas article 74 is the basis for a decision of acquittal further to a successful motion and is final, given the nature of that decision. As such, and as explained further directly below, the former decision would potentially be capable of appeal were it to satisfy the

[213] *See* article 1 of the Statute.
[214] *See* *Ntaganda* OA6 Judgment, paras 42-45.

requirements of article 82(1)(d); and the latter decision would be appealable as of right by the Prosecutor under article 81(1).

114. The above simply reflects the reality of no case to answer proceedings. If they are dismissed, the trial continues in the normal way. The decision is therefore necessarily interlocutory in nature as it has been taken during the course of the trial as an exercise of discretion by the trial chamber in ensuring that the proceedings are fair and expeditious.

115. Furthermore, a decision dismissing an improbable no case to answer motion does not sacrifice justice for the Defence. This is because the dismissal of the motion only becomes an interlocutory decision of the trial chamber, in a manner that still fully respects the right of the Defence to present its case. That is to say, the decision does not entail conviction, finality of process and the engagement of jeopardy of a criminal conviction, since the case continues in a manner that fully allows the Defence to present its case. Contrary to the submissions of counsel for Mr Blé Goudé, the fact that a decision dismissing a motion for no case to answer is interlocutory – and therefore does not result in an automatic right of appeal for the Defence, notwithstanding that the Prosecutor does have such a right if the motion is granted – therefore neither results in unfairness to the Defence nor in any breach of the principle of equality of arms. Importantly, the Defence still retains its automatic right to appeal the eventual article 74 decision taken at the end of the case pursuant to article 81 of the Statute in the same way in which the Prosecutor is also granted a direct right of appeal pursuant to that article at the end of the case. The Appeals Chamber further notes that, even if leave to appeal were refused at the no case to answer stage, any issues arising out of the correctness of those proceedings might be capable of being raised by the Defence in any appeal pursuant to article 81 of the Statute that it may bring at the end of the trial.

116. The above point is of particular importance when noting that in any event in which the motion is dismissed in whole or in part, thus resulting in a continuation of the trial for the Defence to present its case, the trial chamber is not required to issue a detailed judgment, nor need such a decision be rendered separately in writing after the decision has been delivered orally in open court. While the Trial Chamber is not legally prevented from issuing a full written decision, it may also only issue an ‘oral’ judgment.

117. The acceptability of such a summary manner of judgment is entirely conducive to efficiency and judicial economy, in a manner that is not inconsistent with the interests of justice. First, it avoids the inconvenience and awkwardness of detailed assessment and pronouncements as to the standard of proof – an exercise that may require repeating at the end of the Defence case. Second, it is also to be considered that a detailed assessment of the evidence in an unsuccessful no case to answer motion may only serve to give either party a mid-term gauge of the strengths and weaknesses of the case and may thus result in an undue advantage.

118. With the above in mind, and taking into account the interlocutory nature of a decision dismissing a motion for no case to answer, the Appeals Chamber recalls that whether or not to grant leave to appeal any such decision always remains a matter within the discretion of the trial chamber pursuant to article 82(1)(d) of the Statute. In exercising that discretion, the trial chamber is required to consider whether the underlying decision 'involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial'; and the trial chamber must be of the opinion that 'an immediate resolution by the Appeals Chamber may materially advance the proceedings'. The trial chamber will determine whether and how to exercise its discretion in light of the facts of the individual case before it. The Appeals Chamber merely notes that, in the context of potential appeals against decisions rejecting motions for no case to answer, there may be situations in which it might in fact be difficult for the Appeals Chamber to evaluate potential arguments about issues such as the assessments of the evidence if they have been dealt with in only a summary manner by the first-instance chamber, as referred to above. In such circumstances, the Appeals Chamber may not have sufficient information – from the decision itself – to be able appropriately to rule on the issues raised on appeal; and the Appeals Chamber may also, in such circumstances, in effect be being asked by the parties to consider evidential issues in greater detail – and at an earlier stage of the proceedings – than was considered appropriate by the trial chamber concerned. More generally, it may also be the case that an assessment by the Appeals Chamber of detailed Defence arguments about the evidential sufficiency of the entire prosecution case is an exercise more appropriately carried out by the Appeals Chamber at the conclusion of the case. The trial chamber will be able to take factors such as these into account when deciding whether to exercise its discretion under article 82(1)(d).

119. In contrast to the above, if the motion for no case to answer is successful, the accused are acquitted and the case ends. It results in the automatic right of appeal provided to the Prosecutor under article 81 of the Statute further to a decision of acquittal. It must logically do so as it is the final pronouncement of the trial chamber and determines that the accused should be acquitted. An automatic appeal in those circumstances is precisely what article 81 of the Statute is there to provide; and to find otherwise would deprive the Prosecutor of her statutory right to appeal the final determination of the case.

120. For the above reasons, the Appeals Chamber is not persuaded by the submission made on behalf of Mr Blé Goudé, also by reference to previous jurisprudence of the Appeals Chamber in other contexts, that the fact that the 15 January 2019 Decision had the legal effect of an article 74 decision did not mean that it was an article 74 decision in nature, as the outcome of a decision does not alter its nature.[215] Counsel for Mr Blé Goudé argues that no case to answer decisions are distinct in nature from those under article 74; and that it is therefore irrelevant that its effect in this case – an acquittal – coincides with one of the effects of a decision under article 74, namely an acquittal pronounced at the end of the trial.[216] However, as explained above, decisions of acquittal fall entirely within the purview of article 74. The nature of the decision in the present case was one of acquittal. Indeed, the Appeals Chamber notes that, in bringing their no case to answer motions, what both accused sought was their acquittal;[217] and what the Trial Chamber granted was '*the Defence motions for acquittal* from all charges' against them (emphasis added). As such, the acquittal was not merely the effect of the decision, but it was the nature of the decision itself. The fact that the acquittal occurred because the Prosecutor had not provided sufficient evidence to

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[215] Mr Blé Goudé's Response, paras 24-25. *See also* Mr Blé Goudé's Response to the OPCV's Observations, para. 51; Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 10; 22 June 2020 Appeal Hearing, p. 51, line 16 to p. 52, line 21.

[216] Mr Blé Goudé's Response, paras 24-25. *See also* Mr Blé Goudé's Response to the OPCV's Observations, para. 51; Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 10; 22 June 2020 Appeal Hearing, p. 51, line 16 to p. 52, line 21.

[217] *See* Mr Gbagbo's No Case to Answer Motion, pp. 1, 5 (the motion was entitled 'Requête de la Défense de Laurent Gbagbo afin qu'un **jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo** et que sa mise en liberté immédiate soit ordonnée' (emphasis added) and the request for his acquittal was repeated at the conclusion of the motion); Mr Blé Goudé's No Case to Answer Motion, para. 671, in which counsel for Mr Blé Goudé requested the Trial Chamber, *inter alia*, to 'find that there is no case for the Defence to answer with respect to all the charges against Charles Blé Goudé and to dismiss the charges accordingly'.

sustain a conviction, which was the examination undertaken by the Trial Chamber, and that the decision was taken further to no case to answer proceedings, does not alter the overall nature of the decision as being one of acquittal.

121. Further to the above, the Appeals Chamber finds, contrary to the arguments put forward on behalf of Mr Blé Goudé,[218] that article 66(2) cannot be the legal basis for the decision in the present case. That provision puts the onus upon the Prosecutor to prove the guilt of the accused. It is an essential provision which applies throughout the proceedings, including at this stage, in much the same way as other provisions that protect the rights of the accused, such as the remainder of article 66 and article 67. However, it does not regulate the contents of a decision further to an acquittal nor the procedure for the issuance of that decision. Nor is there any other related subsidiary provision to article 66(2) which does so. The only provision in the Statute that sets out the requirements for a decision of acquittal is article 74(5).

122. The Appeals Chamber is equally unpersuaded by the argument put forward on behalf of Mr Blé Goudé where, referring to decisions further to admissions of guilt, it is argued that this demonstrates that there was no legal requirement for the decision to be entered pursuant to article 74 in the present case, as such decisions demonstrate that not all 'final' decisions need to be entered pursuant to article 74.[219] However, decisions further to admissions of guilt are specifically regulated by article 65 of the Statute and rule 139 of the Rules, that latter rule specifying the requirements for the decision and thereby constituting *lex specialis* in that regard.[220] This is a separate procedure under the Court's legal texts relating only to admissions of guilt. A separate provision – article 74(5) – sets out the requirements of a decision concerning an acquittal, which is why it is applicable to the present case.

123. Finally, the Appeals Chamber has noted the various arguments that have been made arising out of the *Ruto and Sang* case – in particular, the arguments of counsel for Mr Blé Goudé that the decision in that case was not made under article 74.[221]

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[218] Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 2.
[219] Mr Blé Goudé's Response, para. 32; Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 17; 22 June 2020 Appeal Hearing, p. 52, line 22 to p. 53, line 5.
[220] Rule 139(2) provides: 'The Trial Chamber shall then make its decision on the admission of guilt and shall give reasons for this decision, which shall be placed on the record'.
[221] Mr Blé Goudé's Response, para. 33.

However, the Appeals Chamber observes that the Trial Chamber in *Ruto and Sang* did not itself expressly consider whether or not article 74 could have applied to its decision, and nothing within the decision of the majority of the Trial Chamber in that case suggests in any confident way that article 74 would not be applicable where a full acquittal was granted; nor was the question of whether article 74 might be applicable to the decision in the *Ruto and Sang* case considered by the Appeals Chamber. In any event, nothing arising out of the arguments of the parties about the *Ruto and Sang* case in the present appeal would change any of the conclusions that the Appeals Chamber has already set out above.

124. For all of the above reasons, the Appeals Chamber finds that article 74 of the Statute applies to decisions granting motions for no case to answer which result in the acquittal of the accused; and that article 81 is the provision that governs an appeal by the Prosecutor against such decisions. The Appeals Chamber therefore finds that this appeal is admissible pursuant to article 81 of the Statute. It further finds that the provisions of article 74(5) of the Statute applied to the decision in the present case.[222]

C. Were the requirements of article 74(5) of the Statute violated?

1. Introduction

125. Having determined that the requirements of article 74(5) applied to the Trial Chamber's decision to acquit, the Appeals Chamber turns to the Prosecutor's arguments that the Trial Chamber allegedly breached those requirements.

126. The Prosecutor raises what she terms two sub-grounds to this ground of appeal:[223] both allege that the Trial Chamber erred in law and/or procedurally in either breaching the mandatory requirements of article 74(5) of the Statute[224] (first sub-ground), or erring in the exercise of its discretion under that provision by breaching the same requirements (second sub-ground).[225] In relation to the latter, she lists 'a number

[222] The conclusion of the Appeals Chamber in this regard is unanimous. Judge Ibáñez and Judge Bossa disagree with some of the reasoning used to reach this conclusion, for reasons set out in their dissenting opinions.
[223] Prosecutor's Appeal Brief, paras 6, 7.
[224] Prosecutor's Appeal Brief, paras 21-59.
[225] Prosecutor's Appeal Brief, paras 103-114.

of procedural guarantees [that] can be gleaned which limit a Trial Chamber's exercise of discretion when rendering a decision of conviction or acquittal',[226] and which she states, '[b]y exceeding these limits, the Majority erred in the exercise of its discretion'.[227]

2. The Trial Chamber's approach

127. The Trial Chamber acquitted Mr Gbagbo and Mr Blé Goudé, of all charges, by way of a decision rendered in a hearing held on 15 January 2019. Having found that the Prosecutor had 'not satisfied the burden of proof in relation to several core constitutive elements of the crimes as charged',[228] the Trial Chamber continued as follows:

> The Chamber will provide its full and detailed reasoned decision as soon as possible. The Chamber recognises that it would have been preferable to issue the full decision at this time. However, Rule 144(2) of the Rules of Procedure and Evidence states that the Chamber must provide copies of its full decision, and I quote, 'as soon as possible' after pronouncing its decision in a public hearing, and there is no specific time, time limit [*sic*] in this regard.
>
> The majority is of the view that the need to provide the full reasoning at the same time of the decision is outweighed by the Chamber's obligation to interpret and apply the Rome Statute in a manner consistent with internationally recognised human rights as required by Article 21(3) of the Statute.
>
> Indeed an overly restrictive application of Rule 144(2) would require the Chamber to delay the pronouncement of the decision, pending completion of a full and reasoned written statement of its findings on the evidence and conclusions. But given the volume of evidence and the level of detail of the submissions of the parties and participants, the majority, having already arrived at its decision upon the assessment of the evidence, cannot justify maintaining the accused in detention during the period necessary to fully articulate its reasoning in writing.[229]

128. The Reasons for the oral decision of 15 January 2019, signed by all three judges, were filed on 16 July 2019; paragraph 29 thereof stated that '[t]he reasons for the oral decision are attached', and refers to the accompanying three opinions of the judges. It stated that '[t]he majority's analysis of the evidence is contained in Judge Henderson's

[226] Prosecutor's Appeal Brief, para. 113.
[227] Prosecutor's Appeal Brief, para. 114.
[228] 15 January 2019 Decision, p. 2 line 25 to p. 3 line 17.
[229] 15 January 2019 Decision, p. 3 line 18 to p. 4 line 9.

reasons' and that Judge Tarfusser's opinion, and Judge Herrera Carbuccia's dissent, were also attached.[230]

3. Summary of submissions

(a) Submissions related to 'one decision' and issuance of reasons following a verdict

129. The Prosecutor relies primarily upon the Judgment of the Supreme Court of Canada in the case of *R v Teskey* to argue that the Trial Chamber violated article 74(5) of the Statute by failing to enter 'one decision'.[231] Her argument is that 'for a decision to be legally valid, it must include both the verdict *and* the full written reasons which led to it'[232] and that, in this case, the Trial Chamber violated this requirement by separating the verdict from the reasons.[233] She argues that the unity between a decision and the reasons therefor is *per se* broken by any temporal disparity between them,[234] and that, unless the decision and its reasons are delivered together, one cannot be sure that the subsequent reasons were not result-driven.[235] The crux of the Prosecutor's argument is thus that '[t]he reference in article 74(5) to "one decision" does not allow a Chamber to announce its verdict with reasons to follow'.[236]

130. In the alternative, the Prosecutor argues that if a Trial Chamber may issue its decision with reasons to follow, in doing so it must: (i) have reached all of its findings on the evidence and conclusions at the time of rendering the decision, with the editorial process being all that remains to be finished;[237] (ii) read in court a written substantive summary which sets out its main findings and conclusions with 'sufficient clarity';[238] and (iii) 'set out, and follow, a precise and reasonably short deadline' for issuance.[239] She argues that the Trial Chamber failed to properly exercise its discretion by not following these procedural steps.[240]

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[230] Reasons for the 15 January 2019 Decision, para. 29.
[231] Prosecutor's Appeal Brief, paras 29, 45.
[232] Prosecutor's Appeal Brief, para. 45 (emphasis in original).
[233] Prosecutor's Appeal Brief, para. 45.
[234] Prosecutor's Appeal Brief, para. 29.
[235] Prosecutor's Appeal Brief, para. 29.
[236] Prosecutor's Appeal Brief, para. 49. *See also* para. 29.
[237] Prosecutor's Appeal Brief, para. 113(ii). *See also* paras 111-112.
[238] Prosecutor's Appeal Brief, para. 113(ii).
[239] Prosecutor's Appeal Brief, para. 113(ii). *See also* paras 47, 111-112.
[240] Prosecutor's Appeal Brief, paras 113-114.

131. The OPCV argues that failing to provide reasons is contrary to article 81(3)(c) of the Statute as 'the lack of reasoning' does not allow 'the parties to substantiate any appeal or related request, since the relevant criteria of article 81(3)(c)(i) cannot be properly addressed'.[241] It states that 'this was the scenario faced when the Chamber issued the 15 January 2019 Oral Decision'.[242] The OPCV further argues that in all other decisions at the Court that resulted in the termination of proceedings and the release of the accused, chambers issued reasons with their decisions.[243] It argues that 'as […] pointed out by Judge Herrera Carbuccia, a decision with reasons to follow suggests that the judges have not analysed all the facts and evidence prior to issuing their ruling, and the subsequent delivery of the reasons for the decision may in turn lead to a violation of the right of the accused to an expeditious trial'.[244] The OPCV agrees with the Prosecutor's argument that the requirements of article 74(5) of the Statute are not discretionary, but mandatory.[245] It submits that the Trial Chamber was obliged to issue the verdict and reasons at the same time and that in failing to do so committed an error of law and procedure.[246] The OPCV states, however, that if the Appeals Chamber finds that the requirements of article 74(5) of the Statute are not mandatory, it agrees with the alternative argument put forward by the Prosecutor that the Trial Chamber abused its discretion.[247]

132. Counsel for Mr Gbagbo argues that the Prosecutor has not tendered anything to support her claim that article 74(5) of the Statute 'precludes written reasons being delivered after an oral announcement of the essential content of the acquittal'.[248] Counsel for Mr Gbagbo avers that in order to sustain her unconvincing line of argument, the Prosecutor's approach has been one of improvisation, which sidelines the written Reasons for the 15 January 2019 Decision (since they comply with article 74(5) of the Statute) and casts the 15 January 2019 Decision as the main decision.[249] He argues that the notion that six months is too long to issue a decision is merely opinion which has

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[241] OPCV's Observations, para. 59.
[242] OPCV's Observations, para. 59.
[243] OPCV's Observations, para. 62.
[244] OPCV's Observations, para. 65 (footnote omitted).
[245] OPCV's Observations, para. 66.
[246] 22 June 2020 Appeal Hearing, p. 30, line 20 to p. 31, line 4.
[247] OPCV's Observations, para. 72.
[248] Mr Gbagbo's Response, para. 112.
[249] Mr Gbagbo's Response , para. 113.

no legal foundation and fails to take into account either the rights of Mr Gbagbo or the complexity of the case.[250] He submits that the case law cited by the Prosecutor clearly shows that lapse of time is not problematic without a showing of bias on the part of the judges which has not been demonstrated in this case.[251]

133. Counsel for Mr Blé Goudé submits that the Prosecutor's use of the 'one decision' requirement of article 74(5) of the Statute as the legal basis to support her argument that the Trial Chamber was not permitted to separate the reasons from the verdict is misplaced.[252] He argues that the Prosecutor 'does not cite a single case or article in support of [her] argument' that reasons may not follow the decision.[253] He argues further that the Prosecutor 'fails to substantiate why the fact that the Trial Chamber did not provide any date by which it would render its reasons was an additional sign of a breach of the principle of unity of a decision.'[254] Counsel for Mr Blé Goudé submits that regard must be had to the particular circumstances of each case in respect of the time limits for the issuance of decisions; this being the reason that article 74(5) of the Statute and rule 142 of the Rules do not impose a specific time limit for the judges to issue their judgment, only providing that it should be pronounced 'within a reasonable period of time' after deliberations pursuant to the aforementioned rule.[255]

134. Counsel for Mr Blé Goudé further submits that, unlike rule 168(B) of the STL Rules, article 74(5) of the Statute does not specify whether the reasons should accompany the decision or could also follow it; therefore the choice of delaying the articulation in writing of the reasons of a judgment is not expressly banned and may be left to a trial chamber's discretion.[256] He contends, with respect to the ICTR 'where it was common practice to issue verdicts with reasons to follow', that it has been said by an academic commentator that 'six months after the public pronouncement of the verdict is an adequate period' to issue the reasons; which was what was done in this

[250] Mr Gbagbo's Response, para. 115.
[251] Mr Gbagbo's Response, paras 118-19.
[252] Mr Blé Goudé's Response, para. 73.
[253] Mr Blé Goudé's Response, para. 60.
[254] Mr Blé Goudé's Response, para. 64 (footnote omitted).
[255] Mr Blé Goudé's Response, paras 64-65.
[256] Mr Blé Goudé's Response, para. 65.

case.[257] He argues that reasons for the judgment are *presumed* to reflect the reasoning that led the trial judge(s) to a decision. Counsel for Mr Blé Goudé argues that, in the present case, the Prosecutor failed to adduce sufficient and cogent evidence that the reasons were crafted after the announcement of the verdict.[258] Clearly, he maintains, the Trial Chamber *did* provide a full and reasoned written statement, and a summarised form *was* given in open court.[259] Counsel for Mr Blé Goudé contests the Prosecutor's idea that the need for a summary is any indication that reasons *cannot* follow the verdict under article 74(5), noting that nothing prevents the full reasons from being published after their summary.[260] He argues, with reference to the German legal system, that providing a summary is actually a reason as to why the reasons would be able to follow.[261]

(b) Submissions related to the Trial Chamber's reference to 'internationally recognised human rights'

135. The Prosecutor argues that, '[c]ontrary to the Majority's view, interpreting article 74(5) in light of international human rights law pursuant to article 21(3) does not demand a more expansive approach to the provision or legitimise the Majority's approach' and that '[i]t thus cannot cure the Majority's invalid decision of acquittal'.[262] She states that the question 'is not whether the Majority's approach accords with internationally recognised human rights, but whether, in the circumstances of this case, the Majority was required to depart from the ordinary meaning of article 74(5) as it did, to comply with internationally recognised human rights'.[263] She argues that '[a] conviction or acquittal decision must always comply with article 74(5)' and that the requirements of this provision 'are not mere formalities' but are 'essential components of international human rights law'.[264] Having cited the relevant excerpt from the 15 January 2019 Decision, in which reference to internationally recognised human rights

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[257] Mr Blé Goudé's Response, para. 66 (footnote omitted).
[258] Mr Blé Goudé's Response, para. 67.
[259] Mr Blé Goudé's Response, para. 71.
[260] Mr Blé Goudé's Response, para. 71.
[261] Mr Blé Goudé's Response, para. 72.
[262] Prosecutor's Appeal Brief, para. 86.
[263] Prosecutor's Appeal Brief, para. 87 (footnote omitted).
[264] Prosecutor's Appeal Brief, para. 88 (footnote omitted).

was made, the Prosecutor makes four arguments as to why, in her view, the Trial Chamber erred.[265]

136. The OPCV generally supports the Prosecutor's submissions, and argues that the Trial Chamber's approach was inconsistent with the obligation under article 21(3) of the Statute to apply and interpret article 74(5) and rule 144 in a manner consistent with internationally recognised human rights.[266]

137. Counsel for Mr Gbagbo argues that 'the [principal] *raison d'être* of article 74(5) is […] to protect the rights of the person prosecuted, in the broader context of the right to a fair trial, rather than to safeguard any purported rights of the prosecution'.[267] He states that '[t]he spirit of article 74(5) was undeniably obeyed in the case […]: the Judges acquitted [Mr] Laurent Gbagbo as soon as they were satisfied that an acquittal was justified in the light of their assessment of the Prosecutor's evidence' and they 'pronounced the acquittal as soon as possible, so that [Mr] Laurent Gbagbo could be released without delay rather than remaining in detention throughout the time it would take to write the reasons for the decision'.[268] He states that '[i]n order to obey the spirit of the Statute and respect the rights of [Mr] Laurent Gbagbo, the Judges therefore terminated his detention which, had it continued once the Judges knew they intended to acquit him, would have been wrongful'.[269]

138. Counsel for Mr Blé Goudé disputes the Prosecutor's arguments, engaging with each limb, and arguing that the Prosecutor's argument 'is unfounded and is based on a mischaracterization of the [15 January 2019 Decision]. The Trial Chamber's exercise of its judicial discretion in a way that would mitigate the impacts of a lengthy procedure on the rights of the accused was entirely lawful and consistent with international human rights.'[270]

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[265] Prosecutor's Appeal Brief, paras 91-96.
[266] OPCV's Observations, paras 68, 88.
[267] Mr Gbagbo's Response, para. 65.
[268] Mr Gbagbo's Response, para. 68.
[269] Mr Gbagbo's Response, para. 70.
[270] Mr Blé Goudé's Response, para. 135 (footnote omitted).

(c) Submissions related to 'one decision' and the alleged lack of a majority decision

139. The Prosecutor also argues that the 'one decision' principle was breached in a second manner, namely by the three judges of the Trial Chamber issuing 'their own opinions or reasons'.[271] This argument is twofold. First, it is argued that whereas Judge Henderson's opinion is presented as 'the Majority's analysis of the evidence', there is no indication that Judge Tarfusser participated in reaching the conclusions contained therein, which appear to be those of Judge Henderson alone,[272] being largely written in the first person.[273] She states that nothing in either separate opinion 'allows the reader to conclude that the Majority Judges deliberated to reach any joint findings and conclusions' and that the majority views, as referred to in article 74(5), were 'the reasons of a single Judge, which the other Majority Judge then ascribed to'.[274] Additionally, the Prosecutor maintains that even if Judge Tarfusser agreed with Judge Henderson's 'ultimate "factual and legal" *conclusions*, it is apparent that he did not agree with all of Judge Henderson's reasoning, including the legal threshold to reach those conclusions',[275] which the Prosecutor argues affected the coherence of the Majority's views.[276] Second, the Prosecutor contends, in reliance upon the drafting history of article 74(5),[277] that 'a separate opinion must be issued *in addition* to the joint majority opinion'.[278] According to the Prosecutor, a judgment falling within article 74(5) of the Statute is one where the judges in the majority 'form and deliver a shared and consistent Majority's view'.[279] The Prosecutor also requests that the Appeals Chamber mandate future trial chambers to issue majority decisions in this specific format.[280]

140. The OPCV maintains, with reference to the 1996 Report of the Preparatory Committee on the Establishment of an International Criminal Court,[281] that article 74(5)

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[271] Prosecutor's Appeal Brief, para. 52.
[272] Prosecutor's Appeal Brief, para. 54.
[273] Prosecutor's Appeal Brief, para. 53.
[274] Prosecutor's Appeal Brief, para. 54.
[275] Prosecutor's Appeal Brief, para. 55 (emphasis in original).
[276] Prosecutor's Appeal Brief, para. 56.
[277] Prosecutor's Appeal Brief, para. 59.
[278] Prosecutor's Appeal Brief, para. 58 (emphasis in original).
[279] Prosecutor's Appeal Brief, para. 57. *See also*, paras 59, 113(iii).
[280] Prosecutor's Appeal Brief, para. 113(iii).
[281] *Citing* 1996 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Article 45, p. 61, para. 291.

of the Statute places emphasis on the completeness of a decision which 'strongly suggests that a chamber must include its thorough assessment on the evidence when delivering its decision'.[282] It contends that, contrary to the views of the Trial Chamber, 'the unequivocal meaning of article 74(5) cannot be changed by referring to unidentified internationally recognised human rights on the basis of article 21(3) of the Statute',[283] and the Chamber's decision is thus unjustified.[284]

141. Counsel for Mr Gbagbo argues that the Prosecutor's argument under this heading relies on an unconvincing grammatical analysis (of the use of the first person) and is unclear, since it goes against what the judges themselves stated in the Reasons for the 15 January 2019 Decision, with respect to how they had reached their decision (*i.e.* by majority) and the fact that one opinion contained the evidential assessment for that majority (*i.e.* Judge Henderson's Reasons).[285] He argues that the Prosecutor impugns, without evidence, the judges' process and integrity by stating that they did not deliberate.[286] He argues that the Prosecutor's reliance on the drafting history is particularly unhelpful since the draft provision cited, which supressed separate and dissenting opinions, was ultimately rejected.[287] Counsel for Mr Gbagbo submits that the disadvantages of plurality judgments[288] against which the Prosecutor remonstrates are (i) irrelevant because the judgment in question was not a plurality judgment, and, (ii) do not provide a legal basis upon which it could be said that plurality is an error leading to the reversal of a judgment; being based purely on the opinions of academics as to preferred style of judgment delivery.[289] He argues that the model of judgment writing in *Ruto and Sang*, the only relevant precedent, is not inapplicable to the present case merely because the outcome there was a mistrial.[290]

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[282] OPCV's Observations, para. 67.
[283] OPCV's Observations, para. 68.
[284] OPCV's Observations, para. 69.
[285] Mr Gbagbo's Response, paras 121-122.
[286] Mr Gbagbo's Response, para. 123.
[287] Mr Gbagbo's Response, para. 129.
[288] According to the Prosecutor, 'a judgment in which a majority of judges agree on the outcome but not on the reasoning is known as a *plurality judgment*', Prosecutor's Appeal Brief, para. 59 (emphasis in original).
[289] Mr Gbagbo's Response, para. 130.
[290] Mr Gbagbo's Response, paras 126-128.

142. Counsel for Mr Blé Goudé argues that the academic article that the Prosecutor cites in support of her argument that the Trial Chamber did not issue 'one decision' is misplaced, as it was based on the form of the *Ruto and Sang* decision in concluding that there did not appear to be a 'single decision' in that case (since the separate opinions of the majority judges offered different bases for their conclusions).[291] He argues that the present case must, however, be distinguished from *Ruto and Sang* since the Reasons for the 15 January 2019 Decision clearly identified Judge Henderson's Reasons as the controlling reasons.[292] He states that the reason for reference to 'one decision' in article 74(5) of the Statute had to do with whether there could be dissenting opinions to a trial judgment under the Statute and had nothing to do with the unity of the decision, in the sense of whether or not the decision could be said to contain its reasoning.[293] He argues that the 15 January 2019 Decision 'was not "full" at the time it was issued, according to the judges', and that there is one and only one decision in this case, the full written version of which was issued on 16 July 2019.[294]

(d) Submissions related to the alleged failure to render a written decision

143. The Prosecutor argues that the 15 January 2019 Decision was issued in violation of article 74(5).[295] She submits that the written transcript of the hearing of 15 January 2019, during which acquittal and release were ordered, cannot be seen as a decision in writing, 'since every oral hearing is recorded through court transcripts'; she argues that, '[i]f court transcripts were considered written decisions, article 74(5)'s requirement that the decision shall be *in writing* would be meaningless'.[296] Referring to the eight page Reasons for the 15 January 2019 Decision, which were issued on 16 July 2019, she states that 'this belated written decision was not the trigger for the acquittals' as they 'had been in effect since 15 January 2019' and she argues that this 'written record' did not 'retroactively cure the Majority's violations of article 74(5)'.[297]

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[291] Mr Blé Goudé's Response, para. 60.
[292] Mr Blé Goudé's Response, para. 60.
[293] Mr Blé Goudé's Response, para. 61.
[294] Mr Blé Goudé's Response, para. 61.
[295] Prosecutor's Appeal Brief, para. 40.
[296] Prosecutor's Appeal Brief, para. 40 (emphasis in original).
[297] Prosecutor's Appeal Brief, para. 41.

144. The OPCV, referring to jurisprudence and rule 144, argues that a successful no case to answer decision should be provided in writing.[298] It argues that the Trial Chamber violated article 74(5), as the 15 January 2019 Decision was not rendered in writing, and the written transcript cannot be considered as such.[299] The OPCV argues that the written reasons cannot be seen as a remedy for the violation committed by this oral decision, as the acquittal, which took place then, should have been in writing.[300] Referring to human rights jurisprudence on 'the provision of a timely written judgment to protect from arbitrariness and to ensure the right to an appeal, in particular regarding the essential elements of the case heard by the court at hand',[301] the OPCV states that the European Court of Human Rights 'has validated the oral pronouncement of some judgments, but has consistently explained that the form of pronouncement to be given to the judgment, *i.e.* oral or written, must be consistent' with the purpose of providing written judgments, to protect from arbitrariness and to ensure the right to an appeal. The OPCV notes that the form of pronouncement is dependent 'on the special features of the proceedings at hand'.[302] The OPCV argues that the fact that one can consult the written reasons now 'does not validate' the 15 January 2019 Decision, which was issued six months before; noting human rights jurisprudence, it further argues that '[t]here was no other decision previously issued on the facts and merits of the NCTA motions' and the public and victims, therefore, needed to know the reasons for the acquittals.[303]

145. Counsel for Mr Gbagbo argues that '[t]he Prosecutor blurs the distinction between the [15 January 2019 Decision] and the written reasons of 16 July 2019'[304] and that she does not explain, in her appeal brief, how the two interrelate.[305] He submits that the written decision was issued on 16 July 2019 and that it 'respects the spirit of article 74(5)', referring to Judge Henderson's Reasons to which Judge Tarfusser stated that he 'subscribe[d]'.[306] He states that, as the Prosecutor cannot argue that the written decision was unreasoned, 'she falls back on the [15 January 2019 Decision] as grounds for

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[298] OPCV's Observations, paras 52-54.
[299] OPCV's Observations, para. 74.
[300] OPCV's Observations, para. 75.
[301] OPCV's Observations, para. 76 (emphasis in original; footnote omitted).
[302] OPCV's Observations, para. 77 (footnote omitted).
[303] OPCV's Observations, para. 78.
[304] Mr Gbagbo's Response, p. 38.
[305] Mr Gbagbo's Response, para. 96.
[306] Mr Gbagbo's Response, para. 97.

suggesting that the Judges failed to discharge their obligations', requiring her to blur the distinction between the two 'and to pass the oral decision off as the written decision'.[307] He argues that '[t]hat strat[a]gem is symptomatic of how the Prosecutor has constructed her appeal brief; she recasts what happened in order to contrive something to criticize', finding fault with the judges, while 'at no time did they proceed in the way […] she claims'.[308]

146. Counsel for Mr Blé Goudé does not dispute that article 74(5) requires a written decision,[309] and argues that the Trial Chamber's decision was, in accordance with article 74(5), issued in writing, referring to the reasons issued on 16 July 2019.[310] In response to the Prosecutor's argument that those reasons were not valid under article 74(5), as they did not trigger the acquittals, he argues that 'the verdict pronounced on 15 January 2019 was authoritative and made the acquittal of Mr Blé Goudé effective as from that point on'.[311] He argues that, 'the fact that acquittals are made effective before any written judgment is published is irrelevant to showing that the requirement that the decision shall be in writing was complied with'.[312] He argues that the written reasons did not retroactively cure a violation of article 74(5), 'but *were* the actual authoritative written version of the decision'.[313]

(e) Submissions related to the alleged failure to provide a full and reasoned statement of findings on the evidence and conclusions and failure to deliver a summary in open court

147. Referring to the requirements in article 74(5) for the decision to 'contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions', and that the decision should 'be delivered in open court', at least in the form of a summary, the Prosecutor argues that the Trial Chamber erred.[314] In making this argument, the Prosecutor again targets the 15 January 2019 Decision. The Prosecutor also raises related arguments, in a separate section of her appeal brief,

[307] Mr Gbagbo's Response, para. 98.
[308] Mr Gbagbo's Response, para. 99.
[309] Mr Blé Goudé's Response, para. 39.
[310] Mr Blé Goudé's Response, para. 40.
[311] Mr Blé Goudé's Response, para. 45.
[312] Mr Blé Goudé's Response, para. 46.
[313] Mr Blé Goudé's Response, para. 47 (emphasis in original).
[314] Prosecutor's Appeal Brief, para. 42.

alleging a violation of the right to a reasoned decision and that the Trial Chamber's approach is inconsistent with the principle of publicity.

148. The Prosecutor submits that the 15 January 2019 Decision 'merely identified four "core constitutive elements of the crimes as charged", in particular for which, in the Majority's view, "the Prosecutor has not satisfied the burden of proof"'.[315] She argues that '[t]his is not sufficient and does not satisfy the requirement of a full reasoned decision'.[316] She argues:

> Under article 74(5), a Chamber must set out its full findings on the evidence and its conclusions. It must specify with sufficient clarity the factual and legal basis of its decision by explaining how it assessed the evidence and which facts it found to be relevant in coming to its conclusions. A summary of these reasons must comply with the same principles, meaning that a trial chamber must at least set out the main factual and legal findings explaining its main conclusions. Although the degree of detail in a summary will depend on each case, it must include the key steps of a chamber's reasoning on *how* and *why* it reached its conclusions. Merely stating the ultimate conclusion and verdict, as the Majority did in its 15 January 2019 Oral Acquittal Decision, violated article 74(5) and is inconsistent with the Court's practice.[317]

149. The Prosecutor states that the 15 January 2019 Decision 'was a final acquittal decision that produced all the effects of a decision under Article 74. As such, the requirements under Article 74(5) should have been applied to' it.[318] She also argues that it 'failed to meet the minimum requirements', providing the example of the summary in the case of *Ntaganda*, which, she argues, was 'extensive and proper'.[319] She submits that the summary should 'show that the Chamber has already made all of its findings and what will follow is merely the completion of the editorial process', in order 'to prevent the Chamber from engaging in result-driven reasoning'.[320] She argues that the Trial Chamber's summary, wrongly, made no reference to findings on evidence.[321]

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[315] Prosecutor's Appeal Brief, para. 43.
[316] Prosecutor's Appeal Brief, para. 43.
[317] Prosecutor's Appeal Brief, para. 43 (emphasis in original; footnotes omitted). *See also* 22 June 2020 Appeal Hearing, p.15, lines 12-18.
[318] 22 June 2020 Appeal Hearing, p.16, lines 21-24.
[319] 22 June 2020 Appeal Hearing, p.15, line 12 to p. 16, line 7.
[320] 22 June 2020 Appeal Hearing, p.16, lines 8-15.
[321] 22 June 2020 Appeal Hearing, p.16, lines 8-15.

150. The Prosecutor also raises arguments concerning the Trial Chamber's invocation of rule 144, and as related to the Trial Chamber's decision to defer issuance of its reasons.[322]

151. Finally, when arguing that the Trial Chamber's approach cannot be justified by international human rights, in a separate part of her appeal brief, the Prosecutor argues that the Trial Chamber's approach was 'inconsistent with the right to a reasoned decision', stating that, for a period of six months, 'the Majority's verdict was merely stated but not, as required, explained or justified. As such, it could not dispel any suspicion that the verdict may have been arbitrary or that the Majority was unaccountable'.[323] She argues that '[t]he absence of a reasoned decision also affected the victims' and the Prosecution's right to a fair trial, which does not belong only to the accused'.[324] She also argues that the Trial Chamber's approach was inconsistent with the principle of publicity, and that '[b]y acquitting Mr Gbagbo and Mr Blé Goudé without delivering the decision or a summary in open court, the Majority violated the critical function of ensuring the publicity of the proceedings'.[325] She argues that the decision was shielded from public scrutiny for six months, 'risking public confidence in the Court and undermining the overall legitimacy of the acquittals', that publication six months later did not remedy the lack of publicity until then ('these reasons were delivered six months later, which cannot undo the prior period of uncertainty that existed'), and because a summary of the written reasons was not delivered in open court.[326]

152. The OPCV recounts Appeals Chamber jurisprudence as to the need for reasoning on the evidence and conclusions,[327] and pronouncement in open court.[328] It argues that the summary in court was deficient in terms of article 74(5).[329] Having set out what in its view the summary should have contained, the OPCV argues that '[i]t is obvious, however, that in order to provide a summary of the Majority written decision

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[322] Prosecutor's Appeal Brief, para. 44.
[323] Prosecutor's Appeal Brief, para. 93 (footnotes omitted). *See also* para. 107(ii).
[324] Prosecutor's Appeal Brief, para. 93 (footnote omitted).
[325] Prosecutor's Appeal Brief, para. 94 (footnote omitted).
[326] Prosecutor's Appeal Brief, para. 94. *See also* para. 107(ii) and (iv).
[327] OPCV's Observations, paras 56-58.
[328] OPCV's Observations, paras 60-61.
[329] OPCV's Observations, paras 79-80.

at a minimum a draft thereof was to be in existence at the time of the hearing on 15 January 2019'.[330] It argues that the 15 January 2019 Decision was inconsistent with prior jurisprudence, requiring particular content in reasons 'in order to allow the useful exercise of the right to appeal and to enable the Appeals Chamber to properly exercise its function'.[331] It argues also that it prevented the parties from properly exercising their right to appeal.[332] On delivery in open court, the OPCV argues that the Trial Chamber, based on the 'literal tenor' of article 74(5), erred in not delivering the written reasons in open court.[333] The OPCV argues that the Trial Chamber erred in adopting an interpretation of rule 144, to deliver its reasons only in writing, which is inconsistent with what is required by article 74, to deliver the decision in open court.[334] Referring to Appeals Chamber jurisprudence on delivery in open court, the OPCV argues that the Court has only previously found justification not to deliver in open court because of confidentiality and the judicial recess; neither circumstance arose in this case.[335] Interpreting the matter in accordance with human rights required, it argued, '[t]he pronouncement in open court of the reasons […] to bring to the knowledge of the public why the suspicions concerning Mr Gbagbo and Mr Blé Goudé had not been sufficiently supported by the Prosecution, justifying the sense of the [15 January 2019 Decision]'.[336] It also argues, referring to a case in the European Court of Human Rights, that the Trial Chamber committed an error of law as 'the obligation […] to render orally the reasons of its decision was not limited by the nature of the proceedings or the sensitive issues addressed in this case'.[337]

153. Counsel for Mr Gbagbo submits that the Prosecutor fails to provide any information as to 'the requirements upon issuing an oral acquittal decision that were

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[330] OPCV's Observations, para. 80.
[331] OPCV's Observations, para. 81 (footnote omitted).
[332] OPCV's Observations, para. 82. It argues that '[i]n the absence of a reasoned statement, the parties and participants were unable, for instance, to find out whether the Chamber had actually evaluated all the evidence before it or had instead disregarded important pieces of evidence that should have been addressed. Similarly, the lack of concrete factual references in the 15 January 2019 Oral Decision made it impossible to test the inferences possibly drawn by the Chamber in relation to the elements of the crimes and the modes of liability alleged against Mr Gbabo and Mr Blé Goudé' (footnotes omitted).
[333] OPCV's Observations, paras 83-84.
[334] OPCV's Observations, paras 85-86.
[335] OPCV's Observations, para. 87.
[336] OPCV's Observations, para. 89 (footnote omitted).
[337] OPCV's Observations, para. 90 (footnote omitted), *referring to* *B. and P. v. United Kingdom* [ECtHR], para. 46.

not met'.[338] He submits that this is '[w]ith good reason: there are none, either in the instruments of the Court or its decisions'.[339] He refers again to the Prosecutor blurring the distinction between the oral and written decision, and the fact that she proceeds as if the article 74(5) requirements apply also to an oral decision or summary.[340] He notes that the Prosecutor provides no authority for her submissions as to what a summary should contain.[341] He argues 'that the Prosecutor is of her own motion laying down the rules which she complains the Judges failed to follow, once again fabricating something to criticize'.[342] Counsel for Mr Gbagbo argues that the Trial Chamber complied with the spirit of article 74(5), referring to its purpose being 'primarily to enable the accused to exercise their rights and to ensure that the judicial process is transparent by making decisions public'.[343] He argues that the principle of publicity was fulfilled throughout the trial process and the no case to answer procedure and that an observer would see the acquittal decision 'as the logical outcome of what had occurred during the trial and during the no case to answer procedure in particular'.[344] He therefore refutes the Prosecutor's insinuation that it 'materialized from nowhere'.[345] He also argues that the 15 January 2019 Decision complies with human rights standards[346] and that 'the oral delivery of the acquittal decision, followed by detailed written reasons, quite clearly complies fully with the corpus of decisions on questions of protection of human rights'.[347] He argues that '[c]ontrary to the Prosecutor's claims in her appeal brief, the *raison d'être* of article 74(5) is […] to protect the rights of the person prosecuted, in the broader context of the right to a fair trial, rather than to safeguard any purported rights of the Prosecution'.[348] He argues that '[f]undamental rights belong to the individual, and not to any form of State entity or the like, such as the Prosecution. The corpus of human rights decisions is clear on that point.'[349]

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[338] Mr Gbagbo's Response, para. 100.
[339] Mr Gbagbo's Response, para. 100.
[340] Mr Gbagbo's Response, para. 101.
[341] Mr Gbagbo's Response, paras 102-103.
[342] Mr Gbagbo's Response, para. 104.
[343] Mr Gbagbo's Response, para. 105.
[344] Mr Gbagbo's Response, para. 106.
[345] Mr Gbagbo's Response, para. 106.
[346] Mr Gbagbo's Response, paras 107-110.
[347] Mr Gbagbo's Response, para. 110.
[348] Mr Gbagbo's Response, para. 65.
[349] Mr Gbagbo's Response, para. 66 (footnote omitted).

154. Counsel for Mr Blé Goudé argues that, while the 15 January 2019 Decision may not have satisfied the requirements for a full and reasoned decision, the written reasons in July 2019 did.[350] Referring to human rights jurisprudence, he submits that the Trial Chamber did not err, in particular through extending the time limit for filing an appeal upon receipt of the written reasons.[351] He states that the Prosecutor's arguments as to the content of the summary are 'totally unsubstantiated', noting that the Statute is silent on this issue.[352] At the same time, he notes that the summary 'did identify the core constitutive elements of the crimes' and for which it was found that 'the Prosecutor had not satisfied the burden of proof'.[353] He argues that although this may not be seen 'as a fully reasoned statement', it does constitute 'a summary of the decision'.[354] Referring to summaries at the ICC and *ad hoc* tribunals, he argues there is discretion within trial chambers and that the Prosecutor's argument that the Trial Chamber failed to comply 'with any alleged requirements related to summaries is totally unfounded as there are none'.[355] As to the arguments based on human rights, counsel for Mr Blé Goudé states that the Prosecutor's approach is misplaced as she is relying 'on these principles to the detriment of the accused'.[356] He argues that 'they underline the fundamental role played by courts and tribunals in protecting the rights of accused persons, deprived of their liberty and facing trial and recognize the inherent position of vulnerability and disadvantage of defendants, whether in domestic or international criminal trials'.[357] He argues that '[t]he jurisprudence cited by the Prosecutor, rather than undermining the Trial Chamber's decision, only further reinforces the lawful nature of the Impugned Decision, as consistent with international human rights law'.[358]

4. Determination of the Appeals Chamber

(a) Introduction and background to the issues raised

155. Article 74(5) of the Statute provides:

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[350] Mr Blé Goudé's Response, para. 49.
[351] Mr Blé Goudé's Response, para. 50.
[352] Mr Blé Goudé's Response, para. 51.
[353] Mr Blé Goudé's Response, para. 52 (footnote omitted).
[354] Mr Blé Goudé's Response, para. 53.
[355] Mr Blé Goudé's Response, para. 54 (footnote omitted).
[356] Mr Blé Goudé's Response, para. 127. *See also* para. 129.
[357] Mr Blé Goudé's Response, para. 127.
[358] Mr Blé Goudé's Response, para. 128.

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

156. The Prosecutor argues that the Trial Chamber did not comply with article 74(5) because it failed to render a decision in writing, it failed to provide a full and reasoned statement of its findings on the evidence and conclusions, it failed to deliver its decision or a summary thereof in open court, and it failed to issue 'one decision' (in that the separation of the reasons from the verdict breached the principle of 'one decision' and that the manner of issuance of the reasons consisting of three separate opinions, one by each trial judge, in July 2019, breached the principle of 'one decision').[359] In making her arguments, the Prosecutor views the 15 January 2019 Decision as a stand-alone decision,[360] and argues that it cannot be read together with the reasons filed later in July 2019 with a view to rendering it lawful;[361] its deficiencies cannot be 'cured' by the written reasons.[362]

157. The Trial Chamber acquitted Mr Gbagbo and Mr Blé Goudé, of all charges, by a decision delivered in a hearing on 15 January 2019. As seen above, in doing so, the Trial Chamber stated that it would 'provide its full and detailed reasoned decision as soon as possible'.[363] The Reasons for the 15 January 2019 Decision were filed on 16 July 2019, accompanied by the three opinions of the judges. It is clear to the Appeals Chamber that the Trial Chamber did not intend for its verdict delivered on 15 January 2019 to stand alone; it was intended, as expressly stated by it, to be complemented by full and detailed written reasons to follow.[364] The 15 January 2019 Decision and the Reasons for the 15 January 2019 Decision, issued on 16 July 2019, with their three accompanying opinions, must, therefore, be read together.

158. As for the Prosecutor's precise arguments related to article 74(5), and the alleged breaches by the Trial Chamber of its requirements, the issue turns on the proper interpretation of the Statute, bearing in mind the terms of the relevant provisions and

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[359] Prosecutor's Appeal Brief, para. 52.
[360] Prosecutor's Appeal Brief, paras 40-41.
[361] Prosecutor's Appeal Brief, paras 2, 8, 41, 86, 101.
[362] Prosecutor's Appeal Brief, para. 2.
[363] 15 January 2019 Decision, p. 3, line 18; and Reasons for the 15 January 2019 Decision, p. 7.
[364] 15 January 2019 Decision, p. 3, line 18; and Reasons for the 15 January 2019 Decision, p. 7.

the circumstances of this case. Article 21(3) of the Statute mandates that '[t]he application and interpretation of law […] must be consistent with internationally recognized human rights'. The Appeals Chamber has stated that '[h]uman rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights'.[365] At the same time, the Statute, as per article 31(1) of the Vienna Convention on the Law of Treaties, shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms, in their context, and in the light of its object and purpose.[366]

159. With this in mind, the question before the Appeals Chamber under this ground of appeal is whether the Trial Chamber correctly applied article 74(5) of the Statute to the specific situation it faced.

160. The provision in question, sub-paragraph 5 of article 74, regulates the precise requirements of the decision of the trial chamber as to the criminal responsibility of the accused person.

161. The Appeals Chamber considers that, as is clear from its express terms, the overall object and purpose of article 74(5), situated in Part 6 of the Statute entitled 'The Trial', is to ensure that a decision of such importance, concluding the trial, is issued in accordance with certain formalities going to the guarantees of a fair trial, for the benefit of the parties, the victims and the general public: namely the decision shall be in writing; it shall contain a full and reasoned statement of the trial chamber's findings on the evidence and conclusions; there shall be one decision; in the absence of unanimity, the decision shall contain the views of the majority and the minority; and the decision or a summary thereof shall be delivered in open court. The purpose of these protections is to ensure, as recalled above, that 'each party and participant to the case is fully apprised of the outcome in a predictable manner, which must be public and reasoned',[367] and to guarantee the right to appeal. These protections are similarly

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[365] *Lubanga* OA4 Judgment, para. 37. *See also* *Ngudjolo* OA4 Judgment, para. 15; *Bemba et al.* OA3 Judgment, para. 66; *DRC* Appeal Judgment, para. 38.
[366] Article 31, General Rules of Interpretation: '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. *See also* *DRC* Appeal Judgment, para. 33; *Ngudjolo* OA6 Judgment, para. 5.
[367] *See above* para. 112.

guaranteed through the application of article 21(3), and internationally recognised human rights, as will be expanded upon below.

162. A rigid, exclusively textual, and formalistic reading of the requirements of article 74(5) would disregard this background, and permit the issuance of only one physical document, without judges appending individual opinions, and require that all the components of that decision (including the verdict and reasoning) *must* be issued at the same time, in writing, whatever the circumstances. These absolutes cannot be accepted when, as clearly illustrated by the instant case, trial chambers may be faced with facts and circumstances demonstrating the importance of being fully equipped to be able to deal, in full justice, with the realities of what comes before them. In this regard, and as is relevant to the instant case, the object and purpose of the formalities in article 74(5) cannot require retaining people in detention even when their detention can no longer be justified because a trial chamber has definitively decided to acquit. Nor has it been shown that this is required by internationally recognised human rights which, as seen above, apply to the interpretation of article 74(5), as a result of article 21(3) of the Statute.

163. The Appeals Chamber has considered the Prosecutor's arguments related to article 74(5) under the first ground of her appeal and, with the above legal and factual background in mind, finds them to be without merit.

(b) Separation of reasons from the verdict

164. On the matter of the issuance of 'one decision', in terms of delivering the verdict and the reasons therefor in unison, the Prosecutor argues that the Trial Chamber erred 'by separating the verdict from the reasons' and that reference to '"one decision" in article 74(5) does not allow a Chamber to announce its verdict with reasons to follow'. The Appeals Chamber rejects this argument.

165. Recalling what has been said above, the overall objective of article 74(5) is to ensure the transparent delivery of reasoned decisions. To achieve this, ideally, trial chambers should deliver both the verdict and reasons concurrently. Taking into account the need to ensure that the proceedings remain fair, however, the Appeals Chamber cannot accept that the very fact that a delay is encountered between the issuance of a verdict and its reasons, could necessarily invalidate an entire trial process, or indeed

breach article 74(5). The separation of verdict and reasons does not entail a violation of article 74(5) of the Statute. There may, on the contrary, be clear justification for such separation in the particular circumstances of a case; most obviously in this regard is when the liberty of the person in question is at stake.

166. In this case, the reason for the separation of the verdict and the full reasons was, in the view of the Trial Chamber, the need for the release of the then detained persons. The Trial Chamber, having definitively arrived at its decision to acquit, could not countenance unnecessarily maintaining Mr Gbagbo and Mr Blé Goudé in detention by delaying the pronouncement of its verdict for the duration of time that it would have taken to issue its reasons. This much is patently clear from the 15 January 2019 Decision.[368] In it, the Trial Chamber strove to balance what it saw as two obligations. On the one hand, the need to provide a full and reasoned opinion at the same time as the decision and, on the other hand, the obligation to interpret and apply the Statute 'in a manner consistent with internationally recognised human rights' pursuant to article 21(3).[369] The Trial Chamber correctly found that the need to pronounce the verdict and thereby release Mr Gbagbo and Mr Blé Goudé outweighed the formal requirements of article 74(5).

167. Counsel for Mr Gbagbo submits that 'the reality is that the Chamber placed Laurent Gbagbo's fundamental rights, in particular his right to liberty, at the heart of the approach it took when delivering its decision'.[370] The Appeals Chamber accepts this argument.

168. The Statute is clear that release should follow promptly once a decision to acquit has been taken: article 81(3)(c) provides expressly that, '[i]n case of an acquittal, the accused shall be released immediately'. Indeed, release must necessarily follow a definitive decision to acquit as such a decision means that the reason for detention has fallen away and, subject to exceptional circumstances being established, as referred to in article 81(3)(c)(i) of the Statute, acquitted persons shall be released immediately.[371]

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[368] 15 January 2019 Decision, p. 4, lines 3-9. *See also* Reasons for the 15 January 2019 Decision, p. 7.
[369] 15 January 2019 Decision, p. 3, line 24 to p. 4, line 2.
[370] Mr Gbagbo's Response, para. 31. *See also* para. 95.
[371] The Appeals Chamber has stated that 'it is plain from the wording of article 81 (3) (c) of the Statute that the rule, in the case of an acquittal, is that the acquitted person "shall be released immediately"'.

Thus, a verdict may be announced, and release effected, before a fully reasoned decision is rendered under article 74.

169. The underlying need for issues concerning liberty to be addressed with seriousness and expeditiousness, and the need for the existence of continuing grounds to detain based on charges brought, is recognised in the Court's legal texts (article 60(4) and rule 118(1)) and jurisprudence;[372] it is also broadly recognised in human rights texts, including article 5 of the EConvHR, article 7 of the AConvHR and article 9 of the ICCPR, when dealing with the right to liberty and security and in jurisprudence thereon.[373] The principles in the human rights case law in relation to the right to liberty, which urge the need for expeditious review and release where necessary in the pre-trial context, apply with even greater force to a situation in which it has been decided that the accused person is to be acquitted.

170. The fact that the Trial Chamber in this case prioritised these concerns once it had taken its definitive decision to acquit, when balancing them against the concurrent need for the issuance of its written reasons, cannot be an error.

171. A somewhat comparable situation was confronted in the case of *Aleksovski* at the ICTY, albeit in the context of the delivery of sentence following conviction, where the ICTY Trial Chamber in that case saw the need for immediate release as it was clear that detention was no longer justified. The ICTY Trial Chamber therefore opted to deliver its sentence with written reasons to follow. In sentencing the accused to two and a half years' imprisonment, credit was given for time already served, which was lengthier (amounting to a period of two years, 10 months and 29 days) and Mr Aleksovski was therefore immediately released. The ICTY Trial Chamber stressed the

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Continued detention may be ordered only "[u]nder exceptional circumstances". Thus, in the ordinary course of events, the acquitted person is to be released immediately, thereby respecting the fundamental right to liberty of the person'. *Ngudjolo* OA Judgment, para. 22 (footnote omitted).

[372] *See e.g. Bemba et al.* OA5-OA9 Judgment, paras 43, 45; *Lubanga* OA12 Judgment, paras 36-38 and dissent of Judge Pikis, para. 12; *Ngudjolo* OA4 Judgment, para. 14.

[373] In terms of jurisprudence, *see e.g.*: *Ilnseher v. Germany* [ECtHR], paras 126, 129, 136, 137, 251; *S., V. and A. v. Denmark* [ECtHR], paras 73, 77, 82; *Merabishvili v. Georgia* [ECtHR], paras 181-186, 222; *Khlaifia et al. v. Italy* [ECtHR], paras 88, 131; *Buzadji v. the Republic of Moldova* [ECtHR], paras 84-92; *Ruslan Yakovenko v. Ukraine* [ECtHR], paras 45, 68, 69; *Assanidze v. Georgia* [ECtHR], paras 169-175; *Assenov et al. v. Bulgaria* [ECtHR], paras 154, 162; *Letellier v. France* [ECtHR], para. 35; *Stögmüller v. Austria* [ECtHR], p. 35, paras 4, 5; *Neumeister v. Austria* [ECtHR], p. 33, paras 3-5; *Norín Catrimán et al. v. Chile* [IACtHR], paras 307-312; *Van Alphen v. The Netherlands* [UNHRC], para. 5.8.

urgency of the matter during its oral delivery of the judgment, explaining why the written reasons would follow:

> The conclusions which we have reached have seemed of such a nature that they justify amply the fact that the hearing be organised in the shortest of delays, without waiting for the final judgement to be put down in writing. This judgement will be made public as early as possible, but the urgency seems to be such that we have not waited for the return of the senior trial attorney of this trial […].[374]

172. In its subsequent written reasoned judgment, of 25 June 1999, the ICTY Trial Chamber further stated: 'This sentence was pronounced in open session on 7 May 1999 and, given that the accused was entitled to credit for a longer period of time than that of the sentence imposed, the Trial Chamber ordered his immediate release, notwithstanding appeal'.[375]

173. The need for immediate release is also reflected in rule 159(3) of the KSC Rules, which explicitly provides for written reasons (as soon as possible) to follow an oral decision in the case of an acquittal: 'The Trial Judgment shall be in writing and shall contain a reasoned opinion of the findings of the Panel. In case of an acquittal, the Judgment may be pronounced orally followed by written reasons as soon as possible'. That provision thus recognises, in the view of the Appeals Chamber, that, in the event of an acquittal, the hitherto accused person may be immediately released, avoiding delay because of the drafting of written reasons.

174. The Supreme Court of Canada, in its judgment in the case of *R v Teskey*, upon which the Prosecutor relies, also expressly states that a judge is not precluded from announcing a verdict with reasons to follow,[376] recognising that, *inter alia*, issues related to release may necessitate that this occur:

> In particular circumstances, there may also be good reason for announcing the verdict in a criminal case prior to delivering the reasons that led to it. For example, the prompt delivery of a verdict of acquittal may allow an accused to be immediately released from custody.[377]

175. In the view of the Appeals Chamber, these approaches illustrate the need to take action when faced with factual scenarios which directly call into question the

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[374] *Aleksovski* Transcript of Trial Hearing, at 4348, lines 23-25, at 4349, lines 1-6.
[375] *Aleksovski* Trial Judgment, para. 245.
[376] *R. v. Teskey* [Supreme Court of Canada], p. 268, para. 16.
[377] *R. v. Teskey* [Supreme Court of Canada], para. 17.

fundamental right to liberty. As in these specific examples, the immediate release of Mr Gbagbo and Mr Blé Goudé, in relation to whom verdicts of acquittal had been decided upon, was squarely the point in question and the Trial Chamber, rightly, decided to ensure release as a matter of urgency.

176. In response to the Prosecutor's submission that Mr Gbagbo and Mr Blé Goudé could have been conditionally released instead,[378] counsel for the acquitted persons correctly argue that there is a 'fundamental difference between interim release of an accused person pending trial and release resulting from an acquittal'.[379] The two cannot be equated.[380] In the case of the former, the accused persons would remain charged with very serious crimes and, as such, would remain subject to any restrictions that may accompany such status.[381] Moreover, interim release would not have been appropriate in the circumstances of this case. Had the Trial Chamber, knowing that it would acquit, 'conditionally released Mr Gbagbo and Mr Blé Goudé as part of its review of its previous detention decision under article 60(3)', as suggested by the Prosecutor,[382] this would have been legally disingenuous. In light of the Trial Chamber's conclusion that Mr Gbagbo and Mr Blé Goudé were to be acquitted, attempting to couch its reasoning for their release within the terms of articles 58(1) and 60 of the Statute would clearly have been inappropriate. The reason that the Trial Chamber released the then detained persons was because of the decision that it had taken to acquit. In such circumstances, release should follow and not be deferred for any additional time required to, for example, complete the drafting of reasons.[383]

177. The Appeals Chamber turns to the Prosecutor's argument that for the decision 'to be legally valid' reasons must be issued at the same time as the verdict, in that '[u]nity between the two ensures their consistency and that the verdict is the *result* of the reasons'.[384] The Prosecutor refers to the judgment in the case of *Teskey* and its

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[378] Prosecutor's Appeal Brief, paras 95-96.
[379] Mr Blé Goudé's Response, para. 133.
[380] Mr Gbagbo's Response, para. 93.
[381] *See also* Mr Gbagbo's Response, para. 92.
[382] *See* Prosecutor's Appeal Brief, paras 95-96.
[383] *See also* Mr Gbagbo's Response to the OPCV's Observations, para. 116, stating that had the verdict been delivered in July 2019 as opposed to January 2019, Mr Gbagbo would have spent 'a further six months in prison for nothing, which would have been another violation of his rights'.
[384] Prosecutor's Appeal Brief, para. 29 (emphasis in original).

finding that 'reasons rendered long after a verdict, particularly where it is apparent that they were crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge engaged in result-driven reasoning'.[385] The Appeals Chamber notes, nevertheless, that in the *Teskey* case, the Supreme Court of Canada, in examining the sole question of whether to accept reasons provided 11 months after the delivery of the verdict, went on to state, in full (contrary to the selective quotation by the Prosecutor in a footnote),[386] that '[t]he necessary link between the verdict and the reasons will not be broken, however, on every occasion where there is a delay in rendering reasons after the announcement of the verdict. Since trial judges benefit from a presumption of integrity, which in turn encompasses the notion of impartiality, the reasons are presumed to reflect the reasoning underlying the decision'.[387] Indeed, the judges of the ICC similarly benefit from a presumption of integrity, as explored later in this judgment, and it is not the case that reasons issued later necessarily break the unity of the decision. Moreover, whilst the Prosecutor presses the point that judges may no longer, when writing up their reasons, be able to find justification for a proposition, she fails to relate it to this case.[388] This argument is therefore dismissed as unsubstantiated on the facts.

178. Contrary to the Prosecutor's arguments, the European Commission on Human Rights has expressly found that the reasons for a decision in a criminal case may follow the public pronouncement of the outcome of the case, in the context of considering the publicity of the criminal judicial process. In *Crociani and Others v. Italy*, a criminal case, the 'applicants allege[d] that the judgment is necessarily composed of the sentences and the reasons, and must be read publicly *in its entirety*'.[389] The European Commission on Human Rights rejected the argument that, as only the operative part of the judgment was read out in court, and the reasons for that judgment filed approximately five months later, the decision had not been publicly pronounced.[390] The

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[385] Prosecutor's Appeal Brief, para. 29 (footnote omitted), *referring to* *R. v. Teskey* [Supreme Court of Canada] as cited in Judge Herrera Carbuccia's Dissent to the 15 January 2019 Decision, para. 33.
[386] Prosecutor's Appeal Brief, n. 71.
[387] *R. v. Teskey* [Supreme Court of Canada], p. 268. *See also* para. 19, '[t]he reasons proffered by the trial judge in support of his decision are presumed to reflect the reasoning that led him to his decision'.
[388] Prosecutor's Appeal Brief, para. 30.
[389] *Crociani et al. v. Italy* [European Commission], para. 22 (emphasis added).
[390] *Crociani et al. v. Italy* [European Commission], para. 22. In that case, the findings of guilt and the sentences imposed were pronounced together at the hearing on 1 March 1979, with the reasons for that

European Commission on Human Rights noted 'that it is *standard practice* in States parties to the Convention that the reasons for a decision in a criminal case are often signed at a later date and only the sentences are read out during the public hearing'.[391] In *Crociani*, it ultimately found that 'the decision read out in Court, despite its concise nature, was sufficiently explicit and satisfied the requirements of Article 6(1) of the [Europen Convention on Human Rights]',[392] containing as it did the charges, the finding, the presence of any aggravating circumstances, and the penalty.

179. The European Court of Human Rights has reiterated the finding in *Crociani* that reasons may follow a decision.[393] It has included among its general principle the findings in *Crociani* that there is no violation of the European Convention on Human Rights when a sentence that is publicly read in court (with reasons to follow), includes the offence charged, the finding of guilt, the presence of any aggravating circumstances, and the penalty imposed.[394]

180. The issuance of decisions with reasons to follow is a practice also widely accepted and commonly followed in international criminal courts and tribunals. The rules of procedure of the ICTY,[395] ICTR[396] and IRMCT[397] specifically allow the aforementioned tribunals to issue their final trial judgments with reasons to follow and

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judgment being filed subsequently on 2 August 1979. One of the (subsequently rejected) arguments raised by the applicants before the European Commission of Human Rights was that their rights under articles 5 (1) (a) and 6 (1) of the European Convention on Human Rights had been violated by the reasons for their conviction not being published for several months after the findings were read out on 1 March 1979: *see* *Crociani et al. v. Italy* [ECtHR], pp. 198, 205-206 and para. 22.

[391] *Crociani et al. v. Italy* [European Commission], para. 22 (emphasis added).

[392] *Crociani et al. v. Italy* [European Commission], para. 22.

[393] *Ryakib Biryukov v. Russia* [ECtHR], para. 33.

[394] *See* *Ryakib Biryukov v. Russia* [ECtHR], para. 33; *See also* *Welke and Białek v. Poland* [ECtHR], para. 84. The European Court of Human Rights found that the domestic trial and appeal courts were justified in dispensing with a public hearing, and orally pronouncing the reasons for their judgments *in camera*, as the operative parts of the courts' judgments (including information about the applicants, the charges against them and their legal classification, the findings as to their guilt and sentence and the order for costs) were pronounced publicly.

[395] Rule 98*ter*(c) of the ICTY Rules provides: 'The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended'.

[396] Rule 88(c) of the ICTR Rules provides: 'The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing. Separate or dissenting opinions may be appended'.

[397] Rule 122(c) of the IRMCT Rules provides: 'The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended'.

have been regularly applied in practice.[398] The KSC Rules, as noted above, expressly provide for reasons to follow an orally pronounced acquittal.[399] Notwithstanding that the SCSL Rules[400] and those of the ECCC, like the ICC, do not have provisions similar to the ICTY, ICTR, IRMCT and KSC specifically stating that the written reasons may follow final trial judgments or acquittals, trial chambers in both the SCSL and the ECCC have in practice also found it necessary to issue final trial judgments with reasons to follow.[401]

181. The Appeals Chamber also rejects the implication of the Prosecutor's argument that the Trial Chamber only began, or indeed should only have begun, to think about the merits of the matter before it at the close of the Prosecutor's case or after it had received or heard the last submission in the no case to answer proceedings. She seems to imply that, given the time that elapsed between the closure of the no case to answer proceedings, and the delivery of the judgment, the Trial Chamber could not have had time to properly deliberate and reach the conclusion it did, and that the reasons that followed must, therefore, have been result-driven. This argument is further addressed below in the context of the Prosecutor's submission that the judges were not fully informed. However, it is enough to state here that its premise is simply incorrect. Judges are not sitting insentient for the duration of the trial. It must be expected that they approach their task with seriousness and certainly do not wait until the closure of a case before applying their minds to the evidence and arguments. Clearly, after having sat in the instant case for over two years, the judges of the Trial Chamber would have been

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[398] *See e.g. Prosecutor v. Duško Sikirica et al.* (ICTY); *Prosecutor v. Goran Jelisić* (ICTY); *The Prosecutor v. Hormisdas Nsengimana* (ICTR); *The Prosecutor v. Théoneste Bagosora et al.* (ICTR); *Prosecutor v. Issa Hassan Sesay et al.* ("RUF" case, SCSL); and *The Prosecutor v. Charles Ghankay Taylor* (SCSL).
[399] *See supra*, para. 173.
[400] Rule 88(c) of the SCSL Rules provides: 'The judgement shall be rendered by a majority of the Judges. It shall be accompanied by a reasoned opinion in writing. Separate or dissenting opinions may be appended.'
[401] The ECCC Trial Chamber in *Case 002/02* read a summary of the judgment in court on 16 November 2018, stating that 'the full written Judgement […] will be made available in Khmer, English and French in due course', *Case 002/02* Summary of Judgment, para. 1. The full written Judgment was provided on 28 March 2019 (*Case 002/02* Judgment). The SCSL Trial Chamber in the *Taylor* case pronounced the judgment in court on 26 April 2012, stating that 'the written judgement which is the only authoritative version will be made available subsequently,' *Taylor* Transcript of Trial Hearing p. 49624, lines 8-10. The written judgment, dated 18 May 2012, was subsequently filed on 30 May 2012 (*Taylor* Trial Judgment).

intimately familiar with the Prosecutor's case before deciding to entertain the no case to answer motions.

182. The Prosecutor alternatively argues[402] that, if a Trial Chamber does have the discretion to separate the written reasons from the verdict, this should only be permitted on editorial grounds.[403] However, the authorities presented by the Prosecutor to support this are unpersuasive. The general proposition being argued was not made in *Teskey* and reliance by the Prosecutor upon the Australian case of *R v Wickers* is misplaced. In so far as the Prosecutor uses it to demonstrate that delayed publication of reasons must be solely on editorial grounds, in the vein of 'formatting problems',[404] she overlooks that the court in *Wickers* agreed with the court in *Teskey*, that a judge is not precluded from announcing a verdict with reasons to follow (and the latter case did not limit this principle to editorial corrections alone).[405] Thus, *Wickers* cannot be accepted as a limiting factor given that the court accepted the broader proposition that reasons may follow a decision. Also, again contrary to the Prosecutor's argument,[406] the facts that led the ICTR Appeals Chamber in *Bagosora et al.* to dismiss the appellant's request to invalidate the trial judgment on the basis that 'the written reasoned opinion was complete at the time of the delivery of the judgement […] and that what followed was merely the completion of the editorial process'[407] is not on point. It is key that in *Bagosora et al.*, the appellant sought to have the trial judgment voided due to the fact that, by the time the ICTR Trial Chamber issued its reasoned opinion accompanying its oral judgment, the mandate of one of the trial judges had expired.[408] What was at stake in *Bagosora et al.* was the point in time when it could be said that the written reasons had been completed, *i.e.* whether or not they were completed *before* or *after* the mandate of the judge in question had expired; the appellate judgment in *Bagosora et al.* thus turns on its facts and does not create a general principle that the Prosecutor may

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[402] Prosecutor's Appeal Brief, paras 103 *et seq*.
[403] Prosecutor's Appeal Brief, para. 111.
[404] Prosecutor's Appeal Brief, para. 111, n. 238; 22 June 2020 Appeal Hearing, p. 16, lines 8-14.
[405] *R v. Wickers* [Supreme Court of South Australia], para. 99.
[406] Prosecutor's Appeal Brief, para. 112.
[407] *Bagosora and Nsengiyumva* Appeals Judgment, para. 25 (footnote omitted).
[408] *Bagosora and Nsengiyumva* Appeals Judgment, para. 25. The ICTR Trial Chamber orally announced its verdict on 18 December 2008. The mandate of Judge Reddy expired on 31 December 2008; before the ICTR Trial Chamber rendered its full written reasoning on 9 February 2009. The ICTR Appeals Chamber found that the appellant had not demonstrated that Judge Reddy failed to fulfil his judicial duties in the case prior to the expiration of his mandate on 31 December 2008 (para. 25).

rely upon to argue that written reasons must be complete at the time of delivery of the decision, with only the editorial process outstanding. The jurisprudence relied on by the Prosecutor has not demonstrated that deferring the issuance of written reasons is restricted to purely editorial grounds. Indeed, whilst the deferral of issuance of reasons at the international level may have at times been for the completion of the editorial process,[409] other judgments have not given an explanation for deferral or have shown that it has been to give the chamber the relevant time to write up those reasons.[410] The limitation that the Prosecutor argues exists is, therefore, unsupported by the references she provided.

(c) Did the manner in which the Trial Chamber separated the verdict from the reasons breach article 74(5)?

183. Having found that the Trial Chamber did not err, as a matter of law, in separating the verdict from the reasons in this case, the Appeals Chamber will address the Prosecutor's arguments impugning the Trial Chamber's actual approach to the separation.

184. The Prosecutor argues that the Trial Chamber breached the requirements of article 74(5) that the decision should 'contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions', and 'be delivered in open court', at least in the form of a summary.[411]

185. The Appeals Chamber understands that what was read out in open court, on 15 January 2019, was comprised of two parts: the actual verdicts of acquittal, which technically form part of the article 74(5) decision, and the summary of that decision. In this regard, article 74(5) allows for either a summary of the decision, or the decision itself, to be read out in open court and the Trial Chamber, in this case, clearly chose the former. In this sense, the Prosecutor is correct in stating[412] that the 15 January 2019

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[409] In *Nsengimana*, the ICTR trial judgment stated: 'The Chamber delivered the oral summary of its judgement on 17 November 2009. It acquitted Nsengimana of all counts and ordered his immediate release. [...] The written version of the judgement was filed on 18 January 2010 after the completion of the editorial process.' (*Nsengimana* Trial Judgment, para. 866, footnotes omitted). In *Nizeyimana* the ICTR trial Judgment stated: 'The Chamber pronounced its judgement on 19 June 2012. The written judgement was filed on 22 June 2012 after the conclusion of the editorial process.' (*Nizeyimana* Trial Judgment, p. 1, n. 1.)
[410] *Supra*, paras 171-172.
[411] Prosecutor's Appeal Brief, para. 42.
[412] Prosecutor's Appeal Brief, para. 42.

Decision does not 'contain a full and reasoned statement';[413] indeed the Trial Chamber did not purport to read out such a statement, stating that it would provide it 'as soon as possible'.[414] Therefore, to the extent that the Prosecutor argues that the 15 January 2019 Decision was lacking in reasoning, in terms of article 74(5), and that it was, therefore, unlawful, her argument is rejected for the reasons set out above.

(i) A decision in writing

186. Turning to what occurred in January 2019, the Prosecutor argues that the Trial Chamber breached article 74(5) by not issuing the 15 January 2019 Decision in writing; the verdicts of acquittal having been delivered orally alone.[415] She submits that the Reasons for the 15 January 2019 Decision were not 'the trigger' for the acquittals, as they 'had been in effect since 15 January 2019', and that the written reasons could not 'retroactively cure the Majority's violations of article 74(5)'.[416]

187. As stated above, one component of the article 74(5) decision in this case – the verdict – was indeed pronounced by the Trial Chamber in a hearing on 15 January 2019. The verdict was not, at that time, also filed with the Registry, although a written transcript of the 15 January 2019 Decision was made publicly available. The Reasons for the 15 January 2019 Decision, consisting of eight pages – a reiteration of what was read out in court in January 2019, including the verdict – were filed in writing on 16 July 2019 and signed by all three judges, appended to which were the two majority opinions and the dissenting opinion. This document acknowledged, in its title, and content, that it contained the reasons for the decision issued on 15 January 2019.[417]

188. Article 74(5) of the Statute clearly requires that decisions issued pursuant to article 74 should be in writing. All components of this decision must be issued in writing – both the operative part (the verdict) and the reasons.

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[413] *See* Article 74(5).
[414] 15 January 2019 Decision, p. 3, line 18.
[415] Prosecutor's Appeal Brief, para. 40.
[416] Prosecutor's Appeal Brief, para. 41.
[417] It is entitled: 'Reasons for oral decision of 15 January […]'; *see also* the preamble of the Reasons for the 15 January 2019 Decision, ('Trial Chamber I […] hereby issues the reasons for the Majority's oral decision […]), and para. 28 ('On 15 January 2019, following deliberations, the Trial Chamber, by majority […] issued the following decision').

189. Although Judges Eboe-Osuji, Morrison and Hofmański diverge on the question of whether or not the verdict delivered on 15 January 2019 met this requirement,[418] the Appeals Chamber finds that whether or not the decision was in writing is, in the instant case, patently incapable of materially affecting the decision of the Trial Chamber for the reasons given in full in the section on material effect below.[419] Thus, to the extent that any error could be said to exist, this has no impact upon the overall finding which the Appeals Chamber has reached on the Prosecutor's first ground of appeal.

(ii) A summary of the decision

190. Turning to the content of the Trial Chamber's summary in court in January 2019, the Prosecutor argues, having referred to jurisprudence as to the requirements for reasoning,[420] that '[a] summary of [the Trial Chamber's] reasons must […] at least set out the main factual and legal findings explaining its main conclusions'.[421]

191. Nothing in the Statute strictly commands the content of any summary of the reasons to be issued at the time of announcement of the verdict.[422] What the Statute requires is that the trial chamber issue a fully reasoned judgment. Save for the Prosecutor's argument that in Austria and Germany, courts may only issue reasons to follow on the condition that a summary 'consisting of the essential content of the reasons' is read out,[423] the Prosecutor does not point to any other national authorities to support her position and the ICC jurisprudence she cites concerns the adequacy of reasons in a decision, and not the adequacy of a summary.[424]

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[418] Judges Eboe-Osuji and Morrison find no error for the reasons given at paragraphs 200-212 of the separate opinion of Judge Eboe-Osuji, and Judge Hofmański finds an error for the reasons given in his separate opinion. So too do Judges Ibáñez and Bossa find an error, for the reasons given in their separate opinions. As a result, there is technically a majority for finding an error on that point. However, as regards materiality of any such error, Judges Eboe-Osuji, Morrison, Hofmański and Bossa find that any such technical error had no material effect, for the reasons expressed in this judgment. Therefore, it is the finding of the Appeals Chamber that any such technical error is inconsequential to the outcome of this appeal.
[419] *Infra*, paras 255-268.
[420] Prosecutor's Appeal Brief, para. 43.
[421] Prosecutor's Appeal Brief, para. 43.
[422] As pointed out by counsel for Mr Blé Goudé, there are different examples, available at various comparable courts, as to the length and content of summaries. *See* Mr Blé Goudé's Response, para. 54, referring to a range of summaries delivered at the *ad hoc* tribunals and at the ICC. Guidance to be drawn from this seems limited to a general conclusion that trial chambers have discretion as to the content of summaries.
[423] Prosecutor's Appeal Brief, para. 111.
[424] Prosecutor's Appeal Brief, para. 111 and n. 236.

192. The European Court of Human Rights, as noted above, has found that in order to satisfy the principle of publicity when delivering a decision with written reasons to follow, it is sufficient that the offence charged, the finding of guilt, the presence of any aggravating circumstances, and the penalty imposed are pronounced orally.[425] Whilst the Trial Chamber's summary in this case was certainly brief, the Appeals Chamber considers that it contained the most important parts of the reasoning which were needed. In terms of the charges, the Trial Chamber briefly summarised the procedural background,[426] stated that it found no need for the Defence to submit evidence, 'as the Prosecutor has not satisfied the burden of proof in relation to several core constitutive elements of the crimes as charged',[427] stated that the Prosecutor had 'failed to demonstrate': that there was a common plan, that the alleged policy existed, that the crimes were committed as part of a policy, that the speeches of both persons led to the ordering, soliciting or inducing of the crimes alleged, or that either person otherwise knowingly or intentionally contributed to the commission of the alleged crimes, and that it would 'provide its full and detailed reasoned decision as soon as possible'.[428] The Trial Chamber also set out its principal conclusions, namely that both motions for acquittal from all of the charges were granted; and that the two persons should be immediately released,[429] before going on to set out the procedural steps that were to occur as a result of its decision, related to the release of both persons and the time limit for appeal.[430] The Trial Chamber further stated that Judge Herrera Carbuccia had issued a dissenting opinion, which was to be filed later the same morning.[431] Therefore, although concise, the Appeals Chamber considers that this summary was sufficient, in particular in light of the overall circumstances of this case, the object and purpose of article 74(5), and the overall steps taken by the Trial Chamber to provide adequate reasoning, ensure expeditious and public proceedings and ensure that no prejudice was caused to the parties (these issues are explored further below).[432]

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[425] *Supra*, paras 178-179.
[426] 15 January 2019 Decision, pp. 1-2.
[427] 15 January 2019 Decision, p. 2, line 25 to p. 3, line 4.
[428] 15 January 2019 Decision, p. 3, line 18.
[429] 15 January 2019 Decision, p. 4, line 14 to p. 5, line 1.
[430] 15 January 2019 Decision, p. 4, line 3 to p. 5, line 6.
[431] 15 January 2019 Decision, p. 5, lines 5-6.
[432] *Infra*, paras 210-215.

193. The Appeals Chamber notes, however, that more detailed summaries of article 74 decisions may be of assistance in circumstances in which trial chambers find it necessary to issue verdicts with reasons to follow.

(iii) The timing of issuance of reasons

194. As to the timing of issuance of the Reasons for the 15 January 2019 Decision, the Prosecutor argues that the unity of the decision was broken by the lapse of time of six months between the 15 January 2019 Decision and those reasons, and/or by the fact that a definitive time-frame for the delivery of the written reasons was not given by the Trial Chamber (noting that the Trial Chamber only referred to the delivery of reasons 'as soon as possible').[433]

195. The Appeals Chamber notes that article 74(5) of the Statute does not include a time limit within which a decision issued pursuant to that provision should be provided following a trial.[434] Rule 142(1) refers to pronouncement of the decision being made 'within a reasonable period of time after the Trial Chamber has retired to deliberate',[435] but no further express guidance exists in the Court's legal texts.

196. Such time limits are also not generally found in other international criminal courts and tribunals, including where written reasons may expressly be separated from the oral pronouncement of the verdict.[436] Nor do the rules of those international courts and tribunals provide that trial chambers must set out a timeline within which those written reasons will follow and those courts and tribunals have not generally set out such timelines in practice.[437] Whereas the Prosecutor indicates that there are national

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[433] Prosecutor's Appeal Brief, para. 47; *see also* paras 106, 111, 112, 113(ii).
[434] *See also* Judge Herrera Carbuccia's Dissent to the 15 January 2019 Decision para. 28.
[435] It is noted that rule 144(2) of the Rules, as referred to by the Trial Chamber, requires that copies of the decision be provided 'as soon as possible' to those who participated in the trial and the accused, in a working language of the Court and a language the accused understands and speaks if necessary to meet the requirements of fairness in article 67 of the Statute, respectively. As stated by the Prosecutor, this seems to be a procedural rule related simply to providing copies of the decision and not to when it should be delivered by the Trial Chamber. *See* Prosecutor's Appeal Brief, para. 44.
[436] *See* the respective rules of procuedure of the ICTY (at n. 395 above), ICTR (at n. 396 above) and IRMCT (at n. 397 above), which all refer to a written reasoned opinion following a judgment '*as soon as possible*' (emphasis added). Rule 159 of the KSC Rules (at paragraph 173173 above) equally provides for a written reasoned opinion to follow an oral pronouncement of a verdict of acquittal '*as soon as possible*' (emphasis added).
[437] The following are examples of trial judgments issued with reasons to follow without setting out precise timelines for delivery: the SCSL Trial Chamber in the oral delivery of the trial judgment in the *Taylor* Appeal Judgment case stated that 'the written judgement […] *will be made available subsequently*', *see*

legal systems (namely Poland, Peru, Costa Rica, South Korea and Italy)[438] which only allow the delivery of written reasons to be deferred for a set period of time, this offers limited guidance to the Appeals Chamber since it does not demonstrate universal practice, as there are other national jurisdictions which do not, in criminal cases, set deadlines or require the court to set out its delivery timeframe, such as Canada and Australia, as shown in the *Teskey* case relied upon by the Prosecutor and, as set out directly below, in subsequent cases which considered the reasoning in *Teskey*. Indeed, in those jurisdictions, it is clear that even a very long delay between the delivery of the verdict and the delivery of the reasons cannot alone succeed as a ground of appeal. A principle to be derived from the case of *Teskey*, which has already been referred to, and as stated by the British Columbia Court of Appeal when considering the *Teskey* case in the case of *R v. Port Chevrolet*, is that 'an inordinate delay providing reasons for a decision that has been pronounced does not alone establish the reasons do not reflect the judge's reasoning'.[439] That court stated that '[i]t is clear from *Teskey* that delay in providing reasons for judgment does not in and of itself raise an apprehension that "the written reasons are in effect an after-the-fact justification for the verdicts rather than the articulation of the reasoning that led to the decision" […]. The Court noted factors that in combination rebutted the presumption of integrity and impartiality afforded to judges' reasons'.[440] The Supreme Court of South Australia in *Wickers* specified that

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Taylor Transcript of Trial Hearing, p. 49624, lines 8-10 (emphasis added); the ECCC Trial Chamber in the oral delivery of the trial judgment in *Case 002/02* stated that 'the full written Judgement […] will be made available […] *in due course*', *see* *Case 002/02* Summary of Judgment, para. 1 (emphasis added); in *Aleksovski* the ICTY Trial Chamber stated during oral delivery that its written 'judgement will be made public *as early as possible*', *see* *Aleksovski* Transcript of Trial Hearing, at 4349, lines 2-6 (emphasis added); and, in *Nahimana* during the oral delivery, the ICTR Trial Chamber stated that 'all issues relating to notice and procedure are addressed in the written judgement. This oral summary of the judgement will concentrate on the facts at issue. Only the written judgement is authoritative and *will soon be available*', *Ndahimana* Transcript of Trial Hearing, p. 1, line 36 to p. 2, line 1 (emphasis added).

[438] Prosecutor's Appeal Brief, n. 237.

[439] *R. v. Port Chevrolet* [British Columbia Court of Appeal], para. 58,

[440] *R. v. Port Chevrolet* [British Columbia Court of Appeal], para. 57, *referring to* para. 23 of *R. v. Teskey* [Supreme Court of Canada]. In *R. v. Port Chevrolet* [British Columbia Court of Appeal] the main concern was the delay in providing reasons. Although the 18 month delay was deemed 'most unfortunate' (para. 61), 'there [wa]s little objectively to support the appellants' contention the judge was struggling with the decision or that she was uncertain in her views' (para. 59). Although the judge 'did not address a number of points identified by the appellants, this appears to be because she did not consider them of consequence based on her analysis of the relevant facts' (para. 59). The circumstances of the case did not 'objectively raise a reasonable apprehension that the judge was attempting to justify her decision rather than stating the reasoning that led to it' (para. 61).

Teskey made plain that, 'if the only factor in the case was the [11 month] delay in the post-verdict delivery of the reasons, there would be no issue'.[441]

197. The timelines for the delivery of trial judgments of the ICTY, ICTR, SCSL and ECCC, where reasons followed the oral announcement of verdicts, ranging from days to months, also illustrate that there is no fixed rule as to the length of time that may be taken to craft a judgment.[442] Indeed, the length of time needed may differ substantially between cases. The complexity of a case can increase the overall time needed to render a decision[443] whether or not reasons follow, as can the length of the proceedings, the number of witnesses, exhibits and defendants.

198. The instant case was heard over a period of two years, nine months, 26 days (from the start of the trial to the last submission)[444] and had two accused and two Defence teams. Judge Henderson, in his reasons, stated that it was 'undeniably true that this case has suffered from being exceedingly complex' and that the evidence was 'voluminous'.[445] He wrote of 'the complexity of the Prosecutor's case and the large volume of evidence' which had 'inevitably resulted in a long and detailed opinion' and 'complex and detailed submissions'.[446] A 'simple and straightforward' case it was not, in his view.[447] The approach taken by Judge Henderson was to issue a detailed opinion of 968 pages. He explained that as 'the Chamber was not unanimous, I felt it was necessary to explain my decision with some precision. Indeed, it would have been much easier for me to simply say that the evidence is insufficient and give a few illustrative examples. This may be appropriate in other contexts, but I am of the view that in this case it is not.'[448] Judge Tarfusser, in his own separate opinion of 90 pages, stated that

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[441] *R v. Wickers* [Supreme Court of South Australia], para. 97.
[442] *For example*, *The Prosecutor v. Ildéphonese Nizeyimana* (ICTR, 3 days); *The Prosecutor v. Gaspard Kanyarukiga* (ICTR, 8 days); *The Prosecutor v. Charles Ghankay Taylor* (SCSL, 1 month, 3 days); *Prosecutor v. Aleksovski* (ICTY, 1 month, 18 days); *The Prosecutor v. Théoneste Bagosora et al.* (ICTR, 1 month, 22 days); *The Prosecutor v. Grégoire Ndahimana* (ICTR, 2 months, 1 day); *The Prosecutor v. Hormisdas Nsengimana* (ICTR, 2 months, 1 day); and *Case 002/02* (ECCC, 4 months, 12 days).
[443] *R. v. Teskey* [Supreme Court of Canada], para. 50.
[444] The cases against Mr Gbagbo and Mr Blé Goudé were joined on 11 March 2015, Decision on Joinder, para. 68. The trial proper commenced on 28 January 2016, Decision on Mr Gbagbo's Request for Re-scheduling Opening Statements. The last submissions were heard orally on 22 November 2018, Transcript of 22 November 2018.
[445] Judge Henderson's Reasons, para. 5 (in preliminary remarks, p.12).
[446] Judge Henderson's Reasons, para. 4 (in preliminary remarks, p.12).
[447] Judge Henderson's Reasons, para. 4 (in preliminary remarks, p.12). *See also* Judge Henderson's Reasons, para. 10 (in preliminary remarks, pp.13-14).
[448] Judge Henderson's Reasons, para. 3 (in preliminary remarks, pp.11-12).

he 'subscribe[d] to the factual and legal findings' in Judge Henderson's Reasons,[449] whilst Judge Herrera-Carbuccia wrote a dissent of 307 pages.

199. Thus there is no hard and fast rule as to when reasons should be provided following a verdict, save to say that the reasons should be provided as soon as possible. Some guidance as to an *outside* limit for issuance of full reasons may be found in the recent informal internal guidelines adopted by the judges of the Court in November 2019. These guidelines were adopted '[w]ith due regard to the need for efficiency' and provided that '[t]he written decision under Article 74 of the Statute shall be delivered within 10 months from the date the closing statements end'.[450] They provided that any extension to this recommended deadline 'must be limited to exceptional circumstances and be explained in detail in a public decision'.[451] As concerns the instant case, it is noted that the Reasons for the 15 January 2019 Decision were issued on 16 July 2019, just under eight months after the closure of the oral hearings on the no case to answer motions, on 22 November 2018, and therefore within these time limits.

(iv) 'One decision' and separate and dissenting opinions

200. The Appeals Chamber turns to the Prosecutor's arguments that the 'one decision' principle was breached because the three judges of the Trial Chamber issued 'their own opinions or reasons',[452] as opposed to a reasoned statement of the majority.

201. The 15 January 2019 Decision, as reiterated in the Reasons for the 15 January 2019 Decision, states that it was taken by majority. The former document uses the formulation, 'Majority', throughout, beginning the substance of the decision by stating: 'The Chamber, having thoroughly analysed the evidence and taken into account, into consideration all legal and factual arguments submitted both orally and in writing by the parties and participants, finds, by majority […]'.[453] The latter document, signed by all three judges, repeats the 15 January 2019 Decision, and expressly states that the decision was taken 'following deliberations'.[454] It proceeds to identify Judge

[449] Judge Tarfusser's Opinion, para. 1.
[450] Chambers Practice Manual, paras 86, 87.
[451] Chambers Practice Manual, para. 86.
[452] Prosecutor's Appeal Brief, para. 52.
[453] 15 January 2019 Decision, p. 2, line 25 to p. 3, line 2.
[454] Reasons for the 15 January 2019 Decision, para. 28.

Henderson's Reasons as containing '[t]he majority's analysis of the evidence'.[455] Judge Tarfusser, in the first paragraph of his opinion, states that he 'fully concur[s] with the Majority outcome of this trial', and he 'could not be more in agreement with [Judge Henderson] in believing that acquitting both accused is the only possible, and right, outcome for these proceedings'.[456] He goes on to confirm that, '[f]or the purposes of the Majority reasoning', he 'subscribe[s] to the factual and legal findings contained in the "Reasons of Judge Henderson"'.[457] He states that 'the Majority's view is soundly and strongly rooted in an in-depth analysis of the evidence (and of its exceptional weakness) on which my fellow Judge Geoffrey Henderson and I could not be more in agreement', and refers to the evidence having been 'exhaustively addressed in [Judge Henderson's] Reasons and highlighted here in those parts which I found particularly significant'.[458] Judge Henderson also clearly states that he joins Judge Tarfusser in deciding to acquit Mr Gbagbo and Mr Blé Goudé.[459]

202. The Appeals Chamber, in the absence of cogent evidence to the contrary, must rely on, and take in good faith, the statements of the judges. Moreover, the Prosecutor has singularly failed to produce any cogent evidence to the contrary. The fact that Judge Tarfusser, in other parts of his opinion, questions the style and level of detail in Judge Henderson's Reasons,[460] being of the view that the shortcomings of the Prosecutor's case did not necessitate a detailed analysis,[461] in no way detracts from the fact that he writes in concurrence and the fact that he, as pointed out by counsel for Mr Gbagbo,[462] also cross refers to Judge Henderson's Reasons many times. The fact that Judge Henderson writes in the first person[463] is similarly of little consequence, given the clarity as to the standing of his opinion, in the Reasons for the 15 January 2019 Decision, as the controlling reasons containing '[t]he majority's analysis of the evidence'.[464] Moreover, it was not necessary for Judge Tarfusser to have agreed with all of Judge Henderson's reasoning (or vice versa) in order to take a decision by

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[455] Reasons for the 15 January 2019 Decision, para. 29.
[456] Judge Tarfusser's Opinion, para. 1.
[457] Judge Tarfusser's Opinion, para. 1.
[458] Judge Tarfusser's Opinion, paras 67-68.
[459] Judge Henderson's Reasons, para. 1 (in preliminary remarks, p.11).
[460] Judge Tarfusser's Opinion, para. 9.
[461] Judge Tarfusser's Opinion, para. 10.
[462] Mr Gbagbo's Response, para. 17.
[463] Prosecutor's Appeal Brief, para. 53.
[464] Reasons for the 15 January 2019 Decision, para. 29.

majority. The Appeals Chamber finds that the arguments made as to possible disagreements between the two majority judges do not affect the legal requirement for 'one decision'. This is because article 74(5) concerns a procedural formality in the requirement to issue one decision and does not relate to the substance of what is issued. The judges left no room for doubt in this case, stressing their full agreement with and support for the decision. The Appeals Chamber therefore rejects the Prosecutor's argument that the requirement to provide one decision was breached because 'Judge Henderson provided *his own* full and reasoned statement and made *his own* findings on the evidence while Judge Tarfusser only agreed in part, and afterwards, with his findings'.[465]

203. Turning to the manner in which the Trial Chamber issued its written reasons, the Prosecutor does not argue that trial judges may not append separate and dissenting opinions to article 74 decisions, only that this must be done '*in addition* to the joint majority opinion setting out the majority's findings on the evidence and conclusions with sufficient detail to amount to a fully reasoned opinion within the terms of article 74(5)'.[466]

204. The Appeals Chamber rejects the Prosecutor's proposition that her interpretation of the words 'one decision' in article 74(5) is supported by the drafting history of that provision. The genesis of the wording 'one decision' in article 74(5) appears to stem from discussions as to whether the trial judgment should accommodate differences in judicial opinion at all; and does not assist the Prosecutor in her arguments relating to the degree of concurrence required *in reasoning* (as opposed to result) in order to form a majority judgment. During the drafting process, proposals for unanimous decision-making and the suppression of dissenting and separate opinions proved controversial. As the evolution of the provision clearly shows: (i) earlier drafts which required unanimity in the decision on the part of the trial judges were rejected in favour of the current provision which does not require unanimity; and (ii) earlier drafts which precluded the expression of minority views were rejected in favour of the current

[465] Prosecutor's Appeal Brief, para. 57 (emphasis in original).
[466] Prosecutor's Appeal Brief, para. 58 (emphasis in original; footnote omitted). *See also* para. 52.

provision which allows the expression of majority and minority views.[467] The draft text of article 74(5) that was sent to the Rome Conference had the question of unanimity and dissent in optional, square-bracketed text.[468] Sub-paragraph 3 of the relevant draft provision presented two options; one option allowing for trial judgments taken by majority and the other option requiring unanimity in order to convict. At the same time, sub-paragraph 6 of the provision presented options as to whether the trial judgment should refer to differences in judicial opinions: '[It shall be the sole judgement issued.] [It may contain dissenting opinions [, one dissent covering all opinions].]' The provision was ultimately altered to its current form at the Rome Conference without recorded discussion as to why the subsequent alterations were made. The provision adopted: (i) allowed for majority decisions; (ii) replaced the phrase it 'shall be the sole judgment issued' with the phrase 'The Trial Chamber shall issue one decision'; and (iii) allowed for the airing of different judicial views, providing: '[w]hen there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority'. The Official Records of the Rome Conference do not provide clarity on the rationale for the redrafting of article 74(5) of the Statute to its current wording of 'one decision' and therefore 'its *travaux préparatoires* are of a limited value in interpreting Article 74(5)', as Vasiliev states.[469] The Prosecutor's proposed interpretation of 'one decision' is thus not supported by the drafting history that she relies upon.

205. Notwithstanding the above, the Appeals Chamber finds that the requirement in article 74(5), for the Trial Chamber to 'issue one decision', requires the production of a single document clearly reflecting what the judges decided. That document should be signed by all three judges – to confirm that they participated in the decision-making process. The production of a single document of this nature, in addition to any separate, concurring or dissenting opinions, ensures that what the judges decided is clear to the parties, the Appeals Chamber and the general public, which is in line with the wording, object and purpose of article 74(5).

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[467] *See*, 1993 ILC Working Group Draft Statute, article 51(2) and commentary; 1994 ILC Draft Statute, article 45(5): 'The judgment shall be in writing and shall contain a full and reasoned statement of the findings and conclusions. It shall be the sole judgment issued, and shall be delivered in open court'; 1996 Preparatory Committee Draft, article 45(5): 'The judgement shall be in writing and shall contain a full and reasoned statement of the findings [on the evidence] and conclusions. It shall be the sole judgement issued [It may contain dissenting opinions], and shall be delivered in open court.'
[468] 1998 Preparatory Committee Draft, article 72.
[469] S. Vasiliev, p. 567, para. 619 (emphasis in original).

206. As to what the above means in practice, the Appeals Chamber considers that different approaches may be taken and it is likely to depend upon the circumstances of the case, the extent of any disagreement, the complexity of the issues and the potential length of any views. As a matter of best practice, it should be self-evident from the document signed by all three judges where agreement and disagreement lie, and on what issue(s), if any, a judge is writing separately. Ideally, this document should contain the full reasons for the decision, explaining the judges' conclusions, and setting out the fact of any differing or dissenting views. If it is not possible to include differing or dissenting views in full in that document (either in the main text or in a footnote), separate or dissenting opinions may be appended; in such circumstances, reference to the separate or dissenting view could be made at relevant junctures in the main text of the document or in a footnote or footnotes. Alternatively, depending upon the facts, and in particular where a dissent relates to the entire judgment, it may be more appropriate simply to identify within the main document which judge or judges are writing separately or dissenting at the outset and to state that their full separate or dissenting opinion is attached, without needing further to refer to its contents within the main document.

207. For the avoidance of doubt, the above understanding of 'one decision' does not in any way affect the issuance of separate or dissenting opinions, a practice which has developed in trial chambers over the years, and the Prosecutor, indeed, does not question this practice.[470] Although, the judges in a trial chamber must strive to reach agreement and to reflect, in one text, their views and reasoning, judges cannot be compelled to go against their conscience. Not all judicial perspectives can necessarily be accommodated within one line of reasoning, and the integrity of the judicial process, and the views of judges, must be respected by allowing judges to freely, and individually, develop their views.[471] Article 74(5), which clearly provides that where the trial chamber cannot achieve unanimity, trial judges are permitted to reach decisions by majority, is in keeping with the principle that judges cannot be forced to agree.

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[470] Prosecutor's Appeal Brief, para. 59.
[471] Judges serve the Court as independent and impartial individuals, as stated in articles 36(3)(a) and 40(1) of the Statute and articles 3(1) and 4(1) of the Code of Judicial Ethics. They solemnly undertake to perform their duties under the Statute 'honourably, faithfully, impartially and conscientiously', in accordance with article 45 of the Statute and rule 5 of the Rules. *See* Code of Judicial Ethics.

Whether in concurrence or dissent, writing separately may be felt by an individual judge to be his or her duty, in line with his or her solemn undertaking. Indeed, writing separately and allowing a judge to freely and fully express his or her opinion about the case may also enhance the clarity of the decision as a whole and further the development of the law.

208. On the facts of this case, the Appeals Chamber considers that there was no violation of the 'one decision' requirement in article 74(5). This is because the Reasons for the 15 January 2019 Decision were set out in one document, which included a procedural background to what had occurred in this case, the operative part of the 15 January 2019 Decision, as well as the bare reasoning for that decision, and referred to the three attached opinions, also making clear that the decision was taken by majority. This document was signed by all three judges – the two judges comprising the majority, and the one judge in dissent – and, therefore, formally satisfied the basic understanding of the requirement to issue one decision.

209. In finding as such, the Appeals Chamber recognises that what was set out in the Reasons for the 15 January 2019 Decision in this case was the minimum that is required. It would have been preferable had the judges set out more detailed reasons for their agreement and disagreement within that document, even if they were then elaborated upon in their separate or dissenting opinions. However, read in light of the overall object and purpose of article 74(5), what the Trial Chamber issued as a whole in this case, including the three opinions of the judges, was sufficiently clear. Therefore, the Appeals Chamber finds that the Trial Chamber, in this case, did not err and that it formally satisfied the requirements of article 74(5).

(v) The Trial Chamber's approach and human rights law

210. The purpose of the requirements of article 74 is to ensure that the parties, the victims, the Appeals Chamber as necessary, and the general public are in a position to fully assess and appreciate the decision and reasoning of the trial chamber, and to ensure that the parties are in a position to properly exercise their right of appeal against that crucial decision. As seen above, the Appeals Chamber has found that the combination of the 15 January 2019 Decision, the Reasons for the 15 January 2019 Decision, and the three opinions of the judges, met these requirements, while properly safeguarding the rights of the accused through early issuance of the verdicts of acquittal. The Appeals

Chamber considers, contrary to the arguments raised by the Prosecutor, that the Trial Chamber was not prevented by internationally recognised human rights law from taking the approach it did, and also notes that, in doing so, it ensured that no prejudice was caused to the parties, the victims or indeed to the public.

211. First, the Trial Chamber suspended the time-limits for appealing the acquittals until receipt of the written reasons.[472] There are specific time limits in the Court's legal texts regulating the filing of appeals[473] and the ICC, as also confirmed by the European Court of Human Rights,[474] has recognised that appeals are only possible if parties receive sufficient reasoning to enable the mounting of an appeal. The same was acknowledged by the Trial Chamber in this case, when it specifically stated that the relevant time limit for appeal would only begin running as of notification of the written reasons, specifically preserving the Prosecutor's appellate rights.[475] The Prosecutor also had the right, and exercised that right, to apply to maintain Mr Gbagbo and Mr Blé Goudé in detention pending appeal pursuant to article 81(3)(c)(i).[476] Although the victims argue that they were prejudiced as no reasons were provided at the time this application was made,[477] that fact is irrelevant as the very relief that the Prosecutor sought in her application – conditional release[478] – was, in fact, ultimately granted.[479] Therefore no prejudice in either regard can be made out. Nor has either acquitted person complained of any prejudice occasioned by the Trial Chamber's approach to the issuance of its decision.

212. Second, the public was sufficiently kept abreast of developments in these proceedings. The Prosecutor stated that the gap between issuance of the verdict and the reasons meant that the acquittals were incapable of public scrutiny for six months, 'risking public confidence in the Court and undermining the overall legitimacy of the

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[472] Stating that '[t]he deadline for appealing the present decision will start running at the moment the parties are notified of the full reasons for it', Reasons for the 15 January 2019 Decision, p. 8; 15 January 2019 Decision, p. 5, lines 2-3.
[473] *See* rules 150, 154 and 155 of the Rules and regulations 58 and 64 of the Regulations.
[474] *Lubanga* OA5 Judgment, para. 20, *referring to Hadjianastassiou v. Greece* [ECtHR], para. 32. *See also* para. 33. *See also Cerovšek and Božičnik v. Slovenia* [ECtHR], para. 40.
[475] 15 January 2019 Decision, p. 4, lines 10-11.
[476] 15 January 2019 Decision, p. 4, line 24 to p.5, line 1.
[477] OPCV's Observations, para. 59.
[478] Prosecutor's Request for Conditional Release, para. 31.
[479] Judgment on Conditional Release, para. 60.

acquittals', and that '[t]his affected the trust in the outcome of the trial and the legitimacy of the Majority's decision to acquit Mr Gbagbo and Mr Blé Goudé'.[480] Such allegations are serious and, more worryingly, speculative; the Prosecutor has presented no evidence in support. The arguments are without substantiation, and are, accordingly, rejected.

213. As correctly referred to by the parties, there is a need for, and right to, public scrutiny of the work of the Court. Considering the broader context of these no case to answer proceedings, the Trial Chamber had this in mind as seen in the process it followed in issuing its decision. The Trial Chamber held public hearings in the no case to answer proceedings in October and November 2018[481] and held a further public hearing on 13 December 2018, to hear submissions on release.[482] It also held hearings on 15 January 2019 to deliver the verdicts of acquittal, and on 16 January 2019 to hear submissions, and issue a decision, on release pursuant to article 81(3)(c) of the Statute. Press releases, with hyperlinks to the relevant decisions, were issued in respect of (i) the 15 January 2019 Decision,[483] (ii) the Trial Chamber's Decision on Release of 16 January 2019[484] and (iii) in respect of the Reasons for the 15 January 2019 Decision and its annexes.[485] With this as background, and bearing in mind what internationally recognised human rights require in terms of publicity (e.g. article 6(1) of the EConvHR and article 14(1) of the ICCPR), providing for a judgment to be 'pronounced publicly'),[486] it cannot be substantiated that the Trial Chamber's approach violated the principle of publicity; the aim of which is to ensure that justice is transparent and

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[480] Prosecutor's Appeal Brief, paras 94 (footnote omitted), 107(ii).
[481] On 1, 2 and 3 October 2018, the Trial Chamber held hearings, during which the Prosecutor presented her response to the defence motions: Transcript of 1 October 2018, Transcript of 2 October 2018, Transcript of 3 October 2018. On 12, 13, 14, 19, 20, 21 and 22 November 2018 the Trial Chamber heard counsel for Mr Gbagbo's and counsel for Mr Blé Goudé's oral responses to the Prosecutor: Transcript of 12 November 2018, Transcript of 13 November 2018, Transcript of 14 November 2018, Transcript of 19 November 2018, Transcript of 20 November 2018, Transcript of 21 November 2018, Transcript of 22 November 2018.
[482] Order Convening a Hearing on Detention.
[483] ICC Press Release of 15 January 2019.
[484] ICC Press Release of 16 January 2019.
[485] ICC Press Release of 16 July 2019.
[486] ECtHR, Chamber, *Malmberg et al. v. Russia* [ECtHR] paras 55-58; *Fazliyski v. Bulgaria* [ECtHR], paras 64-66; *Ryakib Biryukov v. Russia* [ECtHR], paras 30-37, 39, 45; *Lamanna v. Austria* [ECtHR], paras 30-34; *B. and P. v. United Kingdom*, paras 36, 45-48; *Werner v. Austria*, paras 54-55, 60; *Szücs v. Austria* [ECtHR], paras 43, 48; *Axen v. Germany* [ECtHR], paras 25, 30-32; *Pretto et al. v. Italy* [ECtHR], paras 21-22, 25-27; *Sutter v. Switzerland* [ECtHR], paras 26-27, 32-34; *J v. Peru* [IACtHR], para. 217; *Crociani et al. v. Italy* [European Commission], p. 147, p. 228, para. 22.

accessible to the public and to avoid arbitrary decision-making. The requirement to deliver in open court the decision or a summary thereof was adequately met in the hearing on 15 January 2019. The Reasons for the 15 January 2019 Decision need not have been rendered orally on 16 July 2019 in this case to fulfil this purpose, contrary to the arguments of the OPCV.[487] The possibility of public scrutiny was fulfilled in this case, as those reasons were made publicly accessible through their filing with the Registry, coupled with a press release notifying the public of their existence as noted above.

214. Third, the Prosecutor has not substantiated her argument that the Trial Chamber erred in failing to provide sufficient reasoning.[488] The Prosecutor argues that the Trial Chamber's approach was 'inconsistent with the right to a reasoned decision', stating that, for a period of six months, 'the Majority's verdict was merely stated but not, as required, explained or justified. As such, it could not dispel any suspicion that the verdict may have been arbitrary or that the Majority was unaccountable'.[489] The Appeals Chamber has already found above that, in this case, the Trial Chamber did not err in issuing its reasons six months after delivery of the verdict. Nor did it err in the manner in which it did so. Furthermore, the reasons provided in July 2019 were extensive.

215. Fourth, the Prosecutor argues that the judges '[should] have overcome their differences and fractures, to have clearly articulated the NCTA standard and assessed the evidence consistently, and to have otherwise ensured the expeditious conduct of the proceedings', and that they 'could have tried to form and properly articulate their findings and conclusions by the time they issued their verdict'.[490] The Prosecutor's argument appears to be that had the Trial Chamber acted expeditiously, it could have delivered its full decision earlier. She refers to the Trial Chamber's 'inability to form and articulate its full findings and conclusions in writing within a shorter time' and how this 'cannot constitute good cause to depart from the guarantees in article 74'.[491] However, there is no evidence to support the allegation that the Trial Chamber did not

[487] *See e.g.* OPCV's Observations, para. 103.
[488] Prosecutor's Appeal Brief, para. 93.
[489] Prosecutor's Appeal Brief, para. 93. *See also* para. 107(ii).
[490] Prosecutor's Appeal Brief, para. 92.
[491] Prosecutor's Appeal Brief, para. 92.

act expeditiously. Indeed, it appears somewhat farfetched to, without any specifics, allege a lack of expedition. The time line of this case has been set out above and, without substantiation, it is hard to see where the lack of expedition emerges. The Appeals Chamber also notes the contradictory nature of the Prosecutor's argumentation; she both submits that the Trial Chamber could not have properly reached a verdict of acquittal by January 2019, given the short lapse of time from the closure of the proceedings in November 2018, and that the Trial Chamber erred in not acting more expeditiously, and rendering not only its verdict, but also its full reasoned opinion, within a shorter period of time.

(vi) Conclusion

216. To conclude, the Appeals Chamber finds that the Trial Chamber correctly prioritised liberty over formality, in a process that satisfied the requirements of publicity, and provided detailed and lengthy reasoning for its decision. To the extent that any error could be said to exist, it could not have had any material effect on the decision of the Trial Chamber.

D. Was the Trial Chamber's decision fully informed?

1. Summary of submissions

217. The Prosecutor argues that, when the Trial Chamber issued the 15 January 2019 Decision, 'despite its assertion to the contrary, it apparently had not yet completed the necessary process of making its findings on the evidence and reaching all its conclusions, *nor* completed the written articulation of its findings and conclusions'.[492] She argues that, '[i]n other words, the Majority had not yet completed its fully informed reasoning',[493] which is 'troubling', pointing to Judge Herrera Carbuccia's reference to 'result-driven reasoning'.[494]

218. The Prosecutor argues that the following issues illustrate that the Trial Chamber's 15 January 2019 Decision was not fully informed: (1) the fact that it 'was not accompanied by summary reasons or a precise timeline for issuing the reasons';[495]

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[492] Prosecutor's Appeal Brief, para. 60 (emphasis in original; footnote omitted).
[493] Prosecutor's Appeal Brief, para. 60.
[494] Prosecutor's Appeal Brief, para. 60, *referring to* Judge Herrera Carbuccia's Dissent to the 15 January 2019 Decision, para. 33.
[495] Prosecutor's Appeal Brief, p. 30; *see also* paras 62-64.

(2) the fact that the Trial Chamber 'had not completed its assessment of the evidence or reached all conclusions';[496] (3) the fact that there were '[s]ubstantive inconsistencies between the [Trial Chamber's 15 January 2019 Decision and Judge Henderson's Reasons], [which] demonstrate that the oral acquittal was not fully informed';[497] and (4) the fact that there were '[i]nconsistencies in assessing the sufficiency of evidence at the NCTA stage within Judge Henderson's Reasons'.[498]

219. The Prosecutor concludes with the following:

> Had the Majority not violated but instead properly interpreted and applied article 74(5), it would have completed the process of making all its findings on the evidence and conclusions and developed fully informed and written reasons before acquitting Mr Gbagbo and Mr Blé Goudé. It would have been able to publicly deliver at least a summary of its reasons in open court when rendering its verdict. However, since the Majority violated article 74(5), the [15 January 2019 Decision] to acquit the Accused was premature and not fully informed. It is vitiated by fatal procedural flaws, and is therefore unlawful.[499]

220. The OPCV agrees that the 15 January 2019 Decision was not fully informed.[500] In the 22 June 2020 Appeal Hearing, principal counsel referred to the Trial Chamber rendering a 'not fully informed oral decision',[501] arguing also that the short time frame before delivery of the 15 January 2019 Decision (after closure of filings and the December 2018 hearing on detention) illustrated that the Trial Chamber could not have properly considered the matter.[502]

221. Counsel for Mr Gbagbo disputes the Prosecutor's arguments, stating that '[w]hen the Prosecutor claims that the Judges were not "fully informed" when they made their decision in January 2019, she is denying that they had any analytical capacity during those two years'.[503] He disputes each of the Prosecutor's arguments in

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[496] Prosecutor's Appeal Brief, p. 31; *see also* paras 65-75.
[497] Prosecutor's Appeal Brief, p. 37; *see also* paras 76-82.
[498] Prosecutor's Appeal Brief, p. 40; *see also* paras 83-84.
[499] Prosecutor's Appeal Brief, para. 85.
[500] OPCV's Observations, para. 42.
[501] 22 June 2020 Appeal Hearing, p. 26.
[502] 22 June 2020 Appeal Hearing, p. 32.
[503] Mr Gbagbo's Response, para. 10.

turn, as referred to below, arguing that they cannot show that the Trial Chamber was not fully informed.[504]

222. Counsel for Mr Blé Goudé argues that the Prosecutor's argument is 'unsubstantiated and should be rejected', and 'that there are objective elements to conclude that the [15 January 2019 Decision] was fully informed'.[505] He responds to each aspect of the argument,[506] as referred to below. He asserts that there is a presumption of integrity of the judges; he argues that the burden of proof rested on the Prosecutor to show that this integrity was not complied with.[507] He argues that the Prosecutor failed to produce evidence that the written reasons were an after-the-fact justification for its decision to acquit, and that it was clear that the majority did not find themselves in a position where they had to come to a conclusion and that conclusion was indefensible when they came to write reasons.[508] He argues that there are numerous statements leaving no doubt that the outcome was based on an obvious and sustainable conclusion which did not change in the slightest since January 2019.[509]

2. Determination of the Appeals Chamber

223. The Prosecutor's allegations come close to alleging lack of propriety on the part of the two majority trial judges, as also pointed out by counsel for both Mr Gbagbo and Mr Blé Goudé;[510] counsel for Mr Gbagbo makes the same assertion regarding the OPCV's observations in a more general manner.[511] Counsel for the Prosecutor expressly refuted this assertion during the oral hearing.[512] Despite this, it is the case that

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[504] Mr Gbagbo's Response, paras 132-146.
[505] Mr Blé Goudé's Response, para. 87.
[506] Mr Blé Goudé's Response, paras 88-124.
[507] 22 June 2020 Appeal Hearing, p. 58.
[508] 22 June 2020 Appeal Hearing, p. 58.
[509] 22 June 2020 Appeal Hearing, pp. 58-59.
[510] 22 June 2020 Appeal Hearing, pp. 40-41, 58.
[511] Mr Gbagbo's Response to the OPCV's Observations, para. 216: 'Ultimately, the LRV well and truly imputes motives to the Trial Chamber, to the point of casting aspersions on the Judges' professional integrity'.
[512] 24 June 2020 Appeal Hearing, pp. 59-60. The Prosecutor stated the following: '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 […] 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 […] 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

the Prosecutor is alleging that the two judges forming the majority entered a verdict of acquittal prematurely, without being fully informed. If this were the case, it would be a grave error, which would affect the integrity and impartiality of the judges. The allegation goes far beyond the mere allegation of a legal, factual or procedural error in the decision, as it alleges behaviour antithetical to the judicial office.

224. As recalled above, judges at the ICC, as elsewhere, must be presumed to act with integrity and impartiality.[513] The Appeals Chamber would expect evidence of a very clear nature to support such a serious allegation; being that essentially these judges had entered verdicts of acquittal, before proper deliberations, or considering the evidence presented.[514] This is especially so, given the public averment of the Presiding Judge that the Trial Chamber had, before reaching its verdict, 'thoroughly analysed the evidence and taken into account […] all legal and factual arguments submitted both orally and in writing by the parties and participants'.[515] In addition, in its written reasons, the Trial Chamber expressly stated that it had issued its 15 January 2019 Decision 'following deliberations'.[516] The burden is on the party raising the issue – in this case the Prosecutor – to rebut the presumption of integrity and impartiality, and to

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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'.

[513] Article 36(3)(a) of the Statute provides that Judges at the Court are 'chosen from among persons of high moral character, impartiality and integrity', while article 45 of the Statute requires them to make a solemn undertaking that they will exercise their 'functions impartially and conscientiously'. Specifically, this undertaking, as per rule 5(1)(a) of the Rules, provides as follows: 'I solemnly undertake that I will perform my duties and exercise my powers as a judge of the International Criminal Court honourably, faithfully, impartially and conscientiously, and that I will respect the confidentiality of investigations and prosecutions and the secrecy of deliberations'. *See also* Code of Judicial Ethics.

[514] *See e.g.* decisions of the Presidency: *Katanga* Plenary Decision, paras 38-40; *Bemba et al.* Plenary Decision, paras 15-18; *Lubanga* Plenary Decision, paras 8-10; 34-40 and the separate opinion of Judge Eboe-Osuji referring to the presumption of integrity, paras 52, 55; *Banda* Plenary Decision, paras 13-14; *Bemba* Decision on Defence Request for Relief for Abuse of Process, para. 100. From the ICTY and the ICTR, *see*: *Mladić* Decision on Defence Motion for Fair Trial and Presumption of Innocence, para. 10; *Furundžija* Appeal Judgment, paras 177 *et seq*; *Renzaho* Appeal Judgement, paras 20-23; *Munyakazi* Appeal Judgement, para. 115; *Nahimana et al.* Appeal Judgment, paras 47-50; *Rutaganda* Appeal Decision, paras 28-29; *Šešelj* Presidency Decision, paras 4-5. From the ECtHR and national courts, *see*: *Hauschildt v. Denmark* [ECtHR], paras 46-48; *Morice v. France* [ECtHR], paras 73-78 and concurring opinion of Judge Kūris, para. 2. *R. v. Teskey* [Supreme Court of Canada], paras 19, 21; *R. v. KGK* [Supreme Court of Canada], paras 55, 65-66; *Cojocaru v. British Columbia Women's Hospital and Health Centre* [Supreme Court of Canada], paras 14-29; *R v. Wickers* [Supreme Court of South Australia], para. 96; *Forbes of Culloden v. Robert Ross et al.* [Court of Session], p. 554; *State v. Richard* [Ohio Court of Appeals], p. 4; *Frank Novak & Sons, Inc v. Brantley, Inc* [Ohio Court of Appeals] p. 3; *In re Long* [Ohio Court of Appeals], para. 63.

[515] 15 January 2019 Decision, pp. 2-3.

[516] Reasons for the 15 January 2019 Decision, para. 28.

illustrate concretely how the actions of the trial judges were in error. The Appeals Chamber will analyse the arguments of the Prosecutor to see if there is clear evidence that is capable of rebutting the presumption that the 15 January 2019 Decision was made in a manner that was fully informed.

(a) The 15 January 2019 Decision was not accompanied by summary reasons or a precise timeline for issuing the reasons

225. The Prosecutor first argues that the Trial Chamber did not deliver a summary in court, as required under article 74(5) of the Statute, and that this 'shows that the decision was not fully informed'.[517] She argues, that had it been completed, the analysis of the evidence, including all factual and legal conclusions, could have been summarised in court.[518] She argues that the lack of a summary, the length of Judge Henderson's Reasons, and the length of time until their delivery, further shows that the Majority's necessary reasoning process had not been completed by the time of the Trial Chamber's 15 January 2019 Decision, pointing also to Judge Henderson's reference to the fact that he did not have the necessary resources to make admissibility rulings in an expeditious manner.[519] Also, she argues that the lack of a time limit for delivery of the reasons, 'further shows that the process of analysing the evidence and reaching all necessary conclusions had not been completed by the time of the [15 January 2019 Decision]'.[520]

226. The Appeals Chamber considers that these allegations amount to, simply put, speculation; as discussed above, a summary of the decision was issued. The fact that it was short does not mean that the Trial Chamber had not completed its work, bearing in mind also, the express statement made by the Trial Chamber in its 15 January 2019 Decision that it had, *inter alia*, 'thoroughly analysed the evidence and taken into account […] all legal and factual arguments submitted both orally and in writing by the parties and participants'.[521] Similarly, neither the ultimate length of the written reasons (noting that Judge Henderson explained the background to his lengthy reasons),[522] nor the fact that a precise time frame for their issuance was not given, can substantiate the

[517] Prosecutor's Appeal Brief, para. 62.
[518] Prosecutor's Appeal Brief, para. 62.
[519] Prosecutor's Appeal Brief, para. 63.
[520] Prosecutor's Appeal Brief, para. 64.
[521] 15 January 2019 Decision, pp. 2-3.
[522] Judge Henderson's Reasons, paras 3-5 (in Preliminary Remarks, pp.11-12).

serious allegation that the Trial Chamber acquitted both persons without having been fully informed when doing so.

227. The Appeals Chamber notes that Judge Henderson's remarks, as seen above and pointed to by the Prosecutor,[523] regarding the case's complexity, volume of evidence and complex submissions,[524] as well as those regarding his resources to complete admissibility determinations expeditiously[525] do not support the contention that he only began his considerations after the Trial Chamber's decision[526] and, on their own do not support an allegation[527] that he, or Judge Tarfusser, were therefore not fully informed in January 2019. It is similarly hard to see how the Trial Chamber's statement that the reasons will be issued 'as soon as possible', 'shows that the process of analysing the evidence and reaching all necessary conclusions had not been completed by the time of the [15 January 2019 Decision]'.[528]

228. The Appeals Chamber notes the OPCV's argument that the speedy delivery of the 15 January 2019 Decision, following receipt of the last filing in the no case to answer proceedings, and the hearing on detention on 13 December 2018, also illustrates that the 15 January 2019 Decision could not have been fully informed.[529] Again, the Appeals Chamber considers this to be speculation. The time period between closure of filings and delivery of the verdict cannot, in and of itself, mean that the Trial Chamber was not informed and is not evidence that the Trial Chamber did not properly deliberate on this case, before taking the serious decision to acquit two persons who had been in

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[523] Prosecutor's Appeal Brief, para. 63.
[524] Judge Henderson's Reasons, paras 3-5.
[525] Judge Henderson's Reasons, para. 29: 'I note my disagreement for the purposes of the present opinion because, as explained below, it affects how I have proceeded with my analysis. In this regard, I note that I do not have, at my disposal, the resources that a chamber could have in order to make these determinations in an expeditious manner, on a rolling basis or otherwise, so as to render a complete opinion on the submissions at this stage within a reasonable time. In addition, even if I did have the means to make reasoned rulings on the admissibility of all pieces of evidence relied upon, the present opinion would not amount to excluding any piece of evidence as 'ruled irrelevant or inadmissible' within the meaning of rule 64(3). I am therefore required to evaluate the evidence considered "submitted" before the Trial Chamber, regardless of how I would have actually proceeded with respect to admissibility. This leaves me with little choice but to carry on without making admissibility rulings that I consider necessary'.
[526] *See also* Mr Blé Goudé's Response, para. 90.
[527] Prosecutor's Appeal Brief, para. 63.
[528] Prosecutor's Appeal Brief, para. 64.
[529] OPCV's Observations, para. 108; 22 June 2020 Appeal Hearing, p. 32.

the hands of the court since 2011[530] (Mr Gbagbo) and 2013[531] (Mr Blé Goudé).[532] As previously stated, and recalled further below, it would be wrong for the Trial Chamber to only commence discussion and analysis of the case after closure of proceedings. Therefore, the argument is rejected.

(b) The Majority had neither completed its assessment of the evidence nor reached all conclusions

229. The Prosecutor submits that the Trial Chamber was not fully informed when it acquitted in January 2019, because it had neither completed its assessment of the evidence nor reached all of its conclusions.[533] The Prosecutor raises several arguments in support of this contention.

230. Her first argument turns on what the Presiding Judge stated, on 16 January 2019, during the hearing on detention, in reaction to a remark made by the dissenting judge in her opinion which was filed the previous day, and in relation to whether the Trial Chamber had properly assessed the evidence.[534] The Presiding Judge stated:

> The majority also strongly reject [Judge Herrera Carbuccia's suggestion] that the majority had a duty to assess relevance, probative value and potential prejudice of each item of evidence for the purpose of this decision. This only arises in the context of admissibility rulings when giving the Chamber's decision pursuant to Article 74. This is not now relevant given the Chamber's direction to the parties and participants that for the purpose of this procedure, all evidence submitted is to be considered'.[535]

231. The Prosecutor argues, '[t]hat the Chamber in this case adopted the "submission regime" as opposed to the "admission regime" for assessing the evidence did not absolve it from its duty to make detailed assessments of the relevance, probative value and potential prejudice of each item of evidence before deciding to acquit'.[536] She refers

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[530] Reasons for the 15 January 2019 Decision, paras 6-7.
[531] Reasons for the 15 January 2019 Decision, paras 14-15.
[532] *See also* Mr Gbagbo's Response to the OPCV's Observations, paras 101-104.
[533] Prosecutor's Appeal Brief, paras 65-75.
[534] Judge Herrera Carbuccia's Dissent to the 15 January 2019 Decision, para. 47: 'At this stage, and considering that the Majority of the Chamber (Judge Tarfusser and Judge Henderson) have issued an oral summary, contrary to "a reasoned statement" pursuant Article 74(5) of the Statute, and although they have stated that they have "already arrived at its [*sic*] decision upon the assessment of the evidence", it is not evident if they have complied with their duty to consider the 'relevance, probative value and potential prejudice to the accused of each item of evidence. This individual analysis is required in order to reach a determination beyond reasonable doubt which they have reached, albeit without reasoning'.
[535] Prosecutor's Appeal Brief, para. 70, *referring to* 16 January 2019 Decision, p. 4.
[536] Prosecutor's Appeal Brief, para. 67.

to jurisprudence from the Appeals Chamber, where it was stated, *inter alia*, that 'irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings – when the evidence is submitted, during the trial, or at the end of the trial'.[537] She essentially argues that, in the context of no case to answer motions, if rejected, detailed findings on evidence are not required while, if granted, they are required, and that '[b]y acquitting an accused without considering the evidence in detail, a Trial Chamber contravenes the Appeals Chamber's case-law.[538] As a result, she argues that the lack of a proper assessment of the evidence before acquitting in January shows that the Trial Chamber's decision at that time was not informed and that, even if it 'completed an in-depth analysis of the evidence by 16 July 2019, this does not remedy the fact that' its actual acquittal decision was not fully informed.[539] She states that the majority, in January 2019, did not consider its decision to fall under article 74; however, in July, Judge Tarfusser had changed position.[540] Therefore, 'at least he, as one of the Majority Judges, acquitted [both persons] without having made the necessary evidentiary assessments required' under article 74, which also demonstrates that the decision was not fully informed.[541] She adds that Judge Henderson later 'acknowledged this issue and his solution was to accept all the evidence submitted as in [*sic*] and analyse all of it against the no case to answer standard. But this doesn't get around the problem that by 15 January they had not done so, as Judge Tarfusser openly acknowledged in court on 16 January'.[542]

232. The Appeals Chamber acknowledges that what was said by the Presiding Judge on 16 January 2019 as to the duty to assess relevance, probative value and prejudice was not wholly clear. Nevertheless, the Presiding Judge stated that all evidence that had been submitted would be considered.[543] He also noted that the majority *had* conducted a more in-depth review of the evidence in this case.[544] This was in line with his

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[537] Prosecutor's Appeal Brief, para. 67.
[538] Prosecutor's Appeal Brief, para. 68.
[539] Prosecutor's Appeal Brief, para. 69.
[540] Prosecutor's Appeal Brief, para. 70.
[541] Prosecutor's Appeal Brief, para. 70.
[542] 22 June 2020 Appeal Hearing, p. 20.
[543] 16 January 2019 Decision, p. 4.
[544] 16 January 2019 Decision, p. 5. The Trial Chamber stated: 'It is worth pointing out that even the standard adopted by Judge Herrera Carbuccia leaves open the possibility to go beyond a mere superficial

statement the day before, when he prefaced the Trial Chamber's decision by stating that it had 'thoroughly analysed the evidence and taken into account […] all legal and factual arguments submitted both orally and in writing by the parties and participants'.[545] In addition, the fact that the Trial Chamber did not make formal admissibility assessments does not, in any event, inevitably mean that the judges were any less familiar with the evidence presented to them during the course of the trial; they stated that they had considered the evidence and their ultimate conclusion was that there was insufficient evidence on which to proceed. The Prosecutor has presented no evidence to show that the Trial Chamber did not assess the evidence thoroughly or that these statements were untrue.

233. It is not possible to conclude, from Judge Tarfusser's statement on 16 January 2019, that he was not fully informed at the time of reaching the decision to acquit in the 15 January 2019 Decision because he had not properly assessed the evidence.

234. The second argument concerns other indications in the record which illustrate, in the Prosecutor's view, that Judge Tarfusser 'had not yet completed his assessment' by January 2019, and which show 'that he appears to have reached his final conclusion even before he received the Defence's NCTA motions and the Prosecution's response, both filings which later informed his Opinion and Judge Henderson's Reasons'.[546] The Prosecutor refers to the background on the standard of proof in this case, in particular the Second Order on the Conduct of Proceedings and the Decision on Prosecutor's Motion Seeking Clarification, in the latter of which the Single Judge rejected the Prosecutor's request for clarification of the standard.[547] She then points to Judge Tarfusser's Opinion, where he discusses the standard of proof, stating that he 'recognised that the previous instructions to the Parties and participants on the matter included "sometime[s] neutral if not ambiguous procedural formulas"' and that, in his view, 'these "were necessary *en route* to make the trial progress towards its right

assessment. This may take place in exceptional cases such as the present one where the credibility and reliability of the evidence is seriously questioned and where the Prosecutor contends that guilt is based in whole or in part on questionable inferences to be drawn. In these cases it is not appropriate for the trial to continue on the tenuous basis of such superficial assessment'.

[545] 15 January 2019 Decision, pp. 2-3.
[546] Prosecutor's Appeal Brief, para. 71.
[547] Prosecutor's Appeal Brief, para. 72.

conclusion"'.[548] The Prosecutor, referring to this phrase, ultimately argues that this indicates that Judge Tarfusser was minded, already then, in June 2018, to acquit.[549]

235. The Appeals Chamber is not persuaded by the Prosecutor's argument. The statement of Judge Tarfusser on which the Prosecutor relies addressed the applicable standard, as follows:

> 67. What matters, more and beyond labels and theoretical approaches, is that the Majority's view is soundly and strongly rooted in an in-depth analysis of the evidence (and of its exceptional weakness) on which my fellow Judge Geoffrey Henderson and I could not be more in agreement. In spite of the parties' and especially the Prosecutor's attempts to drag the trial down the route of the classic no-case-to-answer proceedings, the exercise entertained by the Chamber (starting with the first order on the conduct of the proceedings, down to the oral decision deferring the issuance of the reasoning), at least in my understanding, was never meant to replicate the so-called 'Ruto and Sang model', in spite of the sometime neutral if not ambiguous procedural formulas which were necessary *en route* to make the trial progress towards its right conclusion.
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> 68. Furthermore, the very features of the present case and of the submitted evidence – as exhaustively addressed in the Reasons and highlighted here in those parts which I found particularly significant – do not require engaging in further discussions as to either the theoretical foundation or the practical application of the notion. […][550]

236. The Prosecutor infers, from the above, that reference to the 'right conclusion', meant that Judge Tarfusser knew, already in June 2018, that he would acquit; that this phrase meant, in his mind, acquittal. The Appeals Chamber rejects the Prosecutor's argument; the inference which the Prosecutor urges the Appeals Chamber to draw is simply too strained.

237. In any event, the fact that Judge Tarfusser, or all of the judges in the Trial Chamber, may indeed have been inclined in a particular direction, in June 2018 – which is not clear from the transcript referred to – is not in and of itself an error. First, one may recall that the Appeals Chamber has found that trial chambers can themselves decide to initiate no case to answer proceedings: 'Should it appear to the Chamber that

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[548] Prosecutor's Appeal Brief, para. 72, *referring to* Judge Tarfusser's Opinion, paras 65, 67.
[549] She states that, as Judge Tarfusser did not believe in no case to answer proceedings, the only route for him, as referred to in that statement, having sought submissions at the end of the Prosecutor's case, 'would have been to enter a final decision under article 74'. The Defence had not yet called evidence, so he must not have been minded to convict. *See* Prosecutor's Appeal Brief, paras 73-74.
[550] Judge Tarfusser's Opinion, paras 67-68.

the expeditiousness and/or fairness of the trial so warrants, […], having regard to the evidence presented'.[551] Therefore, even if Judge Tarfusser or the Trial Chamber had been inclined in a particular direction at the close of the Prosecutor's case, it may indeed explain why the Trial Chamber decided to exercise its discretion to engage no case to answer proceedings in the present case to receive submissions on the matter.

238. Second, it may be recalled that this Trial Chamber had been hearing this case for some time, the trial commencing on 28 January 2016.[552] They had concluded nearly two years in trial, hearing the Prosecutor's evidence and the Prosecutor had filed the Prosecutor's Mid-Trial Brief, on 18 March 2018. One would expect the Trial Chamber, in such circumstances, to be fully cognisant of this case and the evidence and not that this would only become clear, for the first time, in filings made subsequently, related to the no case to answer proceedings.[553] Indeed, as pointed out by counsel for Mr Gbagbo, '[l]ogically, since the burden of proof rests with the Prosecution, it had to be open to the Judges, in theory, to rule on whether or not the Prosecutor had proven the charges beyond reasonable doubt at the time the Prosecutor closed her case, in spring 2018 – solely on the basis of that case against the Accused'.[554] Even still, and correctly, filings were then made on the no case to answer proceedings between July and September 2018, with hearings on the issue held in October and November 2018.

239. Judges who have been conducting trials, in some cases trials lasting years, will surely have developed, and should be expected to have developed, their view of the case, based on the appropriate legal principles, over the period of time during which they are hearing that case. As argued by counsel for Mr Gbagbo, 'contrary to what the Prosecution seems to be suggesting, the fact that a judge has a clear idea of the nature of the Prosecution's case when the Prosecution has concluded the presentation of its case cannot be equated with bias. It is part of the normal exercise of a judge's office'.[555] The Appeals Chamber cannot accept the Prosecutor's premise that trial judges are expected to begin evaluating the case only once the entire case has concluded. All three judges are required to 'be present at each stage of the trial' (article 74(1) of the Statute)

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[551] *Ntaganda* Decision on Request for Leave to file a NCTA Motion, para. 27.
[552] Reasons for the 15 January 2019 Decision, para. 20.
[553] *See also* Mr Gbagbo's Response, paras 142-143; Mr Blé Goudé's Response, para. 101.
[554] Mr Gbagbo's Response, para. 143.
[555] Mr Gbagbo's Response, para. 144. *See also* 22 June 2020 Appeal Hearing, pp. 41-42, 45-46.

and to ensure that the proceedings are both 'fair and expeditious' (article 64(2) of the Statute); to meet these requirements, a judge will actively engage in the trial on an ongoing basis. The introduction in the Chambers Practice Manual of internal deadlines for the issuance of trial judgments in order to ensure efficiency, is seen as 'mak[ing] the early commencement of the drafting process [by the judges] even more crucial'.[556] The consequence of this must be that judges, in order to act expeditiously, should on an ongoing basis form preliminary views on matters as and when they arise in the trial proceedings.

240. At the same time, no decision should be taken until a fair opportunity has been given to all parties and participants to complete the relevant process; the Trial Chamber provided the Prosecutor with the opportunity to argue her case in response to the requests by both persons, both orally and in writing. She has not argued otherwise.

241. The Prosecutor has failed to demonstrate any error.

(c) Substantive inconsistencies between the 15 January 2019 Decision and the written reasons demonstrate that the 15 January 2019 Decision was not fully informed

242. The Prosecutor's third argument is that '[s]ubstantive inconsistencies between the [15 January 2019 Decision] and the [Reasons for the 15 January 2019 Decision] demonstrate that the oral acquittal was not fully informed'.[557] She argues that several such inconsistencies demonstrate that, on 15 January 2019, the judges 'had not reached all necessary conclusions', referring specifically to the Trial Chamber having 'not yet decided on the applicable standard of proof and the very nature of the decision'.[558] She states that the judges 'apparently developed their conclusions on these matters only after acquitting' the accused and that '[t]hese inconsistencies show that the [15 January 2019 Decision] was not fully informed'.[559]

243. The Prosecutor's first sub-argument refers to the alleged inconsistencies in the majority judges' understanding of the nature of the decision they took in January 2019, as between what they stated in the 15 January 2019 Decision and in the two separate

[556] Chambers Practice Manual, para. 86.
[557] Prosecutor's Appeal Brief, p. 37.
[558] Prosecutor's Appeal Brief, para. 76.
[559] Prosecutor's Appeal Brief, para. 76.

opinions in July 2019. The second sub-argument relates to the applicable standard of proof and is considered within the second ground of appeal below.

244. The issue of the nature of the decision has been addressed above, when addressing whether article 74 of the Statute applies to the acquittal in this case.[560] However, in addition to her argument in that context, that the Trial Chamber erred in failing to enter a formal decision under article 74, the Prosecutor also argues that the lack of coherence in the views of the judges on this issue illustrates that the Trial Chamber was not fully informed. She states that, while in January 2019 the two majority judges appeared to share the view that the 15 January 2019 Decision 'was *not* a decision of acquittal under article 74', their views, in July 2019, clearly showed a disagreement on this matter; Judge Henderson stated that the legal basis for the acquittal was article 66(2) of the Statute, whereas Judge Tarfusser stated that '[t]rial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81 [of the Statute]'.[561] She further argues:

> There is thus a clear contradiction, a non-reconciled disagreement, between the two Majority Judges as to the nature of the decision they had taken on 15 January 2019. This shows that the Majority, although proceeding to acquit and release Mr Gbagbo and Mr Blé Goudé, had not yet fully completed its reasoning and reached the necessary shared conclusions on significant matters.[562]

245. Counsel for Mr Blé Goudé argues that the majority's view has always been consistent. However, even if one assumes that Judge Tarfusser's view on the nature of the decision was different, as stated by him, 'a debate as to the nature of the decision is 'theoretical' and not 'necessary, or wise' as long as the decision that there is no case to answer is based on an in-depth analysis of the evidence and both judges agree on the practical effect of the decision'.[563] Accordingly, he argues that the theoretical disagreement between the judges 'would not make the decision of the Majority any less informed nor would it violate its unity'.[564]

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[560] *See supra*, paras 78-124.
[561] Prosecutor's Appeal Brief, para. 77 (emphasis in original).
[562] Prosecutor's Appeal Brief, para. 78.
[563] Mr Blé Goudé's Response, para. 109.
[564] Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 38.

246. As seen above, there is a certain lack of clarity, as between the relevant documents,[565] with regard to whether the judges considered that article 74 applied to the decision they were issuing. However, the Appeals Chamber is not persuaded as to the relevance of this to the issue being argued here; a lack of clarity in the eyes of the beholder as to the precise legal basis for the decision does not mean that the decision itself was not fully informed. In particular, Judge Tarfusser made it clear that he did not consider it necessary or wise to engage in a debate about the nature of the decision. The Prosecutor's argument is therefore rejected.

(d) Inconsistencies in assessing the sufficiency of evidence at the no case to answer stage within Judge Henderson's Reasons

247. The Prosecutor also alleges that there are inconsistencies within Judge Henderson's Reasons.[566] In support of her argument, she refers to her submissions under the second ground of appeal. For that reason, the Appeals Chamber shall address these arguments comprehensively in its assessment of the Prosecutor's second ground of appeal.

E. Material effect in respect of the first ground of appeal

1. Summary of submissions

248. The Prosecutor argues that the alleged violations of article 74(5) of the Statute meant that the 15 January 2019 Decision 'was entered outside the applicable law' and was '*ultra vires* the Statute and has no legal effect', with the result that the decision and acquittals 'should be considered null and void'.[567] She suggests that the errors under the first ground materially affected the 15 January 2019 Decision, and that they affected not only the validity of the decision to acquit in the 15 January 2019 Decision but also affected 'the most important effect of that decision – the dismissal of all charges'.[568] She argues that the subsequent reasons 'cannot retroactively give effect to a previous decision that is null and void and thus cannot undo or cure the impact that the errors had on the 15 January 2019 Decision'.[569]

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[565] 15 January 2019 Decision, Reasons for the 15 January 2019 Decision, Judge Tarfusser's Opinion and Judge Henderson's Reasons; *see* the summary in paras 79-90, *supra*.
[566] Prosecutor's Appeal Brief, paras 83-84.
[567] Prosecutor's Appeal Brief, paras 99, 116-118.
[568] Prosecutor's Appeal Brief, para. 118.
[569] Prosecutor's Appeal Brief, para. 118.

249. The Prosecutor then argues, 'further or in the alternative', that the errors under the first ground of appeal materially affected the oral decision, read *together with* the written reasons, as the decision to acquit was not fully informed. She contends that: 'In plain terms, the errors materially affected the [15 January 2019 Decision] because a partially informed decision to acquit is substantially different from a fully informed decision to acquit'.[570]

250. On the one hand, it is argued that whilst the majority's errors in ground one may not have automatically invalidated the acquittal decision,[571] the requirements of article 74 are 'so fundamental to ensuring a reliable decision that without them the decision can barely be considered a valid legal outcome'.[572] On the other hand, it is argued that 'the violations of article 74(5) that occurred in this case were so fundamental as to render the decision *ultra vires* the Statute and thereby "null and void"'.[573]

251. The Prosecutor avers that, 'to show the materiality of the majority's error, [she does] not need to show that had they not erred, and instead followed the Article 74 requirements before acquitting […] in January 2019, the majority would necessarily have dismissed the no case to answer motions and found a case to answer'.[574] It is instead argued, relying on: (i) the Separate Opinion of Judge Eboe-Osuji in the *Bemba* case, (ii) the Dissenting Opinion of Judges Tarfusser and Trendafilova in the *Ngudjolo* case and (iii) the case of *R v. Graveline* from the Supreme Court of Canada,[575] 'that the majority's failure to render a proper reasoned decision which complied with all the Article 74(5) requirements when acquitting the two men was so fundamental that there is a reasonable likelihood that they might have [dismissed the no case to answer motions and found a case to answer]'.[576] She submits that 'an appellant appealing against an almost 1000-page decision acquitting accused persons in a complex case such as the

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[570] Prosecutor's Appeal Brief, para. 120. *See also* 24 June 2020 Appeal Hearing, p. 55, lines 11-12.
[571] 22 June 2020 Appeal Hearing, p. 17, lines 12-13.
[572] 22 June 2020 Appeal Hearing, p. 21, lines 10-12; 24 June 2020 Appeal Hearing, p. 55, lines 11-18.
[573] Prosecutor's Response to the Appeals Chamber's Questions, para. 16.
[574] 22 June 2020 Appeal Hearing, p. 18, lines 20-24. *See also* Prosecutor's Response to the Appeals Chamber's Questions, para. 20.
[575] Prosecutor's Response to the Appeals Chamber's Questions, paras 18-19, *referring to* *Bemba* Concurring Separate Opinion of Judge Eboe-Osuji, paras 81-83; *Ngudjolo* Joint Dissenting Opinion of Judge Trendafilova and Judge Tarfusser, para. 30; and *R. v. Graveline* [Supreme Court of Canada], para. 14.
[576] 22 June 2020 Appeal Hearing, p. 19, lines 1-4. *See also* 24 June 2020 Appeal Hearing, p. 55, lines 9-11; Prosecutor's Response to the Appeals Chamber's Questions, para. 20.

present one—involving multiple predicate factual findings—cannot be expected to demonstrate that the final disposition of the case would necessarily have been different'.[577]

252. The OPCV argues that lack of reasons affected the right to effectively appeal the 15 January 2019 Decision[578] and that, but for the alleged errors, it is highly likely that the Trial Chamber would not have issued the 15 January 2019 Decision.[579] It further argues that a material effect would also have existed if the 'no case to answer' motions had been denied orally, as the Defence would have been unable to immediately file an appeal and the accused would have remained in detention.[580] The OPCV argues that the Trial Chamber's violation of the mandatory requirements of article 74(5) of the Statute renders the relevant decision 'null and void' as it was taken outside the applicable legal framework and is therefore invalid. It contends that '[n]ot every act of non-compliance will result in the nullification of the act complained of; but acts amounting to violations of a fundamental rule of fairness and occasioning a miscarriage of justice must always be nullified. In the case at hand, the violations are so egregious and the fairness of the overall trial process so heavily compromised, that it is evident how justice was not served'.[581] The OPCV also argues that the lack of reasoning at the time of issuance of the decision prevents substantiation of an appeal or related request, since the relevant criteria of article 81(3)(c)(i) cannot be properly addressed.[582]

253. Counsel for Mr Gbagbo argues that none of the Prosecutor's arguments could lead to the decision being overturned, and that the Prosecutor presents no examples of international judgments that were overturned because of a failure to comply with formal requirements in relation to delivery.[583] In relation to the Prosecutor's reliance upon the dissent in the *Ngudjolo* case, counsel for Mr Gbagbo first notes 'that the only support which the Prosecutor is able to muster for her argument is a dissent'. Second, he argues that 'the reasoning of the dissenting Judges in *Ngudjolo* can absolutely not be

[577] Prosecutor's Appeal Brief, para. 260.
[578] OPCV's Observations, para. 82.
[579] OPCV's Observations, para. 105.
[580] OPCV's Observations, para. 107.
[581] OPCV's Response to the Appeals Chamber's Questions, para. 33.
[582] OPCV's Observations, para. 59.
[583] Mr Gbagbo's Response, paras 147-152.

transplanted to the case at bar', since they applied to different circumstances.[584] He argues that the Prosecutor has not shown any impact of the alleged errors on the decision to acquit.[585]

254. Counsel for Mr Blé Goudé argues that the Prosecutor failed to identify the precise impact of the alleged errors[586] and that the grounds of appeal do not affect the evidentiary outcome of the case.[587] In respect of the Prosecutor advocating a lower standard for showing materiality in reliance upon Judge Eboe-Osuji's Concurring Separate Opinion in the *Bemba* case, counsel for Mr Blé Goudé argues that this lower standard is a departure from the established test, but that even if this lower standard were to be applied then the Prosecutor has failed to meet it.[588] It is argued that, in any case, this lower standard is not of relevance as it was set in relation to the position of a convicted person appealing that conviction, unlike the present case where the Prosecutor is appealing an acquittal.[589] Counsel for Mr Blé Goudé submits that even a violation of a fundamental procedural right does not lead to a retrial – procedural justice is closely connected with substantive justice.[590] He argues that '[t]here is no valid legal authority to support the Prosecution's argument that alleged violations of article 74(5) render the Impugned Decision "null and void"'.[591]

2. Determination of the Appeals Chamber

255. As indicated above, the Appeals Chamber does not consider that any error, to the extent that it could be said to exist under the first ground of appeal, materially affected the decision of the Trial Chamber. In examining this issue below, the Appeals Chamber confirms its previous jurisprudence on material effect and further notes that, on the basis of the arguments made, there was no realistic prospect of material effect being established in respect of the other errors alleged under this ground of appeal, even if they had been made out.

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[584] Mr Gbagbo's Response to the Appeals Chamber's Questions, paras 62-63.
[585] 22 June 2020 Appeal Hearing, p. 50, lines 13-17; Mr Gbagbo's Response, paras 2, 17, 30, 148.
[586] 22 June 2020 Appeal Hearing, p. 61, lines 24-25.
[587] Mr Blé Goudé's Response, para. 1.
[588] 22 June 2020 Appeal Hearing, p. 62, lines 6-16.
[589] 22 June 2020 Appeal Hearing, p. 62, lines 17-23.
[590] 24 June 2020 Appeal Hearing, p. 72, line 12 to p. 73, line 7.
[591] Mr Ble Goude's Response to the Appeals Chamber's Questions, para. 22.

256. It is recalled that, according to that previous jurisprudence, 'for the Appeals Chamber to reverse or amend a decision under article 74 of the Statute, or to order a new trial before a different Trial Chamber, it is not sufficient for the appellant to establish that an error occurred. In accordance with article 83(2) of the Statute, it must also be demonstrated that "the decision […] appealed from was materially affected by [that] error"'.[592]

257. The appellant must not simply set out the alleged error but is required to indicate with sufficient precision how that error materially affected the impugned decision. This requirement 'is explained by the fact that a Trial Chamber's decision, at the end of what will often have been a lengthy trial, should not be disturbed lightly. In particular in the case of an acquittal, it is not justifiable to put the person through the ordeal of a new trial or even to reverse the acquittal and enter a conviction, unless it is shown that the error indeed materially affected the decision under review'.[593]

258. This standard is high – 'it must be demonstrated that, had the Trial Chamber not erred […], the decision under article 74 of the Statute *would* (as opposed to "could" or "might") have been *substantially* different'.[594] This aforementioned definition of 'material effect' applies to both errors of law and procedural errors.[595]

259. In this case, where acquittals have been entered further to no case to answer proceedings, it has to be established in relation to the errors of law and procedural errors alleged that there is a high likelihood that the Trial Chamber, had it not committed the alleged errors, would not have acquitted Mr Gbagbo and Mr Blé Goudé.[596]

260. The Appeals Chamber rejects the urging by the OPCV not to look at the material impact of the alleged errors and instead hold that they are of such a fundamental nature that they necessarily render the Trial Chamber's decision null and void.[597] The Appeals

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[592] *Ngudjolo* Appeal Judgment, para. 284. *See also*, *Lubanga* Appeal Judgment, paras 18-19; *Kony* OA3 *Judgment*, para. 48; *Bemba* OA3 Judgment, para. 103; *Bemba* OA4 Judgment, para. 69; *Mbarushimana* OA Judgment, para. 18; *Gbagbo* OA2 Judgment, para. 44. *See supra*, Standard of Review on Appeal and Substantiation of Arguments.
[593] *Ngudjolo* Appeal Judgment, para. 284.
[594] *Ngudjolo* Appeal Judgment, para. 285 (emphasis in original). *See also* paras 20-21; *Lubanga* Appeal Judgment, paras 19-20; *Bemba et al.* Appeal Judgment, para. 90.
[595] *Lubanga* Appeal Judgment, paras 19-20; *Bemba et al.* Appeal Judgment, para. 99.
[596] *Ngudjolo* Appeal Judgment, para. 285.
[597] OPCV's Response to the Appeals Chamber's Questions, para. 33.

Chamber cannot accept this. Article 83(2) of the Statute *itself* requires a showing of the materiality of the error on a decision. As well as being contrary to the terms of article 83(2) of the Statute, and the jurisprudence of the Appeals Chamber (as shown above), where the Prosecutor is seeking the drastic remedy of a retrial, in circumstances in which acquittals were entered at the no case to answer stage, it is wholly inappropriate to seek to dispense of a showing of material effect of the alleged errors upon the decision.

261. The Appeals Chamber also rejects the Prosecutor's arguments advocating the use of a lower standard to assess material effect based on *inter alia* the Separate Opinion of Judge Eboe-Osuji in the *Bemba* case and the Dissenting Opinion of Judges Tarfusser and Trendafilova in the *Ngudjolo* case.[598]

262. In his Concurring Separate Opinion in the *Bemba* case, Judge Eboe-Osuji on the one hand wrote of a worry as to how *a defendant* could fairly be expected to shoulder the appellate burden of showing the materiality of an error:

> 81. The Appeals Chamber will not apply its remedial powers at the instance of a trifling or harmless error (of law, fact or procedure). The error in question must be *material*. An error will qualify as *material* if it reasonably compels the view of *likelihood* that the Trial Chamber *might have* rendered a substantially different judgment had the error not occurred; or if the appellate court *could not be sure* that the trial court would have rendered the same judgment had the error not occurred.
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> 82. It may be noted immediately that the test of materiality formulated here—in light of the emphasised words—is indeed a departure from the test adopted in earlier jurisprudence of the Appeals Chamber. There, the effective test of materiality ultimately appears to have amounted to the suggestion that 'the appellant needs to demonstrate' that in the absence of the error 'the judgment would have substantially differed from the one rendered.' That is part of the panoply of the 'settled' standards of appellate review that we were pressed to follow.
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> 83. With respect, that test calls for caution in two significant ways. Beginning with the last element indicated: the test of materiality that speaks in terms of what the Trial Chamber would have done (but for the error) is obviously awkward; as it imports an element of assured prediction of outcomes that defies human affairs. The more workable formulation is that seen in the case law of

[598] Prosecutor's Response to the Appeals Chamber's Questions, paras 18-19, *citing* *Bemba* Concurring Separate Opinion of Judge Eboe-Osuji, paras 81-83; *Ngudjolo* Joint Dissenting Opinion of Judge Trendafilova and Judge Tarfusser, para. 30. The Prosecutor also relies on *R. v. Graveline* [Supreme Court of Canada], para. 14.

> some national jurisdictions, where formulation such as follows have been accepted as adequate for the intended purpose: that '*there might have* been reasonable doubt in the minds' of the trier of fact (but for the error); that the error '*might have* had an effect on the minds of any jury properly directing their minds to the matter'; or that 'it is impossible to say that the jury *might* not have had a reasonable doubt in the matter' (had the error not been committed). […].
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> 84. Second the imposition of the burden of demonstrating the materiality uniformly upon 'the appellant' runs an appreciable risk of distorting the accepted standards of the administration of criminal justice. This is specifically in the sense that it may unfairly shift the burden of proof in a criminal case, by the mere virtue of an appeal against conviction founded on an error. […][599]

263. In their Dissenting Opinion in the *Ngudjolo* case, Judges Tarfusser and Trendafilova on the other hand insisted that the appellant not been called upon to meet an 'impossible standard':

> In this regard, we believe it is compelling to underline that when an alleged error consists in a trial chamber's *failure* to adopt a course of action, an appellant will by definition never be in a position to indicate, with any precision, how this error would have materially affected the impugned decision. Accordingly, the demonstration of the erroneous nature of the inaction must be considered sufficient to substantiate the ground of appeal based on it. To hold otherwise, as the Majority does, is tantamount to require something impossible from the appellant, namely a *probatio diabolica*.[600]

264. The Appeals Chamber finds inapposite the Prosecutor's reliance upon the standard proposed by Judge Eboe-Osuji in his Separate Opinion in the *Bemba* case as that standard was in relation to ensuring that a *defendant* seeking to appeal a conviction was not prejudiced by the reversal of the burden of proof and, would not, in any case, apply to the present circumstances in which the Prosecutor is bringing the appeal. Furthermore, the Appeals Chamber observes that neither that Separate Opinion in the *Bemba* case, nor the dissent in *Ngudjolo*, led to a change in the settled jurisprudence of the Appeals Chamber on the issue of material effect. Nor does it now. The Appeals Chamber is of the view that there is no compelling reason to depart from its jurisprudence, which requires a showing of a 'high likelihood' that had it not been for the alleged error, the chamber would not have acquitted, and to instead apply a lower standard of a 'reasonable likelihood'. Nor has it been shown how even this lower

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[599] *Bemba* Concurring Separate Opinion of Judge Eboe-Osuji, paras 81-84 (emphasis in orginal).
[600] *Ngudjolo* Joint Dissenting Opinion of Judge Trendafilova and Judge Tarfusser, para. 30.

standard of a 'reasonable likelihood' would have assisted the Prosecutor in the instant case, for the reasons set out below.

265. Whilst, Judges Eboe-Osuji, Morrison and Hofmański diverge on the question of whether or not the verdict delivered on 15 January 2019 was in writing,[601] to the extent that any error could be said to exist, the Appeals Chamber finds that this error is patently incapable of materially affecting the decision in this case. The verdict was pronounced in open court, followed by both a written transcript and written press release, and it was later delivered in writing in July 2019. It is self-evident that the verdicts of acquittal would have been the same had the Trial Chamber taken the additional step of filing them on 15 January 2019.

266. The Appeals Chamber can also not fail to note that the Prosecutor has not demonstrated how any of the other errors alleged, had they been made out, could have materially affected the decision of the Trial Chamber. The Prosecutor merely states that the requirements of article 74(5) are so fundamental that their breach is of such a nature as to necessarily result in a retrial. However, she has not explained with any degree of precision, let alone sufficiently, how the alleged errors could have materially affected the decision contrary to the jurisprudence of the Appeals Chamber that sufficient precision is required; nor has she demonstrated how those errors could have rendered the decision 'null and void'. Instead, she simply states that such errors had the required material effect, expecting the Appeals Chamber to acquiesce.

267. All the indications given by the Trial Chamber show that the decision of the majority was not one taken in haste and materialised over the course of time. Judge Tarfusser in his opinion writes of witnessing, '[f]or almost two years', 'the Prosecutor's case unravelling before [his] eyes in the courtroom, where witness after witness, from the humblest of victims to the highest echelons of the Ivorian Army, systematically weakened, when not outright undermined, the case they were 'expected', and had been called, by the Prosecutor to support'.[602] Judge Henderson, for his part, states that the decision was not one that he had reached lightly and writes of the 'pervasive problems' that blighted the authenticity of the evidence that the Prosecutor had called to support

[601] *See supra*, para. 189 and n. 418.
[602] Judge Tarfusser's Opinion, para. 4.

an 'overly ambitious' case, in which she 'may have bitten off more that she could possibly chew with the resources that were available to her'.[603] Such criticism of the Prosecutor's case repeats within the opinions of the majority judges.[604] The Appeals Chamber fails to see how the production of a more extensive oral summary would have altered the overwhelming view in the decision of the Trial Chamber in a manner that was substantially different. Furthermore, even if the judges of the majority had set out more extensive reasoning in a separate document alongside their individual opinions, or announced the verdict concurrently with delivery of the written reasons, the Appeals Chamber also fails to see how this would have caused them to render a substantially different decision, given that the production of such a document or concurrent action would not have affected the fact that they agreed on the verdict.

268. In the present case, where the verdict was read out in open court followed by both a transcript and press release, and later filed with the Registry; where a summary of the findings that were to come in writing was read out in open court; and where the Trial Chamber suspended the time-limits for appealing the acquittals until the delivery of the full written reasons, the publicity of the proceedings was preserved as were the Prosecutor's rights to appeal the Trial Chamber's decision and to apply for the continued detention of the acquitted persons, both of which were exercised. Further, the manner in which the judgment was issued and the fact that the judges chose to write individual opinions could in no way materially affect the decision, being an issue of form alone. Finally, the Appeals Chamber considers that the legal provision under which the judges of the Trial Chamber believed themselves to have been operating could not have had a bearing on the outcome of the decision in the sense of rendering it substantially different. Regardless of which legal provision the judges of the Trial Chamber were applying, they would have reached the same conclusion given their view of the exceptional weakness of the case; and the Prosecutor has also not produced any evidence, in relation to the arguments raised under this ground of appeal, that they were not fully informed when they decided to acquit.

269. The Prosecutor's first ground of appeal is rejected.

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[603] Judge Hendersons's Reasons, paras 1, 5, 36.
[604] *See, e.g.*, Judge Hendersons's Reasons, paras 1, 9 (in 'Preliminary Remarks', pp.11, 13), 36, 2038; Judge Tarfusser's Opinion, paras 3, 4, 12, 73-74; 16 January 2019 Decision, p. 4, lines 3-5.

VII. SECOND GROUND OF APPEAL

A. Summary of submissions

1. The Prosecutor's submissions

270. Under the second ground of appeal, the Prosecutor argues that the Trial Chamber failed to 'properly articulate and consistently apply a clearly defined standard of proof and/or approach to assessing the sufficiency of evidence' at the no case to answer stage – before or during the proceedings or in the 15 January 2019 Decision or the Reasons for the 15 January 2019 Decision.[605] She argues that, in failing to do so, the Trial Chamber erred in law and in procedure.[606]

271. In particular, the Prosecutor submits that the Trial Chamber (i) erred in law by failing to direct itself to the standard of proof applied for the no case to answer proceedings and other evidentiary standards;[607] and (ii) erred in procedure by failing to set out a clear approach on how it would assess the evidence at the no case to answer stage before it did so.[608]

272. As to the alleged legal error, the Prosecutor submits that the Trial Chamber failed to set out the evidentiary standards it would be guided by, and to direct itself as to the standards it would apply to its factual and evidentiary assessments before it assessed the evidence and acquitted Mr Gbagbo and Mr Blé Goudé.[609] She argues that the fact that Judge Henderson set out an evidentiary framework six months later in his Reasons cannot remedy this error, since (i) there was no agreement between the judges forming the majority, and (ii) issues such as 'standard of proof and other legal standards applying to evidence evaluation are core issues – not afterthoughts'.[610] Accordingly, it is submitted that this error of law invalidates the Trial Chamber's factual determinations

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[605] Prosecutor's Appeal Brief, para. 131. *See also*, p. 59, heading IV and para. 122.
[606] Prosecutor's Appeal Brief, paras 122, 131.
[607] Prosecutor's Appeal Brief, paras 123, 142-151. *See also*, Prosecutor's Response to the Appeals Chamber's Questions, paras 22, 28; 22 June 2020 Appeal Hearing, p. 64, lines 6-8, where the Prosecutor defines the alleged error of law only as failure to direct itself to the applicable standard of proof.The Appeals Chamber considers that this does not change the Prosecutor's overall argument.
[608] Prosecutor's Appeal Brief, paras 124, 152-161, *see also*, Prosecutor's Response to the Appeals Chamber's Questions, para. 22.
[609] Prosecutor's Appeal Brief, paras 123, 142.
[610] Prosecutor's Appeal Brief, para. 142.

and the decision itself.[611] The Prosecutor contends that this error is sufficient to reverse the decision.[612] The Prosecutor further submits that the Trial Chamber's 'lack of clarity – and its failure to establish consensus – on its approach to evaluating evidence also led it to forego certain well-established practices in international criminal proceedings'; instead, in her view, 'it adopted an unreasonable and unrealistic approach to assessing aspects of the evidence', which is reflected in six examples she puts forward.[613]

273. Further, or in the alternative, the Prosecutor argues that, by failing to set out and apply a clear procedure and approach to govern the no case to answer motions before determining them, the Trial Chamber erred procedurally.[614] In the Prosecutor's submission, the Trial Chamber's 'lack of clarity and failure to establish consensus among the Judges – and to inform the Parties – as to what the [no case to answer] process entailed and the applicable standards/approaches was itself a flaw'.[615] This flaw led the Trial Chamber to 'make several unreasonable and inconsistent factual findings and/or incorrect evidentiary assessments, many relating to significant findings'.[616] More importantly, the Prosecutor submits, these findings are 'symptomatic of the Majority's broader failing to take a consistent approach to assessing evidence – unsuitable for the [no case to answer] stage or any other for that matter'.[617]

274. In response to the Appeals Chamber's questions, the Prosecutor acknowledges that the legal and the procedural errors alleged, 'though distinct, are linked'.[618] In this respect, she submits that the 'failure to set out a clearly defined standard of proof and other evidentiary standards is primarily a procedural error', and this is 'because it relates to the Majority's erroneous conduct of the proceedings leading up to its adjudication and decision to acquit'.[619] However, in her view, the procedural error also includes the Trial Chamber's failure to determine the applicable legal standard in

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[611] Prosecutor's Appeal Brief, paras 123, 254; Prosecutor's Response to the Appeals Chamber's Questions, para. 22.
[612] Prosecutor's Appeal Brief, para. 142, *see also* paras 143-151, *referring, inter alia, to* the *Ayyash et al.* Appeal Decision.
[613] Prosecutor's Appeal Brief, para. 123.
[614] Prosecutor's Appeal Brief, para. 124, *see also*, para. 152.
[615] Prosecutor's Appeal Brief, para. 124.
[616] Prosecutor's Appeal Brief, para. 124.
[617] Prosecutor's Appeal Brief, para. 124; *see also* paras 152-161.
[618] Prosecutor's Response to the Appeals Chamber's Questions, para. 28.
[619] Prosecutor's Response to the Appeals Chamber's Questions, para. 28.

adjudicating the no case to answer motions, which is, in itself, an error of law.[620] The Prosecutor further argues that while the failure to direct itself to the appropriate standard of proof is 'in itself a distinct and reversible error of law, it is related to the procedural error that followed (*i.e.*, the failure to set out its approach)'. The Prosecutor further explains that '[i]f the Majority had set out its approach clearly, this may have shown that it had, at least, directed itself to the relevant standard first. Likewise, if the Majority had properly directed itself to the [no case to answer] standard, it was more likely that it would have given guidance on the procedure'.[621]

275. The Trial Chamber's alleged failure to articulate and apply its evidentiary approach is illustrated, in the Prosecutor's view, by (i) the procedural history of this case, 'which demonstrated a flawed process';[622] (ii) Judge Henderson's articulation and application of an 'overly rigid' and 'unsupported' approach to corroboration – which is in itself a further error of law – without notice to the parties;[623] and (iii) the Trial Chamber's incorrect and inconsistent assessment of several factual matters, as set out in the six examples.[624] According to the Prosecutor, '[e]ach example consists of multiple errors and/or inconsistencies that show that the Majority's approach was deeply flawed'.[625]

276. In the Prosecutor's view, 'canvassing the factual examples (and the procedural history), to demonstrate the legal/procedural errors (even if not an exhaustive list) best illustrates the multiple and varied flaws in the Majority's decision to acquit'.[626] In particular, she submits that 'the history of this case reveals a continuum between the defective procedure and the defective findings: the Majority's unclear approach led to its inconsistent and incorrect findings'.[627] The Prosecutor submits that '[t]hose findings simultaneously demonstrate *both* the errors *and* also their consequence (*i.e.*, the impact of those errors)'.[628]

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[620] Prosecutor's Response to the Appeals Chamber's Questions, para. 28.
[621] Prosecutor's Response to the Appeals Chamber's Questions, para. 28 (footnote omitted).
[622] Prosecutor's Appeal Brief, paras 130-131, 153-154.
[623] Prosecutor's Appeal Brief, paras 153, 155-159.
[624] Prosecutor's Appeal Brief, paras 130-131, 153, 160.
[625] Prosecutor's Appeal Brief, para. 162.
[626] Prosecutor's Appeal Brief, para. 130.
[627] Prosecutor's Appeal Brief, para. 130.
[628] Prosecutor's Appeal Brief, para. 130 (emphasis in original).

277. The Prosecutor submits that the above errors were so fundamental that '[t]he proceedings were ruptured and, with the acquittals rendered in these circumstances, the Prosecution was prejudiced and justice not properly served'.[629]

278. The Prosecutor submits that the Appeals Chamber must assess the Trial Chamber's error 'under the legal and procedural standards of appellate review' as they are 'fundamentally legal and procedural in nature'.[630]

279. The Prosecutor argues that the result of this 'obscure and erratic approach' could only have been defective and that the Trial Chamber dismissed the Prosecutor's case on the basis of its unclear approach to assessing the evidence.[631] The Prosecutor alleges that, as the examples demonstrate, the Trial Chamber's 'inconsistent and incorrect analysis' affected each of the five charged incidents – which were 'all significant components of the Prosecution's case', and that the 'factual assessments, in turn, were key building blocks leading up to the Majority's verdict'.[632] The Prosecutor argues that the Trial Chamber's 'approach and analysis had a substantial impact on the decision, sufficient to meet the Prosecution's burden on appeal'.[633] She argues that, 'appealing against an almost 1000-page decision acquitting accused persons in a complex case such as the present one—involving multiple predicate factual findings— [she] cannot be expected to demonstrate that the final disposition of the case would necessarily have been different'.[634]

2. The OPCV's observations

280. The OPCV largely concurs with the Prosecutor's arguments under this ground of appeal, namely that the Trial Chamber erred by acquitting Mr Gbagbo and Mr Blé

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[629] Prosecutor's Appeal Brief, para. 127; *see also* para. 125. The Prosecutor argues that the procedure was 'chaotic and fractured'; the no case to answer rules were not clear to the parties, participants or within the Chamber; the Trial Chamber was equivocal and sometimes contradictory as to the evidentiary standards and approaches to apply in assessing the sufficiency of the evidence at this stage – as the examples show (*see* para. 3).
[630] 22 June 2020 Appeal Hearing, p. 74, lines 3-5.
[631] Prosecutor's Appeal Brief, para. 141.
[632] Prosecutor's Appeal Brief, para. 260.
[633] Prosecutor's Appeal Brief, para. 260.
[634] Prosecutor's Appeal Brief, para. 260.

Goudé without properly articulating and consistently applying a clearly defined standard of proof or approach to assessing the sufficiency of the evidence, or both.[635]

281. The OPCV argues that the reason for the Trial Chamber's 'overall failure in dealing with the [no case to answer] litigation in a fair and expeditious manner is mainly rooted on its inability to agree on an applicable standard – and to properly articulate it – prior to the [no case to answer] procedure, during said proceedings, and at the very moment of issuing [its 15 January 2019 Decision] and [its Reasons for the 15 January 2019 Decision]'.[636] In particular, the OPCV submits that the Trial Chamber erred in law by failing to identify the requisite standard of proof before issuing its 15 January 2019 Decision, and erred in procedure by failing to articulate a clear approach in assessing the sufficiency of the evidence for the purposes of a no case to answer motion.[637] According to the OPCV, 'in the absence of a clear provision, it is the chamber's duty to duly inform the parties and participants about how the relevant proceedings will unfold'.[638] In the case at hand, the OPCV submits that, 'having carefully reviewed the relevant rulings of the [Trial] Chamber […] - it is evident that the [Trial Chamber] reached its decision […] without knowing which standard of proof it was to apply.'[639]

282. It further submits that the Trial Chamber's 'failure to agree on any standard when making its respective factual determinations is demonstrated in a number of ways', and that the 'overall defective nature' of the proceedings leading to the 15 January 2019 Decision – 'coupled with the several instances of misguided and inconsistent evidentiary assessments' included in the Reasons for the 15 January 2019 Decision – reveal 'the lack of a defined standard and the continued substantial disagreement on how to approach evidence in general and at the [no case to answer] stage particularly'.[640]

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[635] OPCV's Observations, paras 110-174.
[636] OPCV's Observations, para. 117.
[637] OPCV's Observations, para. 110.
[638] OPCV's Observations, para. 112.
[639] OPCV's Observations, para. 113.
[640] OPCV's Observations, para. 118. According to the OPCV, the overall defective nature of proceedings is apparent from the following. On 13 June 2018, Judge Tarfusser rejected the Prosecutor's request seeking clarification on the standard for a no case to answer motion. The confusion increased when, on 10 December 2018, the majority *proprio motu* scheduled a hearing on the continued detention of the defendants. On 15 January 2019, the Trial Chamber's ruling lasted slightly more than 10 minutes – during which no mention of the Trial Chamber's approach to evidence was made. The issuance of the written

283. The OPCV submits that the Trial Chamber's legal and procedural errors mentioned above had an impact on the evaluation by the Trial Chamber of the facts of the case.[641] With regard to the relevant examples, it is submitted that the Trial Chamber's reasoning in these examples shows (i) a general lack of proper consideration of items of evidence, (ii) failure to adopt a holistic approach to evidence, and, in particular, (iii) failure to assess individual items of evidence and specific facts in light of the entire record of the case, and in the context of other key corroborating evidence.[642] The OPCV makes specific submissions on the factual examples presented by the Prosecutor and the Trial Chamber's assessment of the evidence in relation to those incidents.[643]

284. In response to the Appeals Chamber's questions, the OPCV submits that 'the lack of notice about the applicable standard is also a standalone error which further impacts on the fairness of the proceedings and on the outcome of the decision'.[644]

3. Counsel for Mr Gbagbo's submissions

285. Counsel for Mr Gbagbo first argues that, contrary to the Prosecutor's allegations, the Trial Chamber assessed the evidence applying the appropriate standard of proof and evidentiary standards.[645] Counsel for Mr Gbagbo argues that the Prosecutor's allegations are unclear and her arguments overlapping.[646] He notes that the Prosecutor's main arguments revolve around the following issues: (i) the stage during the no case to answer proceedings when the applicable standard of proof needs to be defined and the parties need to be informed thereof;[647] (ii) whether, in the present case, the applicable standard of proof was appropriately defined;[648] (iii) whether there

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reasons six months later, on 16 July 2019, do not provide an applicable common agreed standard. *See* OPCV's Observations, paras 119, 121, 123, 125-126.
[641] OPCV's Observations, para. 127.
[642] OPCV's Observations, paras 128-129.
[643] OPCV's Observations, paras 131-174.
[644] OPCV's Response to the Appeals Chamber's Questions, para. 30; 23 June 2020 Appeal Hearing, p. 3, lines 12-14.
[645] Mr Gbagbo's Response, paras 153-224.
[646] Mr Gbagbo's Response, para. 155.
[647] Mr Gbagbo's Response, paras 157-173.
[648] Mr Gbagbo's Response, paras 174-200.

was agreement between the majority judges on the applicable standard of proof;[649] and (iv) whether the standard of proof was properly applied.[650]

286. Second, counsel for Mr Gbagbo argues that the alleged examples of factual errors put forward by the Prosecutor to demonstrate the misapplication of the standard of proof are unpersuasive[651] He further submits that the Prosecutor fails to show how the alleged errors had a material effect on the Trial Chamber's decision.[652]

287. In response to the Appeals Chamber's questions, counsel for Mr Gbagbo submits that there is nothing in the case record indicating that the judges forming the majority had not adopted a specific standard of proof, or that they had not analysed the Prosecutor's evidence against that particular standard.[653] He further submits that the Prosecutor's arguments that aim at shirking her duty to demonstrate that the alleged errors materially affected the impugned decision are 'unpersuasive' and run contrary to the statutory framework of the Court.[654] As to the factual examples set forth by the Prosecutor, counsel for Mr Gbagbo argues that they do not in any way support the Prosecutor's second ground of appeal. [655] In his view, while the Prosecutor purports to argue that, in January 2019, the judges forming the majority had not adopted a standard of proof, on the basis that they made incorrect findings of fact in their written reasons of July 2019, it is unclear how those two propositions are connected.[656] He further argues that the Prosecutor fails to establish that the decision of July 2019 reveals a lack of agreement between the two judges as to the standard of proof applied in January, and thus the Appeals Chamber should ignore the examples put forward by the Prosecutor.[657] He notes that the Prosecutor did not allege errors of fact, and that even if the Appeals Chamber were to decide to analyse the factual examples as errors of fact, it should apply

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[649] Mr Gbagbo's Response, paras 201-206.
[650] Mr Gbagbo's Response, paras 207-224.
[651] Mr Gbagbo's Response, p. 86, heading IV; *see also*, among others, paras 225-237.
[652] Mr Gbagbo's Response, paras 24-25.
[653] Mr Gbagbo's Response to the Appeals Chamber's Questions, para. 48; 23 June 2020 Appeal Hearing, p. 14, lines 3-16.
[654] Mr Gbagbo's Response to the Appeals Chamber's Questions, paras 57-65; 23 June 2020 Appeal Hearing, p. 17, line 13 to p. 18, line 6.
[655] Mr Gbagbo's Response to the Appeals Chamber's Questions, paras 66-71; 23 June 2020 Appeal Hearing, p. 17, lines 7-13.
[656] Mr Gbagbo's Response to the Appeals Chamber's Questions, para. 70.
[657] Mr Gbagbo's Response to the Appeals Chamber's Questions, paras 70-71.

the principle of appellate deference which is consistently upheld by the Court.[658] Counsel for Mr Gbagbo also argues that the Prosecutor has not shown that the alleged errors in relation to factual examples affected the impugned decision.[659]

288. In response to the OPCV's observations, counsel for Mr Gbagbo submits that the OPCV advances, without any evidence, that the Judges had not adopted any standard of proof when determining the acquittal in January 2019.[660] He also argues, with respect to the relevant examples of the Trial Chamber's errors, that the OPCV does not demonstrate any error or impact on the Trial Chamber's decision of acquittal.[661]

4. Counsel for Mr Blé Goudé's submissions

289. Counsel for Mr Blé Goudé submits that 'the Prosecutor's argument that the Trial Chamber erred in law and/or procedure by failing to articulate and consistently apply a standard of proof and/or approach to assessing the evidence must fail' for the following four reasons. First, he argues that the Prosecutor premises her argument on a procedural narrative that is unsupported by the procedural history in this case.[662] Counsel for Mr Blé Goudé argues that the Trial Chamber was clear and consistent when it articulated and applied its approach to assessing the evidence.[663] He avers that, the Second Order on the Conduct of the Proceedings, in which the Trial Chamber instructed the Defence 'to explain why there is insufficient evidence which could reasonably support a conviction', was 'crystal clear',[664] and that the Chamber 'indicated consistently and expressly at all stages of the [no case to answer] procedure that it would, and that it did assess the sufficiency of the Prosecution's evidence to sustain a conviction'.[665] In his view, 'the parties were well aware that the Defence needed to establish that there was insufficient evidence upon which a trial chamber could find that the charged crimes were committed beyond a reasonable doubt'.[666] Second, counsel for Mr Blé Goudé argues, the Prosecutor's submissions on the six examples constitute mere

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[658] Mr Gbagbo's Response to the Appeals Chamber's Questions, paras 73-78.
[659] Mr Gbagbo's Response to the Appeals Chamber's Questions, para. 79.
[660] Mr Gbagbo's Response to the OPCV's Observations, paras 118-131.
[661] Mr Gbagbo's Response to the OPCV's Observations, paras 132-214.
[662] Mr Blé Goudé's Response, para. 174.
[663] Mr Blé Goudé's Response, paras 174-191; 23 June 2020 Appeal Hearing, p. 25, lines 7-14.
[664] Mr Blé Goudé's Response, para. 177.
[665] Mr Blé Goudé's Response, para. 177.
[666] Mr Blé Goudé's Response, para. 177.

disagreements with the Trial Chamber's factual findings that do not show any error committed by the Trial Chamber.[667] Third, counsel for Mr Blé Goudé claims that the Prosecutor's submissions with respect to alleged ruptured proceedings fall flat since her arguments are based on the Judges' written separate opinions, which is a 'deeply rooted and uncontested practice at the ICC.'[668] Counsel for Mr Blé Goudé finally submits that the 15 January 2019 Decision, read together with the Reasons for the 15 January 2019 Decision, was not materially affected by the alleged errors under the second ground of appeal.[669]

290. In response to the Appeals Chamber's questions, counsel for Mr Blé Goudé submits that even if the judges of the majority disagreed on the standard of proof and applicable legal provisions for a no case to answer procedure, this did not have any material effect on the Trial Chamber's decision and its assessment of the evidence.[670] According to counsel for Mr Blé Goudé, Judge Tarfusser fully agreed with Judge Henderson's assessment of the evidence, and thus '[t]he Majority was in complete agreement that the Prosecution's case was neither confirmed by the witnesses nor the "mountains of documents purportedly supporting the case, none of which could confirm it in the slightest"'.[671] He further submits that in the event the Appeals Chamber determines that the six examples do not amount to mere disagreements with the evidence, it should apply the standard of review for factual errors to determine the merits of the Prosecutor's allegations, and therefore must give a margin of deference to the Trial Chamber's factual assessments.[672]

291. Counsel for Mr Blé Goudé submits that the arguments relating to the examples should be rejected as they constitute mere disagreements with the Trial Chamber's findings.[673] Also, he argues that a number of them 'concern the application of the Trial Chamber's standard of review and not the lack of one'.[674]

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[667] Mr Blé Goudé's Response, paras 174, 221-229.
[668] Mr Blé Goudé's Response, para. 174.
[669] Mr Blé Goudé's Response, paras 230-236.
[670] Mr Blé Goudé's Response to the Appeals Chamber's Questions, paras 37-40.
[671] Mr Blé Goudé's Response to the Appeals Chamber's Questions, para. 40, *citing* Judge Tarfusser's Opinion, para. 4.
[672] Mr Blé Goudé's Response to the Appeals Chamber's Questions, paras 41-48.
[673] Mr Blé Goudé's Response, paras 188, 221 *et seq*.
[674] Mr Blé Goudé's Response, para. 188.

292. Counsel for Mr Blé Goudé argues that the Prosecutor should have advanced arguments showing that no reasonable trial chamber would have come to such factual findings.[675] Also, as it relates to an acquittal, he argues that it was necessary for the Prosecutor to show that the factual errors occasioned a miscarriage of justice.[676] He contends that the Prosecutor 'must demonstrate that all reasonable doubt as to the accused's guilt has been eliminated once the factual errors by the Trial Chamber have been taken into account'.[677] He argues that, given that the Prosecutor did not make any submissions in this regard, her submissions on the six examples warrant 'dismissal *in limine*'.[678] Counsel for Mr Blé Goudé also argues that there is no possibility that the Trial Chamber's decision would have been different had it not committed the alleged errors because, as the Trial Chamber noted, none of the alleged contributions of Mr Blé Goudé were linked to the crimes and the Prosecutor did not dispute this finding.[679] In particular, he argues that these examples are totally unrelated to the second ground of appeal, namely that the Trial Chamber allegedly did not have a standard in mind.[680] He also stresses that only three of the examples relate to incidents that are relevant to Mr Blé Goudé,[681] and that none of them relate to his alleged criminal responsibility.[682] Counsel for Mr Blé Goudé argues that the examples are wholly unrelated to the acts and conduct of Mr Blé Goudé, and that the Prosecutor's argument is therefore incapable of showing that, without having committed such alleged errors, the Trial Chamber would not have acquitted him.[683]

293. In response to the OPCV's observations, counsel for Mr Blé Goudé submits, *inter alia*, that the specific points presented by the OPCV concerning the second ground of appeal 'consist, almost in their entirety, of mere disagreements with the factual findings

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[675] Mr Blé Goudé's Response, paras 172, 223.
[676] Mr Blé Goudé's Response, para. 172.
[677] Mr Blé Goudé's Response, paras 172, 223.
[678] Mr Blé Goudé's Response, para. 223.
[679] 23 June 2020 Appeal Hearing, p. 29, lines 2-15.
[680] 23 June 2020 Appeal Hearing, p. 27, lines 9-11, 19-23.
[681] Mr Blé Goudé's Response, para. 222. Counsel for Mr Blé Goudé indicated that incidents related to examples 1, 2 and in part 3, are not relevant for Mr Blé Goudé asthe Prosecutor requested for the charges related to those incidents to be dismissed. The Prosecutor requested for the charges related to the third and fourth incidents to be dismissed (*see* Annex to Prosecutor's Response to No Case to Answer Motions, para. 1864).
[682] Mr Blé Goudé's Response, para. 224.
[683] Mr Blé Goudé's Response, para. 235.

of the Trial Chamber and are thus unrelated to the Prosecutor's second ground of appeal'.[684]

B. Determination of the Appeals Chamber

294. The Appeals Chamber notes that the Prosecutor's arguments in support of her second ground of appeal are to some extent overlapping and not always clear. It appears, however, that the Prosecutor is raising the following main arguments:

a. The principal argument of the Prosecutor appears to be that the two judges forming the majority did not set out and agree upon the applicable standard of proof and other evidentiary standards against which they would assess the no case to answer motions, before doing so.[685] The Prosecutor submits that this failure of the majority judges to direct themselves to the applicable standards amounted to a legal error.

b. The Prosecutor argues further that the two judges forming the majority erred in procedure by failing to set out a clear approach as to how to assess the evidence before doing so, which in her view is demonstrated by the relevant procedural history and primarily by the failure to give guidance to the parties and OPCV as to the evidentiary standards and approaches that would be applied.[686]

c. In addition, the Prosecutor submits that the Trial Chamber's 'opaque evidentiary approach' led Judge Henderson to adopt and apply an 'overly rigid' and 'unsupported' approach to corroboration, which, according to the Prosecutor, is in itself an error of law.[687]

d. The Prosecutor finally argues that the lack of clarity and consensus on their approach to the assessment of evidence also led the judges in the majority to make several other mistakes in their evidentiary analysis, as

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[684] Mr Blé Goudé's Response to the OPCV's Observations, paras 66-69.
[685] *See* Prosecutor's Appeal Brief, paras 123, 142-151. *See also*, Prosecutor's Response to the Appeals Chamber's Questions, paras 22 and 28; 22 June 2020 Appeal Hearing, p. 64, lines 6-11.
[686] Prosecutor's Appeal Brief, paras 124, 152-154. *See also*, Prosecutor's Response to the Appeals Chamber's Questions, paras 22 and 28.
[687] Prosecutor's Appeal Brief, paras 153, 155-159.

reflected, according to the Prosecutor, in six examples stemming from Judge Henderson's Reasons.[688]

295. In her response to the Appeals Chamber's questions, the Prosecutor explained that the Trial Chamber's alleged 'failure to set out a clearly defined standard of proof and other evidentiary standards is primarily a procedural error', as it relates to the alleged erroneous conduct of the proceedings leading up to its decision to acquit,[689] and that this procedural error also includes an error of law, consisting of the Trial Chamber's failure to determine the applicable standard in adjudicating the no case to answer motions.[690] The Appeals Chamber does not consider that this significantly changed the Prosecutor's overall argument.

296. The Appeals Chamber understands the thrust of the Prosecutor's arguments within this second ground of appeal to be concerning the Trial Chamber's alleged failure to set out a clear and commonly agreed standard of proof or approach to assessing the sufficiency of the evidence, at the no case to answer stage, before it assessed the evidence. In particular, she submits that (i) by failing to direct itself as to the relevant evidentiary standards, the Trial Chamber erred in law; and (ii) by failing to set out its approach as to how it would assess the evidence before doing so, it erred in procedure. As a consequence of the above failures and of such an '*ambiguous* and *unclear*' approach, the Prosecutor argues, the Trial Chamber made 'several inconsistent and incorrect' evidentiary assessments.[691]

297. In light of the Prosecutor's arguments, the Appeals Chamber will first address the Prosecutor's allegation that the Trial Chamber failed to set out and agree upon the applicable standard of proof before assessing the evidence. In this regard, it will proceed as follows: the Appeals Chamber will first identify the evidentiary standard against which no case to answer motions should be assessed; it will then determine whether the judges of the majority identified an evidentiary standard, whether it was the correct

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[688] Prosecutor's Appeal Brief, paras 131, 160, 162-263.
[689] Prosecutor's Response to the Appeals Chamber's Questions, para. 28.
[690] Prosecutor's Response to the Appeals Chamber's Questions, para. 28.
[691] *See* Prosecutor's Appeal Brief, paras 126, 153 (emphasis in original); Prosecutor's Response to the Appeals Chamber's Questions, paras 22 and 38; 22 June 2020 Appeal Hearing, p. 74, lines 21-24. In this regard, it is noted that the Prosecutor stated that her appeal is 'not about the case itself' but is about the fact that the proceedings 'were conducted without a standard' and were therefore not properly heard. *See* 24 June 2020 Appeal Hearing, p. 54, lines 12-16.

standard, and whether the standard was commonly agreed between the two judges forming the majority. It will then consider the Prosecutor's argument that the Trial Chamber erred procedurally, primarily by failing to give guidance to the parties and the OPCV as to the applicable evidentiary standard before disposing of the no case to answer motions. Finally, the Appeals Chamber will consider the arguments of the Prosecutor concerning corroboration as well as the other alleged errors in the assessment of evidence, which, according to the Prosecutor, resulted from the failure to define and agree upon the applicable evidentiary standard and approach.

298. The Appeals Chamber will examine the Prosecutor's allegations under this ground of appeal applying the standard of review for legal and procedural errors, as defined above.[692]

1. Alleged failure to define and agree upon the applicable evidentiary standard

(a) Evidentiary standard applicable at the no case to answer stage

299. As noted above, in disposing of the Prosecutor's argument that the judges of the majority erred in law by failing to define and agree upon the applicable evidentiary standard, the Appeals Chamber considers it appropriate to determine, first, what the applicable standard is.

300. As recalled above,[693] at the ICC, a trial chamber has discretion – pursuant to article 64(6)(f) of the Statute – to entertain (on its own motion or on the motion of a defendant) submissions to the effect that the imperatives of a fair, impartial and expeditious hearing (required by the combined operation of articles 64(2) and 67 of the Statute) may not warrant putting the defence to its case, due to substantial weaknesses in the evidence presented thus far by the prosecution.

(i) The applicable test

301. In the event of a motion for a finding of no case to answer, the test that guides the trial chamber's decision may be expressed as follows: upon the conclusion of the evidence presented by the prosecution (and on behalf of the victims, as appropriate),

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[692] *See supra*, paras 62-65.
[693] *See supra*, paras 104-105.

the trial chamber shall acquit the defendant or, as the case may be, dismiss one or more of the charges, where the evidence thus far presented is insufficient in law to sustain a conviction on one or more of the charges.

302. The foregoing test is fully consistent with the classic test of the no case to answer procedure, as applied in both international[694] and national[695] jurisdictions.

(ii) The standard of proof

303. In rule 130(3) of the KSC Rules, the test of no case to answer is formulated in a manner that spells out the applicable standard of proof, in the following language: 'Having heard the Parties and, where applicable, Victims' Counsel, the Panel may

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[694] ICTR Rule 98*bis*: 'If after the close of the case for the prosecution, the Trial Chamber finds that the evidence is *insufficient to sustain a conviction* on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgement of acquittal in respect of those counts'; ICTY Rule 98*bis*: 'At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence *capable of supporting a conviction*'; SCSL Rule 98: 'If, after the close of the case for the prosecution, there is no evidence *capable of supporting a conviction* on one or more counts of the indictment, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgment of acquittal on those counts'; STL Rule 167: '(A) At the close of the Prosecutor's case, the Trial Chamber shall, by oral or written decision and after hearing submissions of the Parties, enter a judgement of acquittal on any count if there is no evidence *capable of supporting a conviction* on that count'; KSC Rule 130(3) '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'; and, IRMCT rule 121: 'At the close of the Prosecutor's case, the Trial Chamber shall, unless it decides otherwise, by oral decision and after hearing the oral submissions of the Parties, enter a judgement of acquittal on any count if there is no evidence *capable of supporting a conviction*.' (emphasis added).

[695] *See* *R. v. F(S)* [England and Wales Court of Appeal], para. 36: '[W]here the state of the evidence called by the prosecution, and taken as a whole, is so unsatisfactory, contradictory, or so transparently unreliable, that no jury, properly directed, could convict. […] it is the judge's duty to direct the jury that there is no case to answer and to return a "not guilty verdict"'. *See also* R. v. P [England and Wales Court of Appeal], p. 75: '[L]ooking at all this evidence and treating it with the appropriate care and scrutinising it properly: is there a case on which a jury properly directed could convict?'. It is also helpful to note Lord Lane's classic direction, stated as follows:' How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence: (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case; (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. ... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge': R. v. Galbraith [England and Wales Court of Appeal], p. 1042.

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'.[696]

304. Indeed, a proper *appreciation* of the applicable test should make it wholly appropriate and correct to articulate the standard of proof at the level of proof beyond reasonable doubt and nothing less. This is because the applicable test is uniformly stated in the language of sufficiency of evidence, variously asking whether the evidence *at that stage* has been 'sufficient to sustain a conviction';[697] whether the evidence is 'capable of supporting a conviction';[698] whether the evidence is such upon which 'a jury properly directed [...] could convict';[699] whether the evidence is such on which 'a jury properly directed could [...] properly convict';[700] or 'whether on the evidence as it stands [the defendant] could lawfully be convicted.'[701]

305. Against that background, there is eminent authority in international criminal law, in support of rule 130(3) of the KSC Rules: holding that the proper standard of proof applicable to the no case to answer motions is the standard of proof beyond reasonable doubt. Notable in that regard are the pronouncements of the ICTY Appeals Chamber in the *Jelisić* case. There, the standard of proof was explained as follows:

> 35. In the end, the matter depends on an interpretation of the text of Rule 98*bis*(B), an interpretation aided by reference to particular municipal concepts but not controlled by them. When the Rule is so read, the question becomes: what does its reference to a test of whether "the evidence is insufficient to sustain a conviction" mean? [...] [I]t appears to the Appeals Chamber that those words must of necessity import the concept of guilt beyond reasonable doubt, for it is only if the evidence is not capable of satisfying the reasonable doubt test that it can be described as "insufficient to sustain a conviction" within the meaning of Rule 98*bis*(B). Rule 87(A), confirms this interpretation by providing that a "finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt".
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> 36. Consequently, the notion of proof of guilt beyond reasonable doubt must be retained in the operation of Rule 98*bis*(B). This was recognised by Trial Chamber II's decision in *Kunarac*. The test applied in that case was correctly stated to be

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[696] KSC Rule 130(3) (emphasis added).
[697] ICTR Rule 98*bis*.
[698] ICTY Rule 98*bis*, SCSL Rule 98, STL Rule 167(A), KSC Rule 130(3) and IRMCT Rule 121.
[699] *See, for instance*, *R. v. F(S)* [England and Wales Court of Appeal], *supra*; and R. v. P [England and Wales Court of Appeal].
[700] *See* R. v. Galbraith [England and Wales Court of Appeal].
[701] *See* *May v. O'Sullivan* [High Court of Australia], para. 7.

"whether there is evidence (if accepted) upon which a reasonable tribunal of fact could convict—that is to say, evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question. If the evidence does not reach that standard, then the evidence is, to use the words of Rule 98*bis*(B), 'insufficient to sustain a conviction'". *Kunarac*'s reference to the necessity of a reasonable tribunal being "satisfied beyond reasonable doubt" should be especially noted. So too in *Kvocka*, the Trial Chamber, in applying the same Rule, adopted "the standard that no reasonable chamber could find guilt beyond a reasonable doubt on the basis of the Prosecution's case-in-chief". This interpretation appears in other formulations of the test for mid-trial acquittal to the effect "that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it". A jury will not be "properly directed" if it is not told, verbatim or to the effect, that it cannot convict unless it is "satisfied beyond reasonable doubt" that the guilt of the accused has been proved by the evidence. Consequently, the reasonable doubt standard is adopted in the tests used in common law systems in the determination of a no case submission.

37. The next question is how should the test of guilt beyond reasonable doubt be applied in this situation. The Appeals Chamber considers that the reference in Rule 98*bis* to a situation in which "the evidence is insufficient to sustain a conviction" means a case in which, in the opinion of the Trial Chamber, the prosecution evidence, if believed, is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt. In this respect, the Appeals Chamber follows its recent holding in the *Delalic* appeal judgement, where it said: "[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question". The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt.[702]

[702] *Jelisić* Appeal Judgment, paras 35-37. This test has been applied subsequently by chambers when assessing motions pursuant to Rule 98*bis* of the ICTY Rules of Procedure and Evidence (*see for example*, *Karadžić* Appeal Judgement, para. 9; *Karadžić* Rule 98*bis* Oral Judgment, p. 28774; *Popović et al.* Rule 98*bis* Oral Decision, p. 21461; *Mladić* Decision on Interlocutory Defence Appeal from Trial Chamber Rule 98*bis* Decision, para. 9, *referring to* *Mladić* Rule 98*bis* Oral Decision, pp. 20922-20923.) It is noted that the ICTY jurisprudence may also accomodate the position that at the no case to answer stage the Chamber should not concern itself with issues of credibility or reliability, unless a witness is so lacking in credibility and reliability that no reasonable chamber could find them credible or reliable.The Appeals Chamber has expressed a different view on this point and fully explained its reasons for that view within this judgment.

306. The approach that the ICTY Appeals Chamber articulated in *Jelisić* is also firmly supported by important authority from national jurisdictions.[703] Notably, in the classic case of *The Queen v. Bilick and Starke*, for instance, Chief Justice King of the South Australia Supreme Court explained the operative formula in this way:

> The question of law is whether on the evidence as it stands the defendant *could* lawfully be convicted. He *could* lawfully be convicted on that evidence only if it is capable of producing in the minds of a reasonable jury satisfaction beyond reasonable doubt.[704]

307. The proposition was restated in relation to circumstantial evidence. In that regard, King CJ wrote as follows:

> The same test is to be applied to deciding a submission of no case to answer in a case depending upon circumstantial evidence as in a case depending upon direct evidence, although the manner of its application will be different. The question to be answered by the trial judge is whether there is evidence with respect to every element of the offence charged which, if accepted, could prove that element beyond reasonable doubt. [...] Where the case is a circumstantial or partly circumstantial case and therefore depends on inferences, the question may be expanded so that it becomes: On the assumption that all the evidence of primary fact considered at its strongest from the point of view of the case for the prosecution, is accurate, and on the further assumption that all inferences most favourable to the prosecution which are reasonably open, are drawn, is the evidence capable of producing in the mind of a reasonable person satisfaction, beyond reasonable doubt, of the guilt of the accused?[705]

308. In a very helpful commentary published in the *Australian Law Journal* in 1981, Mr Justice H H Glass of the Court of Appeal of the Supreme Court of New South Wales observed that '[if] the question to be decided is "whether on the evidence as it stands the defendant could lawfully be convicted"', then '[e]x hypothesi, no person can

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[703] In the United States, for instance, the equivalent procedure is to be found in rule 29(a) of the Federal Rules of Criminal Procedure which provides as follows: 'Before Submission to the Jury. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.' US federal courts have consistently held that the adjudication of a motion under that provision requires the court to 'determine whether, viewing the evidence in the light most favorable to the government, the jury could reasonably find the defendant guilty beyond a reasonable doubt.' *See, for instance,* *United States v. Merriweather* [United States Court of Appeals], p.4; *United States v. Hazeem* [United States Court of Appeals], p. 2.
[704] *The Queen v. Bilick and Starke* [Supreme Court of South Australia] at 335 (emphasis in original).
[705] *The Queen v. Bilick and Starke* [Supreme Court of South Australia] at 337.

lawfully be convicted unless his guilt is established beyond a reasonable doubt. These pronouncements imply a conclusion that there is no case to answer unless the evidence adduced by the prosecution is capable of bringing satisfaction beyond reasonable doubt to the minds of a reasonable jury.'[706] In his further analysis, Mr Justice Glass demonstrated why a lesser standard of proof is unworkable. As a starting point, suppose the trial judge rejects a no case submission on the ground that the evidence 'could' support a lawful conviction, though it is not capable of proving guilt beyond reasonable doubt. And suppose further that the accused then calls no evidence and asks for a definitive verdict of acquittal. The trial judge would then have been placed in the awkward position of making inconsistent rulings on the ability of precisely the same body of evidence to support a conviction lawfully.[707]

309. The Appeals Chamber is persuaded by the foregoing analysis, which supports both the *Jelisić* pronouncements as quoted above as well as the standard of proof indicated in rule 130(3) of the KSC Rules. That is to say, the Appeals Chamber is satisfied that it is only when the evidence has satisfied the standard of proof beyond reasonable doubt that it can be said to have been 'sufficient to sustain a conviction', or 'capable of supporting a conviction'; or evidence upon which 'a jury properly directed [...] could convict' or evidence upon which 'a jury properly directed could [...] properly convict.' Nothing less would do. The Appeals Chamber stresses that it is unhelpful to muddle the discussion by alluding to the difference between 'could convict' and 'would convict,' as have been done in some of the case law. The test has never been expressed as 'would convict'. Thus, it is a false contrast that only distracts from the focus of the analysis, which must remain on 'could convict'.

310. It is, of course, possible to envisage a worry that the assessment of the evidence on the standard of proof beyond reasonable doubt, at a stage before the conclusion of the case for the defence, may entail prejudgment of the case for the defence—in the event of an unsuccessful outcome of a motion of no case to answer. On a closer look, however, the worry is more apparent than real. The standard of proof as applied *at that stage* operates only to the extent of the evidence thus far presented and no more. In other words, the assessment does not anticipate or gainsay the evidence yet to be

[706] Glass, 'Insufficiency of Evidence to Raise a Case to Answer', p. 847.
[707] Glass, 'Insufficiency of Evidence to Raise a Case to Answer', p. 847.

presented by the defence. The assessment thus leaves the fullest scope for any evidence that the defence may later present, in the event of an unsuccessful no case to answer motion. There is no incongruity in the arrangement, given the phenomenon in all manner of legal proceedings – also all too common in ordinary human experience – that a contentious story that seems so strong in the partisan mouth of only one side to a dispute, often acquires a different complexion when the opposite side has been heard. Hence, the classic maxim *audi alteram partem* – which precludes the *condemnation* of a party unless he or she has been given a chance to present his or her own side of the case. Thus, a case may speak strongly to proof beyond reasonable doubt from the perspective of only the prosecution evidence, but a subsequent case for the defence may introduce reasonable doubt in the end. Of course, the maxim *audi alteram partem* does not require calling upon an opposing party to be heard if the complaining party has not made out a strong case to begin with, when it has been given full chance to present its case.

311. Yet, the imperatives of a fair and impartial trial do not require a trial chamber to prolong the trial in any case in which the prosecution evidence, seen in 'its best light' – in the sense of being undistracted, unobstructed or unopposed for the time being by evidence introduced on behalf of the defence – is unable to satisfy the standard of proof beyond reasonable doubt. Such a prolongation is not inevitably justified merely upon a speculation – let alone a gamble – that the case for the defence when presented may strengthen the prosecution evidence. In those circumstances, it should be correct to determine that there is no requirement to call upon the defence to present its case. That is to say, if the case for the prosecution, upon its completion, is not strong enough to satisfy the standard of proof beyond reasonable doubt *at that stage*, a trial chamber may reasonably take the view that the evidence up to that point has been insufficient to support a conviction. Consequently, no case has been made out for the defence to answer.

(iii) Assessment of credibility and reliability of the evidence

312. In the assessment of the evidence for purposes of a no case to answer motion, the Trial Chamber is not precluded from sensibly weighing credibility and reliability of the evidence thus far presented, in order to satisfy the applicable standard of proof.

313. In those national criminal proceedings that involve a jury, an agonising debate is often encountered concerning the propriety of judges' assessment of credibility and reliability of evidence. That concern necessarily arises because of the separation of functions between judge and jury, in an arrangement in which assessment of credibility and reliability of evidence is the prerogative of the jury, while the determination of no case to answer motions is the prerogative of judges. In view of that division of functions, the no case to answer process should not become a licence for judicial usurpation of the jury's prerogative of assessment of credibility and reliability.

314. But that concern does not arise in the circumstances of the ICC. There is no similar separation of functions, because there is no jury. Judges have the prerogative of assessment of credibility and reliability of the evidence at any point in the proceedings when such an assessment falls to be made. In this connection, the Appeals Chamber is persuaded by the reasoning of Judge Pocar of the Appeals Chamber of the ICTY, saying as follows:

> 5. It should be noted that the conclusion reached by the majority of the Appeals Chamber is certainly suited to a system in which cases are eventually sent to a jury or to a trier of fact other than the judge who evaluates the evidence at that stage. In such a system, if a judge finds that, while he himself cannot be satisfied of the guilt of the accused, a different trier of fact could come to a conclusion of guilt, he cannot stop the proceedings. Should he apply a higher standard of evaluation of the evidence, he would try the facts himself, instead of leaving the task of doing so to the jury.
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> 6. In this International Tribunal, however, there is no jury; the judges are the final arbiters of the evidence. There is no point in leaving open the possibility that another trier of fact could come to a different conclusion if the Trial Chamber itself is convinced of its own assessment of the case. Therefore, if at the close of the prosecution case, the judges themselves are convinced that the evidence is insufficient, then the Chamber must acquit. Such an approach is not only consistent with the text of Rule 98*bis*(B), which obliges the Chamber to acquit if it finds that the evidence is insufficient to sustain a conviction. It also preserves the fundamental rights of the accused, who is entitled not only to be presumed innocent during the trial, but also not to undergo a trial when his innocence has already been established. Further, the principle of judicial economy is also preserved, in that proceedings are not unnecessarily prolonged: for what is the point in continuing the proceedings if the same judges have already reached the conclusion that they will ultimately adopt at a later stage?[708]

[708] *Jelisić* Partial Dissenting Opinion of Judge Pocar, paras 5-6 (footnote omitted).

315. Indeed, a correct appreciation of the standard of proof applicable at the stage of a 'no case to answer' motion – as expressed in terms as to whether the evidence 'could properly support a conviction' at that stage – necessarily entails assessment of credibility and reliability. This is because no reasonable tribunal of fact 'could properly convict' on the basis of evidence the credibility and reliability of which could not persuade the mind of guilt beyond reasonable doubt.

316. However, in the context of the no case to answer procedure at the ICC, it is important to underscore the following caveat. Any assessment of credibility or reliability of the evidence, in the context of the no case to answer process, must be understood to relate only to the Chamber's sense of the evidence thus far presented. That is to say, it concerns only the evidence presented by the prosecution or on behalf of the victims, as the case may be. On no account should such a sense of the evidence prejudge the strength of the case for the defence, in the event that the case is required to continue, following the trial chamber's dismissal of the no case to answer motion; or in the event of a successful prosecution appeal of an acquittal resulting from the no case to answer motion – thus requiring a continuation of the trial before the same trial chamber. For this reason, the Appeals Chamber encourages trial chambers to exercise great care and circumspection in their pronouncements regarding findings on credibility and reliability of the evidence, in order to avoid undue awkwardness in the event that the trial may have to continue before the same composition of the trial chamber.

317. As to how the evidence should be assessed, as stated above, the prosecution evidence should be considered in 'its best light' – in the sense of being undistracted, unobstructed or unopposed for the time being by evidence introduced on behalf of the defence. It is possible that clarity of thought is undermined by usual formulations which say that for purposes of no case to answer motions, the case for the prosecution must be seen in 'its best light' or 'taken at its highest'. These expressions do not mean that the prosecution evidence must be taken at face value or be presumed to have satisfied its forensic objective. The expressions only mean that the evidential assessment will focus on the strength of the evidence that the Prosecution has tendered to prove their case, rather than focusing on the strength of any evidence that the defence might have introduced at that stage to neutralize the strength of the prosecution evidence. It bears keeping in mind that during the case for the prosecution, the defence often introduces

evidence in support of its case – usually in the process of cross-examination of prosecution witnesses. The requirement that the case for the prosecution must be taken 'at its highest' or seen 'in its best light' means that, although the evidence thus far introduced by the defence may be considered, the benefit of any doubt should be given to that presented by the prosecution.[709] Here, the Appeals Chamber considers it important to stress that this does not mean that the weaknesses in the prosecution case – including weaknesses revealed in the process of cross-examination – are to be ignored in the process of considering whether that evidence 'could' support a lawful conviction. In any event, these considerations are significant because of the division of functions between judge and jury in jury trials.[710] The significance of the issue diminishes where the trial chamber is both the tribunal of fact and the tribunal of law. Here, the more controlling consideration is the command of article 74(2) of the Statute which provides that the trial chamber's judgment 'shall be based on its evaluation of the evidence and the entire proceedings'.

(b) Alleged failure to set out and agree on the evidentiary standard

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

319. The Appeals Chamber notes that the Prosecutor argues that the judges in the majority did not set out, agree, and therefore direct themselves to, the relevant standard *before* they decided to acquit Mr Gbagbo and Mr Blé Goudé on 15 January 2019, as Judge Henderson's interpretation of the standard was contained only in Judge Henderson's Reasons, filed six months later.[711] She argues that the fact that Judge Henderson set out an evidentiary framework six months later cannot remedy this error. According to the Prosecutor, Judge Henderson's Reasons contain mere 'afterthoughts', which were developed only after the 15 January 2019 Decision,[712] and 'did not

[709] *See* Glass, 'Insufficiency of Evidence to Raise a Case to Answer', pp. 845-846.
[710] *See* Glass, 'Insufficiency of Evidence to Raise a Case to Answer', pp. 845-846.
[711] Prosecutor's Appeal Brief, para. 123.
[712] Prosecutor's Appeal Brief, para. 142.

demonstrate that the Majority judges had that – or indeed *any* – standard in mind at the crucial time when deciding to acquit (before 15 January 2019)'.[713]

320. This argument is linked to one of the Prosecutor's allegations under the first ground of appeal, namely that the Trial Chamber's decision to acquit was not fully informed.[714] The Appeals Chamber has rejected some of the arguments in support of this allegation,[715] and will consider, under the second ground of appeal, those remaining. In particular, the Prosecutor submits that there are '[s]ubstantive inconsistencies' between the 15 January 2019 Decision and Judge Henderson's Reasons which, in her view, demonstrate that the oral acquittal was not fully informed,[716] arguing that several such inconsistencies demonstrate that, on 15 January 2019, the judges 'had not reached all necessary conclusions', referring specifically to it having not yet decided on the very nature of the no case to answer decision and the applicable standard of proof.[717] She further argues that there were also inconsistencies within Judge Henderson's Reasons in assessing the sufficiency of evidence at the no case to answer stage, which would also contribute to demonstrate that the acquittal decision was not fully informed.[718]

321. In this regard, the Appeals Chamber recalls, as noted above,[719] that judges benefit from a presumption of judicial integrity which acknowledges that they are bound by their judicial oaths and will carry out the duties they have solemnly undertaken to uphold. According to this principle, judges are presumed to know, and act in accordance with their judicial responsibilities – in this case, to have agreed upon and directed themselves on the standard of proof and/or approach to assessing the evidence before assessing the evidence and disposing of the motions.

322. In the Appeals Chamber's view, this is especially so, given the statement of the Presiding Judge, at the time of delivering the verdict on 15 January 2019, that '[t]he Chamber, having thoroughly analysed the evidence and taken into […] consideration

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[713] Prosecutor's Response to the Appeals Chamber's Questions, para. 30 (emphasis in original).
[714] *See* Prosecutor's Appeal Brief, paras 60-85.
[715] *See supra*, paras 223-246.
[716] Prosecutor's Appeal Brief, p. 37, heading III.E.3; *see also* paras 76-82.
[717] Prosecutor's Appeal Brief, para. 76.
[718] Prosecutor's Appeal Brief, p. 40, heading III.E.4; *see also* paras 83-84.
[719] *See supra*, para. 224.

all legal and factual arguments submitted orally and in writing by the parties and participants, finds, by majority, that there is no need for the Defence to submit further evidence as the Prosecutor has not satisfied the burden of proof in relation to several core constitutive elements of the crimes as charged'.[720] Such a public declaration by judges is protected by the presumption of judicial integrity. As recalled above,[721] given that judicial integrity is a core element of the judicial process, such a presumption is rebuttable only by cogent evidence, which the appellant (in this case the Prosecutor) has the onus to prove, and cannot be discharged by mere speculation. Accordingly, the Appeals Chamber is of the view that in the absence of clear proof to the contrary, it must be assumed that the reasoning set out in the Reasons for the 15 January 2019 Decision, Judge Henderson's Reasons and Judge Tarfusser's Opinion reflect the reasoning that led to the 15 January 2019 Decision and is therefore the basis for acquitting the two accused in January 2019.

323. Thus, in order to determine whether the two judges of the majority defined the evidentiary standard and agreed on it, the Appeals Chamber first notes that in the Reasons for the 15 January 2019 Decision, which was signed by all three judges, the Trial Chamber stated that '[t]he majority's analysis of the evidence is contained in Judge Henderson's reasons'.[722] Judge Henderson, in his reasons, stated that '[w]hat follows are my written reasons for joining Judge Tarfusser in deciding to end the case against Mr Laurent Gbagbo and Mr Charles Blé Goudé and to acquit them of all charges of crimes against humanity'.[723] The Appeals Chamber considers, therefore, that, unless otherwise indicated in Judge Tarfusser's Opinion, Judge Henderson's Reasons contain the Trial Chamber's reasoning – agreed upon by the two judges of the majority – for the 15 January 2019 Decision. Accordingly, Judge Henderson's Reasons are the starting point for the Appeals Chamber's assessment.

324. With regard to the standard applicable at the no case to answer stage Judge Henderson stated, by reference to the *Ruto and Sang* Decision No. 5, that 'the key question to be determined in these proceedings, with respect to each charge, is whether

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[720] 15 January 2019 Decision, p. 2, line 25 to p. 3, line 4.
[721] *See supra*, para. 224.
[722] Reasons for the 15 January 2019 Decision, para. 29.
[723] Judge Henderson's Reasons, para. 1 (in Preliminary Remarks, p.11).

the Prosecutor has submitted sufficient evidence in support of that charge such that a reasonable chamber could convict'.[724] Judge Henderson noted that '[a]ccording to the traditional no case to answer standard, as initially adopted by Trial Chamber V(A)' in the *Ruto and Sang* case, 'trial chambers should not assess reliability and credibility but should consider the Prosecutor's evidence at its highest […] unless the evidence is "incapable of belief" on any reasonable view'.[725] Judge Henderson however recalled that, subsequently, Judge Eboe-Osuji and Judge Fremr (two of the Judges of Trial Chamber V(A)) clarified that 'it makes little sense to completely prevent trial judges from assessing the quality of the evidence at the no case to answer stage'[726] and that 'such an artificial prohibition sits uncomfortably in the ICC's procedural framework'.[727] In this regard, he further recalled that the Pre-Trial Chamber, as pointed out by the Appeals Chamber, 'may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses',[728] when deciding on the confirmation of charges. He further stated that given that Pre-Trial Chamber may assess the quality of the Prosecutor's evidence, 'it would be very strange indeed for the Trial Chamber to be constrained in this regard after having heard the presentation of the Prosecutor's evidence in full detail'.[729] Judge Henderson also referred to the specific circumstances in the instant case, including that the Trial Chamber, contrary to the *Ruto and Sang* case, did not make any admissibility rulings, and therefore '[i]t cannot be assumed […] that all the evidence on the record has at least some minimal probative value',[730] he also made reference, in relation to this, to the method of questioning witnesses by the parties.[731] He further noted that the Trial Chamber accepted the submission into evidence of a 'significant number' of prior

[724] Judge Henderson's Reasons, para. 2.
[725] Judge Henderson's Reasons, para. 3.
[726] *See* *Ruto and Sang* Decision on Judgments of Acquittal, Reasons of Judge Fremr, para. 144; Reasons of Judge Eboe-Osuji, paras 105-125.
[727] Judge Henderson's Reasons, paras 3, 8, 41.
[728] Judge Henderson's Reasons, para. 3, *referring to* Appeals Chamber, *Mbarushimana* Appeal Judgment, para. 46.
[729] Judge Henderson's Reasons, para. 3
[730] Judge Henderson's Reasons, paras 4-5.
[731] Judge Henderson's Reasons, para. 6.

recorded statements 'without making an appropriate effort to assess the reliability of the content of such statements'.[732]

325. Judge Henderson therefore concluded that 'the Chamber must engage in a full review of the evidence submitted and relied upon by the Prosecutor in order to determine whether such evidence is sufficient to support a conviction on the respective charge or charges'.[733]

326. The Appeals Chamber notes that the Prosecutor does not challenge as such the correctness of the standard at the no case to answer stage that Judge Henderson set out, which according to the Prosecutor, was 'in line with the *Ruto and Sang* Decision No. 5 approach'.[734] The Prosecutor seems to assume that Judge Henderson was of the view that the Trial Chamber could only 'in exceptional circumstances, consider the strength of the case and questions of credibility and reliability, […] when the evidence is incapable of belief or when the Prosecution's case has completely broken down'.[735] She argues that '[a]lthough Judge Henderson noted Judges Fremr and Eboe-Osuji's view in *Ruto and Sang* that "it makes little sense to completely prevent trial judges from assessing the quality of the evidence at the no case to answer stage", he said he did not exclude or disregard evidence on the basis of the lack of trustworthiness of the witness *per se*' and that '[h]e did not "systematically" assess the credibility and reliability of witness testimony'.[736] As demonstrated in the preceding paragraphs, this was not the case. Instead, Judge Henderson considered that the Trial Chamber was entitled to assess the quality of the evidence, including the credibility and reliability of the Prosecutor's evidence in the process of determining no case to answer motions. The fact that Judge Henderson stated that he did not 'systematically' assess the credibility and reliability of the Prosecutor's testimonial evidence,[737] does not undermine his reasoning, which

[732] Judge Henderson's Reasons, para. 7. As recalled above, Judge Henderson further explained the legal basis of the decision and its consequences, Judge Henderson's Reasons, paras 10-17. *See also supra*, paras 87-90.
[733] Judge Henderson's Reasons, para. 8.
[734] Prosecutor's Appeal Brief, para. 138.
[735] 22 June 2020 Appeal Hearing, p. 70, lines 15-18.
[736] Prosecutor's Appeal Brief, p. 68, n. 284, *citing* Judge Henderson's Reasons, paras 3, 41.
[737] Judge Henderson's Reasons, para. 41.

relied on the standard and approach finally set out by the Trial Chamber in *Ruto and Sang* at the end of the proceedings.

327. The Appeals Chamber will now consider whether Judge Tarfusser shared the view of Judge Henderson as to how the evidence was to be assessed. The Appeals Chamber notes, as recalled above, that Judge Tarfusser was of the view that no case to answer proceedings 'have no place in the statutory framework of the Court'.[738] He also stated that '[t]here is only one evidentiary standard […] to terminate trial proceedings', namely the '*beyond reasonable doubt*' standard set forth in article 66(3) of the Statute,[739] while, during the hearing on 16 January 2019, he stated on behalf of the majority that 'the dissenting judge is mistaken in stating that the majority has acquitted Mr Gbagbo and Mr Blé Goudé by applying the beyond a reasonable doubt standard. The majority limited itself to assessing the evidence submitted and whether the Prosecutor has met the onus of proof to the extent necessary for warranting the Defence to respond'.[740] These statements appear on their face contradictory and create a degree of ambiguity as to what Judge Tarfusser considered to be the applicable evidentiary standard.

328. This, however, does not take away from the fact that Judge Tarfusser shared Judge Henderson's view that the Trial Chamber, in determining a no case to answer motion, may conduct an in-depth analysis of the Prosecutor's evidence, including assessing its credibility and reliability.[741] In particular, Judge Tarfusser stated that regardless of 'labels and theoretical approaches […] the Majority's view is soundly and strongly rooted in an in-depth analysis of the evidence (and of its exceptional weakness) on which my fellow Judge Geoffrey Henderson and I could not be more in agreement'.[742] Judge Tarfusser expressly noted that despite 'the parties' and especially the Prosecutor's attempts to drag the trial down the route of the classic no-case-to-answer proceedings', the exercise entertained by the Chamber, 'at least in [his]

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[738] Judge Tarfusser's Opinion, para. 65. *See also*, Transcript of 1 October 2018, p. 18 lines 4-11, during which, Judge Tarfusser had already expressed the view that the procedure for a no case to answer motion could not be found in the structure of the Rome Statute.
[739] Judge Tarfusser's Opinion, para. 65 (emphasis in original).
[740] 16 January 2019 Decision, p. 4, lines 11-15.
[741] Judge Tarfusser's Opinion, paras 67-68.
[742] Judge Tarfusser's Opinion, para. 67.

understanding, was never meant to replicate the so-called "Ruto and Sang model"'.[743] The Appeals Chamber notes that the 'Ruto and Sang model' must be understood as a reference to the procedural model set out initially in the *Ruto and Sang* case (namely, in Decision No. 5), according to which the trial chamber is not required to assess the quality of the evidence, and credibility and reliability of the evidence would only be assessed at this stage in narrow and exceptional circumstances.[744] Judge Tarfusser further clarified that the applicable no case to answer standard in this case was different from the one set out in *Ruto and Sang* Decision No. 5. He noted that 'as stated by Judge Henderson, […] "it makes little sense to completely prevent trial judges from assessing the quality of the evidence at the no case to answer stage", if anything because "[i]ndeed, such an artificial prohibition sits uncomfortably in the ICC's procedural framework'.[745] The Appeals Chamber also notes that Judge Tarfusser 'subscribe[d] to the factual and legal findings' contained in Judge Henderson's Reasons.[746] The two judges shared the view that the evidence submitted by the Prosecutor was 'exceptionally weak',[747] and that the fundamental flaw of the Prosecutor's case lay in the numerous divergences between the Prosecutor's 'one-sided' narrative and the facts emerging from her own evidence.[748] In particular, Judge Tarfusser stated that:

> [A]n issue of standard, and the importance to have clarity on it, only arises when there is material tendered in evidence which, 'taken at its highest' (ie, because of its pertinence and relevance to the charges and leaving aside any and all doubts as regards its authenticity, reliability or both, no matter how significant), would be capable of supporting a conviction of the accused. We are not, and never have been, in this scenario; if we had, it would have been necessary to proceed with the presentation of the evidence by the defence. Simply put, there is 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. Otherwise stated, it is not that the Prosecutor's evidence would only support the Prosecution's case if it were taken 'at its highest', which scenario would indeed make it necessary to

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[743] Judge Tarfusser's Opinion, para. 67.
[744] *Ruto and Sang* Decision No. 5, para. 32.
[745] Judge Tarfusser's Opinion, para. 68.
[746] Judge Tarfusser's Opinion, para. 1.
[747] 16 January 2019 Decision, p. 4, lines 3-5. *See also* Judge Henderson's Reasons, *e.g.*, paras 1, 2 (in Preliminary Remarks), 36, 2038; Judge Tarfusser's Opinion, *e.g.*, paras 3, 4, 73-74. For instance, they both agreed that 'there are pervasive problems affecting a considerable number of documents that make their authenticity questionable', and thus a majority of documentary exhibits submitted 'would not pass even the most rudimentary admissibility test in many domestic systems' (Judge Henderson's Reasons, para. 36; Judge Tarfusser's Opinion, para. 4).
[748] *See e.g.* Judge Henderson's Reasons, paras 66-77, 1220, 1286; Judge Tarfusser's Opinion, paras 5, 12, 52.

> debate about the standard; it is, rather, that the Prosecutor's evidence, whether taken individually or as a whole, does not support any of the charges levelled against the accused.[749]

329. He further stated that '[i]t is my considered opinion, after almost three years of listening to the witnesses and sifting through the submissions and the evidence at trial, that no evidence has been tendered by the Prosecutor which would allow a Chamber to establish a link between either Laurent Gbagbo or Charles Blé Goudé and any of the charged facts'.[750] He also stated that '[a]s the analysis of the evidence in [Judge Henderson's] Reasons makes abundantly clear, this is certainly (yet) another case where the evidence is "flimsy, inconsistent or otherwise inadequate" to say the least, such as to never possibly envisage sending the case to trial, let alone sustaining a conviction'.[751] Judge Henderson also stated that 'the evidence on the record is manifestly incapable of supporting a conviction on the basis of the charges against the accused',[752] and that 'the Prosecutor's narrative suffered from a number of internal inconsistencies and portrayed the relevant events in an unbalanced, incomplete and ultimately unpersuasive manner'.[753]

330. In light of the above, the Appeals Chamber finds that the judges in the majority were in the end effectively in agreement on how to approach the evidence at this stage of the proceedings. Importantly, they both agreed to depart from the approach as defined in the *Ruto and Sang* Decision No. 5 and considered that a trial chamber, in determining a no case to answer motion, may conduct an in-depth analysis of the Prosecutor's evidence, assessing the quality of the evidence, including its credibility and reliability. Indeed, it is recalled that in their final decision in the case, the majority of the Trial Chamber in the *Ruto and Sang* case had ultimately modified the approach earlier indicated in their Decision No 5, to permit assessment of credibility and reliability of the evidence. Although not explicitly endorsing the standard set out in Judge Henderson's Reasons, Judge Tarfusser accepted that the Prosecutor's evidence

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[749] Judge Tarfusser's Opinion, para. 68.
[750] Judge Tarfusser's Opinion, para. 74.
[751] Judge Tarfusser's Opinion, para. 12.
[752] Judge Henderson's Reasons, para. 1 (in Preliminary Remarks, p.11).
[753] Judge Henderson's Reasons, para. 2038.

did not meet any standard,[754] including the one set out in Judge Henderson's Reasons, 'whether the Prosecutor has submitted sufficient evidence in support of [a] charge such that a reasonable chamber could convict'.[755]

331. That there was agreement in this regard, is also reflected in the 15 January 2019 Decision. The Appeals Chamber recalls that the Trial Chamber in its 15 January 2019 Decision, decided, by majority, to acquit Mr Gbagbo and Mr Blé Goudé after 'having thoroughly analysed the evidence and taken […] into consideration all legal and factual arguments submitted both orally and in writing by the parties and participants'.[756] It found that 'there [was] no need for the Defence to submit further evidence as the Prosecutor has not satisfied the burden of proof in relation to several core constitutive elements of the crimes as charged',[757] and further concluded that the Prosecutor 'has failed to satisfy the burden of proof to the requisite standard as foreseen in Article 66 of the Rome Statute'.[758]

332. The Appeals Chamber considers that contrary to the Prosecutor's submissions,[759] the proceedings leading up to the 15 January 2019 Decision do not provide any indication as to the Trial Chamber's alleged lack of clarity and consensus on the applicable evidentiary standard at the time of the acquittal decision. The no case to answer procedure, as followed in the present case, does not demonstrate, as the Prosecutor suggests, a 'flawed process'.[760] It rather shows that the Trial Chamber authorised the no case to answer procedure in the instant case to go ahead, and this despite Judge Tarfusser's concerns as to the applicability of the no case to answer proceedings in the Court's legal framework. The proceedings were started by the Trial Chamber, which, on 9 February 2018, at the end of the Prosecutor's presentation of evidence, explicitly directed the Defence teams to indicate whether or not they intended to file a no case to answer motion.[761] On 19 March 2018, the Prosecutor, invited to do

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[754] Judge Tarfusser's Opinion, para. 68 ('[…] Simply put, there is 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.').
[755] Judge Henderson's Reasons, para. 2.
[756] 15 January 2019 Decision, p. 2, line 25 to p. 3, line 4.
[757] 15 January 2019 Decision, p. 3, lines 2-4.
[758] 15 January 2019 Decision, p. 4, lines 15-16.
[759] *See e.g.*, Prosecutor's Appeal Brief, paras 130-131, 153-154.
[760] Prosecutor's Appeal Brief, paras 130-131, 153-154.
[761] First Order on the Conduct of the Proceedings, para. 14.

so by the Trial Chamber, filed her Mid-Trial Brief.[762] After both counsel for Mr Gbagbo and Mr Blé Goudé indicated their intention to file a no case to answer motion,[763] on 4 June 2018, the Trial Chamber ordered them to file submissions addressing 'the specific factual issues for which, in their view, the evidence presented [by the Prosecutor] is insufficient to sustain a conviction'.[764]

333. Following this, the Prosecutor requested that the Trial Chamber 'clarify the [o]rder with respect to the applicable standard at the "no case to answer" stage'.[765] On 13 June 2018, the Trial Chamber, with Judge Tarfusser acting as a single judge, rejected the Prosecutor's request for clarification.[766] It took into account the position of the Defence teams, according to which the order was 'clear',[767] noted that 'accordingly, no additional guidance [was] required […] at [that] stage for the purpose of complying with it', and concluded that '[u]nder these circumstances, the concerns raised by the Prosecutor's Request [were] not warranted'.[768] It also stated that '[the Prosecutor's] assumption [that the Trial Chamber has decided to follow the steps taken by the Trial Chamber in the *Ruto and Sang* Decision No.5] amounts to a mischaracterisation of the procedural steps devised by this Chamber, which have been tailored to the specific circumstances of these proceedings'.[769]

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[762] Prosecutor's Mid-Trial Brief.
[763] *See* Mr Gbagbo's Observations on the Further Conduct of the Proceedings, paras 18-33. Counsel for Mr Gbagbo also referred to the approach adopted in the *Ruto and Sang* case; however, he argued that the Trial Chamber should not be limited in that approach in the instant case. Mr Blé Goudé's Observations on the Continuation of the Trial Proceedings, para. 3. In his observations, counsel for Mr Blé Goudé submitted that while he 'did not oppose that a no case to answer procedure should follow the approach adopted by Trial Chamber V(A)' in the *Ruto and Sang* case, the Trial Chamber had 'the freedom of fully assessing the credibility and reliability of the Prosecution's evidence' (paras 18-19, 25).
[764] Second Order on the Conduct of the Proceedings, para. 10.
[765] Prosecutor's Motion Seeking Clarification, para. 31. The Prosecutor requested to 'adopt the Ruto Principles adopted in Decision No.5 as to the standard for this stage of the proceedings'. In her request, the Prosecutor submitted that 'while the Prosecution believes that [the articulation of the Trial Chamber's order] amounts to an implicit incorporation of the ['Ruto Principles'] in the present case, it cannot afford to assume this to be the case', and therefore 'seeks clarification that the range of principles elaborated in the *Ruto* case applies'. Prosecutor's Motion Seeking Clarification, para. 6.
[766] Decision on Prosecutor's Motion Seeking Clarification, p. 8.
[767] Decision on Prosecutor's Motion Seeking Clarification, para. 15. In particular, counsel for Mr Gbagbo submitted that the Trial Chamber, in its Second Order on the Conduct of Proceedings, made a clear and informed decision, providing the parties leeway to present their positions and allowing for the most in-depth analysis of the parties' submissions. In his view, there was no need for guidance. Mr Gbagbo's Observations on the Prosecutor's Motion Seeking Clarification, paras 6, 9.
[768] Decision on Prosecutor's Motion Seeking Clarification, para. 15.
[769] Decision on Prosecutor's Motion Seeking Clarification, para. 11.

334. On 23 July 2018, counsel for Mr Gbagbo and Mr Blé Goudé filed their no case to answer motions,[770] and on 10 September 2018, the Prosecutor and the OPCV filed their responses.[771] In October and November 2018, the parties had the opportunity to make oral submissions, including those on the applicable standard and approach to assess the sufficiency of evidence.[772]

335. As recalled above, on 15 January 2019, the Trial Chamber rendered an oral decision acquitting the two accused, and on 16 July 2019, in the written reasons, it provided its interpretation of the standard applicable at the no case to answer stage and other evidentiary standards and approach to assessing the evidence at the no case to answer proceedings.[773]

336. The Appeals Chamber therefore finds that the procedural history of the no case to answer proceedings in the present case does not reveal any 'flawed process',[774] as suggested by the Prosecutor.

337. With respect to the Prosecutor's claim that the failure to provide notice of the applicable standard to the parties and the OPCV is evidence of the Trial Chamber's failure to direct itself to a standard prior to assessing the evidence and acquitting the two accused, the Appeals Chamber considers this argument unsubstantiated. The standard adopted by the Trial Chamber since the beginning of the no case to answer proceedings and confirmed in Judge Henderson's Reasons, was 'whether the Prosecutor has submitted sufficient evidence in support of [a] charge such that a reasonable chamber could convict'.[775] The fact that the Single Judge or the Trial Chamber did not provide further guidance in the proceedings leading up to the 15 January 2019 Decision, does not mean that the Trial Chamber had not already identified

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[770] *See* Mr Gbagbo's No Case to Answer Motion; Mr Blé Goudé's No Case to Answer Motion.
[771] *See* Prosecutor's Response to No Case to Answer Motions; OPCV's Response to No Case to Answer Motions.
[772] On 1-3 October 2018 the Trial Chamber held hearings, during which the Prosecutor presented orally her response. From 12 to 21 November 2018, the Trial Chamber heard oral submissions from Mr Gbagbo and Mr Blé Goudé. *See* Transcript of 1 October 2018; Transcript of 2 October 2018; Transcript of 3 October 2018; Transcript of 12 November 2018; Transcript of 13 November 2018; Transcript of 14 November 2018; Transcript of 19 November 2018; Transcript of 20 November 2018; Transcript of 21 November 2018; Transcript of 22 November 2018.
[773] Judge Henderson's Reasons, paras 1-52 ('"No case" standard', paras 1-20; 'Assessment of evidence', paras 31-52).
[774] Prosecutor's Appeal Brief, paras 130-131, 153-154.
[775] Judge Henderson's Reasons, para. 2; *see also*, Judge Tarfusser's Opinion, para. 68.

the applicable standard and directed itself to it when assessing the evidence. Whether the Trial Chamber ought to have provided guidance to the parties and the OPCV will be addressed in the subsequent section.

338. Finally, to the extent that the Prosecutor claims that a lack of clarity and a failure to agree on an evidentiary standard and approach is manifest in the six examples on which the Prosecutor relies,[776] the Appeals Chamber notes that the Prosecutor alleged that the Trial Chamber's error results also from the fact that the standard of proof was not consistently applied. She did not, however, identify any instance within the six examples where the two judges forming the majority would have applied different standards, or expressed a disagreement on the way the standard was applied by the other judge. To the extent that the Prosecutor seems to argue that Judge Henderson engaged in a more thorough analysis of the evidence than he stated he would (which, as recalled above, in her view, is 'in line with the *Ruto and Sang* Decision No. 5 approach'),[777] the Appeals Chamber notes that this argument is based on the Prosecutor's incorrect understanding of the standard that Judge Henderson had adopted.[778] Accordingly, the argument is rejected.

339. In light of the foregoing, the Appeals Chamber finds that there is no lack of clarity or consensus between the judges in the majority as to how to approach the evidence at this stage of the proceedings.[779] They correctly assumed that the Trial Chamber, at the no case to answer stage, is not precluded from conducting an in-depth analysis of the evidence, including an assessment of the credibility and reliability of the evidence.

340. To the extent that there is any doubt whether the Trial Chamber adopted the correct standard of proof,[780] the Appeals Chamber is satisfied that the decision was not materially affected. By adopting the correct approach as to how to assess the sufficiency of the evidence, as required at this stage of the proceedings, and after a detailed analysis

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[776] Prosecutor's Appeal Brief, paras 160, 162-252.
[777] Prosecutor's Appeal Brief, para. 138.
[778] *See supra*, para. 326.
[779] To support her argument that the Trial Chamber erred in law, the Prosecutor relies on the Appeal Decision of the STL in the *Ayyash et al.* case. The Appeals Chamber considers that the circumstances in that case are different from this case, and therefore it is not relevant to the case at hand (*See* Prosecutor's Appeal Brief, paras 147-151, *referring to* *Ayyash et al.* Appeal Decision).
[780] *See supra*, paras 299-317.

of the evidence, the judges in the majority found that the Prosecutor's evidence did not meet any standard (including the one 'whether the Prosecutor has submitted sufficient evidence in support of [a] charge such that a reasonable chamber could convict').[781] Judge Tarfusser and Judge Henderson concurred in their analysis of the sufficiency of the evidence in respect of whether or not the case should continue that the evidence against the appellant was not simply weak but 'exceptionally weak';[782] that determination is of great significance when applying any test of sufficiency.

(c) Alleged lack of clarity on the approach on how to assess the evidence at the no case to answer stage

341. As recalled above, the Prosecutor submits that the Trial Chamber erred in procedure by failing to set out a clear approach on how it would assess the evidence at the no case to answer stage before it did so. She submits that this error is illustrated by (i) the procedural history of this case;[783] (ii) Judge Henderson's articulation and application of an 'overly rigid' and 'unsupported' approach to corroboration – which, in her view, is in itself a further error of law – without notice to the parties;[784] and (iii) the Trial Chamber's incorrect and inconsistent evidentiary assessments, as set out in the six examples. [785]

342. The Prosecutor's arguments in support of the alleged procedural error are not clear. The Appeals Chamber understands the main allegation of the Prosecutor in this set of arguments to be a general lack of clarity as to the conduct of the no case to answer proceedings, and in particular as to the applicable evidentiary standard, which is demonstrated mainly in the Trial Chamber's alleged failure to provide guidance to the parties and the OPCV during the proceedings leading up to the 15 January 2019 Decision.[786]

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[781] Judge Henderson's Reasons, para. 2. *See also*, Judge Tarfusser's Opinion, para. 68.
[782] 16 January 2019 Decision, p. 4, lines 3-5. *See also* Judge Henderson's Reasons, *e.g.*, paras 1, 2 (in Preliminary Remarks, p.11), 36, 2038; Judge Tarfusser's Opinion, *e.g.*, paras 3, 4, 73-74.
[783] Prosecutor's Appeal Brief, paras 130-131, 153-154.
[784] Prosecutor's Appeal Brief, paras 153, 155-159.
[785] Prosecutor's Appeal Brief, paras 130-131, 153, 160.
[786] *See* Prosecutor's Appeal Brief, paras 152-161, in particular para. 154.

2. Alleged failure to give guidance

343. The Prosecutor alleges that the Trial Chamber resisted opportunities to articulate the applicable standard and other evidentiary principles and standards and that Judge Tarfusser, as Single Judge, declined to provide the clarification when requested to do so.[787]

344. In this regard, and as recalled above, the Appeals Chamber notes, first, that, after authorising the filing of the no case to answer motions, it ordered counsel for Mr Gbagbo and Mr Blé Goudé to file submissions addressing 'the specific factual issues for which, in their view, the evidence presented [by the Prosecutor] is insufficient to sustain a conviction'.[788] With regard to the allegation that the Trial Chamber erred by failing to inform the parties and the OPCV of the applicable no case to answer standard, the Appeals Chamber recalls, as noted above,[789] that the Trial Chamber, with Judge Tarfusser acting as a single judge, indeed rejected the Prosecutor's request for clarification, after having taken into account the position of the Defence teams, according to which the Second Order on the Conduct of the Proceedings was 'clear'.[790] On that occasion, the Single Judge also stated that the Prosecutor's assumption that the Trial Chamber had decided to follow the *Ruto and Sang* approach amounted to 'a mischaracterisation of the procedural steps devised by this Chamber, which have been tailored to the specific circumstances of these proceedings',[791] and that 'it is not necessary to take a position either as to the standards adopted by Trial Chamber V(a) or to the application of those principles in the final decision in that case. The Single Judge only notes that, the *Ruto* and *Sang* case being the only precedent in the jurisprudence of this Court to this day, the Prosecutor's statement to the effect that the standards enunciated in it are representative of the jurisprudence at the Court sounds far-fetched'.[792] Noting that the standard of proof was clear to the Defence teams, Judge Tarfusser concluded that no additional guidance was required at that stage and that

[787] Prosecutor's Appeal Brief, para. 136.
[788] Second Order on the Conduct of the Proceedings, para. 10.
[789] *See supra*, para. 333.
[790] Decision on Prosecutor's Motion Seeking Clarification, para. 15 and p. 8.
[791] Decision on Prosecutor's Motion Seeking Clarification, para. 11.
[792] Decision on Prosecutor's Motion Seeking Clarification, para. 13.

under those circumstances, the concerns raised by the Prosecutor were unwarranted.[793]

345. Following this, the parties and the OPCV were provided with ample opportunity to make submissions on the issue of the interpretation of the applicable standard at the no case to answer stage and more generally the approach to assessing the evidence, as well as the evidence itself, both in their written submissions,[794] and orally during the hearings held in October and November 2018.[795] The parties and the OPCV were therefore not, as alleged by the Prosecutor, prejudiced in the case.[796] The Prosecutor relies on two arguments to assert that the Trial Chamber erred: (i) the purported tendency of trial chambers to guide the parties and the OPCV on the applicable evidentiary standards, especially when novel issues are of concern;[797] and (ii) the divergent views between parties and the OPCV on the applicable no case to answer standards and approach to the evidence in this case.[798]

346. The Appeals Chamber is not persuaded by either of these arguments. The Prosecutor has not substantiated that the Trial Chamber in the instant case had a duty to provide notice or guidance to the parties and the OPCV as to the evidentiary standards applied before rendering its decision to acquit, given that the matter was novel and one on which there were different views among the parties and the OPCV.[799] The cases relied on by the Prosecutor[800] at best demonstrate what other trial chambers have done, but do not support her claim that the Trial Chamber in the instant case had any such duty.

347. The Appeals Chamber further notes that the Prosecutor has not explained what, specifically, she would have done differently if the Trial Chamber had given guidance.

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[793] Decision on Prosecutor's Motion Seeking Clarification, para. 15.
[794] *See* Mr Gbagbo's No Case to Answer Motion; Mr Blé Goudé's No Case to Answer Motion; Prosecutor's Response to No Case to Answer Motions; OPCV's Response to No Case to Answer Motions.
[795] Transcript of 1 October 2018; Transcript of 2 October 2018; Transcript of 3 October 2018; Transcript of 12 November 2018; Transcript of 13 November 2018; Transcript of 14 November 2018; Transcript of 19 November 2018; Transcript of 20 November 2018; Transcript of 21 November 2018; Transcript of 22 November 2018.
[796] Prosecutor's Appeal Brief, para. 131.
[797] Prosecutor's Appeal Brief, paras 145, 154.
[798] Prosecutor's Appeal Brief, paras 136, 149.
[799] *See* in this sense, *Gaddafi* OA4 Judgment, para. 203.
[800] Prosecutor's Appeal Brief, paras 145, 154.

Following an invitation from the Trial Chamber to file 'a trial brief illustrating her case and detailing the evidence in support of the charges',[801] the Prosecutor was allowed to present her case in detail, when filing her Mid-Trial Brief.[802] As mentioned above, the parties and the OPCV were provided with opportunities to make submissions on the no case to answer motions, including the applicable evidentiary standard and approaches to the assessment of the evidence. In light of the *Ruto and Sang* final decision, they were aware that in the only case where no case to answer proceedings took place, the Trial Chamber stated that, in principle, it was not prevented from assessing the quality of the evidence and 'entering into an assessment of the credibility of witness testimony at the no case to answer stage'.[803] In any event, the Prosecutor was, and is, at all times aware that she is required to prove her case beyond reasonable doubt and with credible evidence.[804]

348. In sum, the Appeals Chamber rejects the Prosecutor's argument that the Trial Chamber's failure to give guidance as to the evidentiary standard amounted to a procedural error.

349. To the extent that the Prosecutor alleged that the procedural history of this case is one factor illustrating the procedural error, the Appeals Chamber recalls its findings above,[805] and considers that the Prosecutor's allegation that the relevant procedural history in the present case demonstrates the Trial Chamber's lack of clarity on the approach on how to assess the evidence at the no case to answer stage is not substantiated.

3. Other alleged errors in the approach to the assessment of evidence

(a) Alleged errors in relation to corroboration

350. The Prosecutor alleges that the failure of the judges of the majority to set out and agree upon the evidentiary standard or approach to assessing the evidence at the no case to answer stage also led Judge Henderson to adopt and apply an inflexible and legally

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[801] First Order on the Conduct of the Proceedings, p. 8.
[802] Prosecutor's Mid-Trial Brief.
[803] *Ruto and Sang* Decision on Judgments of Acquittal, Reasons of Judge Fremr, para. 144; *see also* Reasons of Judge Eboe-Osuji, paras 105-125.
[804] *See also*, in this sense, Judge Eboe-Osuji opinion in *Ruto and Sang* Decision on Judgments of Acquittal, para. 88.
[805] *See supra*, paras 332-336.

unsupported approach to corroboration. The Prosecutor submits that the Trial Chamber erred in law and in procedure when adopting and applying corroboration to the evidence in this case.[806] She submits that the Trial Chamber applied its approach to corroboration inconsistently in its analysis.[807] In the circumstances, she argues that the Trial Chamber's 'overly strict approach' was also 'unfair', since the parties were given no notice of it.[808]

351. In support of her position, the Prosecutor argues that other international courts and tribunals have been flexible in their approach to corroboration and 'have recognised the fact-sensitive nature of this assessment, which must accommodate other relevant factors in deciding whether corroboration is needed and if so, what that constitutes'.[809] By reference to the jurisprudence of the ICTR,[810] she argues that although '[i]n general, thematic consistencies among testimonies are sufficient to amount to corroboration and mirror images of testimony are unnecessary and unrealistic', the Trial Chamber 'proposed, and apparently adopted, exactly such an unrealistic, unreasonable and incorrect view of corroboration – for which it offered no legal support'.[811] For instance, she submits, in setting out its understanding of corroboration, the Trial Chamber (i) 'expressly rejected that *similar* facts (even if *closely proximate*) – or put another way, a sequence of linked facts or facts occurring in continuum – could be considered as corroborative of one another'; and (ii) 'conflated two distinct evidentiary notions: that evidence should never be assessed in isolation, and that evidence may be considered corroborated.'[812]

352. In contrast, counsel for Mr Gbagbo and Mr Blé Goudé submit that the Prosecutor fails to demonstrate any procedural or legal error with respect to the Trial Chamber's interpretation of and approach to corroboration.[813]

353. The Appeals Chamber does not find the Prosecutor's allegation convincing.

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[806] Prosecutor's Appeal Brief, paras 155-159.
[807] Prosecutor's Appeal Brief, para. 155.
[808] Prosecutor's Appeal Brief, para. 155.
[809] Prosecutor's Appeal Brief, para. 156.
[810] Prosecutor's Appeal Brief, para. 157.
[811] Prosecutor's Appeal Brief, paras 158-159.
[812] Prosecutor's Appeal Brief, para. 159 (emphasis in original).
[813] Mr Gbagbo's Response, paras 178-200; Mr Blé Goudé's Response, paras 213-220.

354. First, the Appeals Chamber does not consider, as found above, that the Trial Chamber's evidentiary standard or approach was unclear when reviewing the 15 January 2019 Decision, the written reasons, and the relevant procedural history. Second, and as explained below, the Prosecutor has failed to show any link between the interpretation of and approach to corroboration and the alleged lack of clarity in the approach to assessing the evidence at the no case to answer stage. Third, and as further explained in the paragraphs that follow, the Appeals Chamber does not consider the Prosecutor's argument about corroboration persuasive.

355. The Prosecutor takes issue with the Trial Chamber's statement that '[c]orroboration only occurs when two pieces of evidence independently confirm the same fact',[814] arguing that two pieces of evidence can corroborate each other even with 'similar facts', and that the Trial Chamber incorrectly required facts to be 'identical or "mirror images" to be considered as corroborative of one another'.[815]

356. The Appeals Chamber recalls that the Trial Chamber stated that '[c]orroboration only occurs when two pieces of evidence independently confirm the same fact'.[816] It also stated that '[w]hen exhibits relate to similar but different facts; for example, a number of killings that took place at different times and locations, even at close proximity, such evidence does not *ne[ce]ssarily* provide corroboration'.[817]

357. Trial chambers enjoy broad discretion in assessing inconsistencies within the evidence and in deciding whether corroboration is necessary. In this respect, as it has been previously stated, different testimonies do not need to 'be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others.'[818] Accordingly, while testimonies need not be identical in all aspects, they must confirm, even if in different ways, the same fact, in order to corroborate each other.

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[814] Prosecutor's Appeal Brief, para. 159, *citing* Judge Henderson's Reasons, para. 47.
[815] Prosecutor's Appeal Brief, para. 159.
[816] Judge Henderson's Reasons, para. 47.
[817] Judge Henderson's Reasons, para. 47 (emphasis added).
[818] *See e.g.* *Nahimana et al.* Appeal Judgment, para. 428; *Šainović et al.* Appeal Judgment, para. 946; *Bizimungu* Appeal Judgment, para. 327.

358. With regard to the ICTR case-law, relied upon by the Prosecutor to support her position, stating that 'two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts',[819] there is need for great care in describing the parameters of corroboration in terms so broad and uncertain. At any rate, the Appeals Chamber does not consider that the description means, without more, that two pieces of evidence corroborate each other merely by bearing a relationship to the same fact. The mere fact that items of evidence may have a linkage does not mean that they are corroborative of one another in the essential core of the inquiry. Some linkages may be strenuous while others are tenuous. It is a matter of appreciation on a case by case basis.

359. With respect to the Prosecutor's argument that the Trial Chamber 'conflated two distinct evidentiary notions: that evidence should never be assessed in isolation, and that evidence may be considered corroborated',[820] the Appeals Chamber notes the statement in Judge Henderson's Reasons that '[w]hile there is no requirement for corroboration, it makes good sense that evidence should never be assessed in isolation'.[821] Corroboration and the rule that evidence should never be assessed in isolation are indeed distinct notions. This notwithstanding, the Appeals Chamber notes that the Prosecutor fails to show how this sentence, on its own, amounts to an error.

360. The Appeals Chamber therefore finds no error in the Trial Chamber's view on corroboration.

361. In light of the above, noting also that this issue had already been discussed during trial proceedings,[822] the Appeals Chamber considers that there was also no need for the Trial Chamber to provide notice of its understanding on corroboration to the parties and the OPCV.

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[819] Prosecutor's Appeal Brief, para. 157 (emphasis in original), *referring to*, *inter alia*, *Nahimana et al.* Appeal Judgment, para. 428; *see also*, *Bikindi* Appeal Judgment, paras 78-85.
Prosecutor's Appeal Brief, para. 157.
[821] Judge Henderson's Reasons, para. 46.
[822] *See for example*, Annex to Prosecutor's Response to No Case to Answer Motions, paras 120-122, 197-198; Transcript of 13 November 2018, p. 52, line 9 to p. 54, line 15; Transcript of 19 November 2018, p. 2, line 2 to p. 7, line 24.

362. The Appeals Chamber, having found no error in the interpretation of corroboration given by the Trial Chamber, does not consider it necessary to review the Prosecutor's arguments regarding the Trial Chamber's approach to corroboration when assessing the evidence. As further explained below, the Appeals Chamber does not find it necessary to review the Prosecutor's allegations raised within the six examples. Thus, the Appeals Chamber does not make any finding as to the correctness of the Trial Chamber's approach to corroboration in these examples. In any event, as noted below,[823] the Prosecutor has failed to establish any link between any such error and the Trial Chamber's alleged lack of clarity in the approach to corroboration at the time it rendered its acquittal decision.

(b) Other alleged errors

363. As noted above, the Prosecutor also submits that the lack of clarity and consensus on their approach to the assessment of evidence led the judges in the majority to make several other mistakes in their evidentiary analysis, as reflected, according to the Prosecutor, in six examples stemming from Judge Henderson's Reasons.[824]

364. In the six examples the Prosecutor argues that the Trial Chamber (i) erred in how it approached the question of corroboration of evidence; (ii) failed to consider the evidence in its totality; (iii) adopted an unreasonable and unrealistic view regarding the assessment of witness testimony; (iv) unfairly subjected evidence of crimes of sexual violence to a heightened level of scrutiny, and (v) speculated on numbers and estimates outside the case record when seeking to set an empirical benchmark to assess patterns of criminality.[825]

365. According to the Prosecutor, the six examples are one factor, among others, illustrating the Trial Chamber's 'flawed and unclear approach' to assessing the sufficiency of evidence, and thus the procedural error.[826] In particular, she submits that the Trial Chamber's 'unclear approach led to its inconsistent and incorrect findings',[827] and that '[t]hose findings simultaneously demonstrate *both* the errors *and* also their

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[823] *See infra*, para. 369.
[824] Prosecutor's Appeal Brief, paras 131, 160, 162-263.
[825] Prosecutor's Appeal Brief, paras 162-164.
[826] 22 June 2020 Appeal Hearing, p. 74, lines 5-7; Prosecutor's Response to the Appeals Chamber's Questions, para. 38.
[827] Prosecutor's Appeal Brief, para. 130.

consequences (*i.e.*, the impact of those errors)'.[828] With regard to the alleged errors identified in the six examples, the Appeals Chamber notes that the Prosecutor made clear that in this case she does not allege errors of fact, and, given the nature of the alleged errors under this ground of appeal, the Prosecutor requests that the six examples be assessed under the procedural standard of appellate review.[829]

366. In her view, they show that the Trial Chamber's 'erroneous procedure led to an unreliable adjudicative process and accordingly, an unreliable outcome (*i.e.*, the acquittals), and thus materially affected the decision'.[830] The Prosecutor also argues that if the Appeals Chamber were minded to view these errors as 'mixed errors of law, procedure and fact, as the final arbiter, it certainly has the authority to do so and may reverse the decision on that basis'.[831]

367. The Appeals Chamber considers that the arguments of the Prosecutor are unpersuasive.

368. The Appeals Chamber notes, first, that it found, when looking at the relevant procedural history, no lack of clarity or disagreement between the judges of the majority as to the standard and approach to assess the sufficiency of evidence.

369. In addition, and in any event, the Prosecutor's submissions as to the link between the factual examples and her main submission under this ground of appeal are unclear. In essence, in respect of the six examples, the Prosecutor challenges the way in which the Trial Chamber assessed the evidence and reached its conclusions. It remains unexplained, however, how, even if the Trial Chamber did err in its assessment of the evidence in relation to the six examples, this would be indicative of its failure to set out and agree on a clear standard and/or approach on how to assess the sufficiency of the evidence before doing so, including the alleged failure to properly direct itself to the applicable evidentiary standards.[832] This is especially given that the six examples reflect

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[828] Prosecutor's Appeal Brief, para. 130 (emphasis in original).
[829] Prosecutor's Response to the Appeals Chamber's Questions, paras 39-42; 22 June 2020 Appeal Hearing, p. 74, lines 7-9.
[830] Prosecutor's Response to the Appeals Chamber's Questions, para. 38; *see also* Prosecutor's Appeal Brief, paras 131, 162-165, 253-262.
[831] Prosecutor's Appeal Brief, paras 130.
[832] *See also*, in this sense, 23 June 2020 Appeal Hearing, p.17 lines 7-13 (Counsel for Mr Gbagbo submits that 'the Prosecutor does not demonstrate on a single occasion that the supposedly problematic

the Trial Chamber's 'incorrect and inconsistent assessment' of a number of factual matters. The Prosecutor has failed to show any link between the alleged lack of clarity as to the evidentiary standard and approach on the one hand and the alleged errors in the evidentiary analysis on the other hand.

370. Furthermore, as recalled above, since the majority of the Trial Chamber departed from the standard set out in the *Ruto and Sang* Decision No. 5, the Prosecutor's arguments that the Trial Chamber inconsistently applied the standard of proof by assessing the evidence at a standard higher than that adopted in Judge Henderson's Reasons are unsubstantiated. Considering that, according to the Prosecutor, the 'standard of proof shapes the evidentiary approach adopted',[833] it is unclear whether her arguments, premised on a different evidentiary standard, have any relevance to the Trial Chamber's evidentiary analysis within the six examples.

371. To the extent that the Prosecutor argues that the alleged errors in the six examples (together with the relevant procedural history) are manifestations of the failure to set out and agree upon the evidentiary standard and approaches,[834] and therefore relevant to the showing of material effect,[835] the Appeals Chamber recalls that it has found that the Prosecutor has not demonstrated any 'lack of clarity' or 'failure to establish consensus'[836] between Judge Henderson and Judge Tarfusser as to the standard of proof and other evidentiary standards and approaches, or the conduct of the no case to answer procedure, either in the Trial Chamber's decision or in the procedural history leading to the 15 January 2019 Decision. Therefore, in the view of the Appeals Chamber, the question of material effect does not arise.

372. Finally, with regard to the Prosecutor's submission that the errors that she alleges in respect of the six examples could be assessed as factual errors, the Appeals Chamber recalls that it would have been necessary for the Prosecutor to advance arguments

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application of the standard in the examples it provides was a result of the so-called grey area surrounding the question of this standard in no case to answer proceedings'.); 23 June 2020 Appeal Hearing, p. 27, line 14 to p. 28, line 3 (Counsel for Mr Blé Goudé submits that 'the Prosecution has not shown any connection between the lack of a clear standard and the supposed flawed approach'.).

[833] Prosecutor's Response to the Appeals Chamber's Questions, para. 33.

[834] Prosecutor's Appeal Brief, paras 130, 160.

[835] Prosecutor's Appeal Brief, para. 130.

[836] *See* Prosecutor's Appeal Brief, paras 123-124, 131.

showing that no reasonable trial chamber would have come to such a factual finding.[837] The Prosecutor has chosen to allege primarily the above-mentioned legal and procedural errors, rather than bringing the alleged errors within the examples as factual errors.[838]

373. In particular, the Prosecutor invites the Appeals Chamber not to follow the approach adopted in *Ngudjolo.* She submits that the '*overall* grounds of appeal in [the *Ngudjolo*] case remained evidentiary in nature',[839] which, according to the Prosecutor, justified examining the errors through the lens of a factual review, while in the present appeal the examples of the Trial Chamber's alleged erroneous factual findings, referred to by the Prosecutor, are 'merely identified to demonstrate the Majority's ambiguous approach'.[840] The Prosecutor reiterated, on different occasions including during the hearing, that she challenges the acquittals 'not on the basis of a factual appeal, rather […] [on the basis of] the clear legal and procedural errors' identified in the Appeals Brief.[841] Having alleged legal and procedural errors, she merely stated that if the Appeals Chamber were minded to view these errors as 'as mixed errors of law, procedure and fact, as the final arbiter, it certainly has the authority to do so and may reverse the decision on that basis'.[842] In these circumstances, the Appeals Chamber considers it inappropriate to consider the allegations within the six examples, as alleged, as factual errors. In this regard, Judge Eboe-Osuji, while not dissenting from the majority, considers that the Prosecutor in fact brought factual errors, as further explained in his separate opinion.

374. In any event, the Prosecutor failed to bring convincing arguments about how the errors alleged within the six examples materially affected the decision. As noted above, the examples include alleged errors and inconsistencies concerning a certain number of factual matters, not all related to incidents that are relevant for both the accused

[837] See *supra*, paras 66-72.
[838] *See* Prosecutor's Appeal Brief, paras 128, 129.
[839] Prosecutor's Appeal Brief, para. 128 (emphasis in original).
[840] Prosecutor's Appeal Brief, para. 128.
[841] *See* 24 June 2020 Appeal Hearing, p. 30, lines 18-21.
[842] Prosecutor's Appeal Brief, para. 130.

persons,[843] or directly to their individual conduct. Even assuming the Trial Chamber erred, the Prosecutor did not show any bearing on the Trial Chamber's findings concerning the absence of link between the two accused persons and the crimes charged. In sum, the Prosecutor's arguments, if accepted, do not show that the Trial Chamber would not have acquitted Mr Gbagbo and Mr Blé Goudé had it not made these errors.[844] The Prosecutor's argument that an appellant challenging a lengthy decision 'cannot be expected to demonstrate that the final disposition of the case would necessarily have been different'[845] is entirely unsubstantiated.

375. In these circumstances, the Appeals Chambers considers it unnecessary and indeed inappropriate to delve into the specific arguments raised by the Prosecutor in respect of the six examples and rejects the Prosecutor's arguments in this regard.

376. In light of the above findings, the Appeals Chamber finds that the Prosecutor has not substantiated her arguments in support of the allegation that the oral acquittal was not fully informed (namely that there are substantive inconsistencies as to the standard of proof between the 15 January 2019 Decision and Judge Henderson's Reasons, and within Judge Henderson's Reasons as to the assessment of the evidence).[846] As mentioned above, the procedural history leading to the 15 January 2019 Decision and the written reasons do not contain any indication that the judges 'had not reached all necessary conclusions' by 15 January 2019,[847] and that the written reasons (*i.e.*, Judge Henderson's Reasons) contained 'result-driven reasoning' or 'after-the-fact justification of the verdict', as alleged by the Prosecutor.[848] For the reasons explained above, the Appeals Chamber has decided not to review six examples and the alleged inconsistencies, within Judge Henderson's Reasons, in assessing the sufficiency of the evidence. Even assuming that some, or all, of the alleged inconsistencies had been

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[843] *See for example*, Prosecutor's Response to No Case to Answer Motions, para. 25, in which the Prosecutor stated that she did not oppose the dismissal of the charges against Mr Blé Goudé related to the third and fourth charged incidents.
[844] *See supra*, paras 255-268.
[845] Prosecutor's Appeal Brief, para. 260.
[846] Prosecutor's Appeal Brief, paras 79-84.
[847] Prosecutor's Appeal Brief, para. 76.
[848] 24 June 2020 Appeal Hearing, p. 21, line 21 to p. 22, line 2; p.22, lines 10-11.

proven, that would not, in the Appeals Chamber's view, suffice to demonstrate that the acquittal decision was not fully informed at the time it was issued, on 15 January 2019.

377. Accordingly, also in light of the findings made under the first ground of appeal, the Appeals Chamber finds that the Prosecutor has failed to present any evidence indicating that the 15 January 2019 Decision, acquitting the two accused persons, was 'premature and not fully informed' and that the written reasons issued in July 2019 consisted of 'result-driven reasoning',[849] and that, as a result, the 15 January 2019 Decision was 'vitiated by fatal procedural flaws, and […] therefore unlawful'.[850] The Prosecutor has failed to provide any evidence that would rebut the presumption of integrity and impartiality afforded to the judges of the majority.[851] The reasoning set out in the written reasons issued in July 2019 was the basis for acquitting the two accused in January 2019.

4. Conclusion

378. For the foregoing reasons, the Appeals Chamber finds that the Prosecutor failed to demonstrate that the Trial Chamber erred in law or in procedure and rejects the Prosecutor's second ground of appeal.

VIII. APPROPRIATE RELIEF

379. The Appeals Chamber may, in an appeal brought pursuant to article 81(1)(a) of the Statute, confirm, reverse or amend the decision being appealed or order a new trial before a different trial chamber in accordance with article 83(2) of the Statute.

380. In the present case, the Appeals Chamber has found no error that could have materially affected the decision of the Trial Chamber in relation to either of the Prosecutor's two grounds of appeal. It therefore hereby rejects the Prosecutor's appeal and confirms the decision of the Trial Chamber.

381. Furthermore, the Appeals Chamber recalls that in its decision on Mr Gbagbo's request for reconsideration of his conditions of release, it reviewed and revised the conditions on the release of Mr Gbagbo and Mr Blé Goudé, revoking some conditions

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[849] *See* in this sense, Prosecutor's Appeal Brief, paras 60, 85.
[850] Prosecutor's Appeal Brief, para. 85.
[851] *See supra*, *e.g.*, para. 224.

and maintaining others.[852] The Appeals Chamber hereby revokes all remaining conditions on the release of Mr Gbagbo and Mr Blé Goudé, as a result of this judgment.

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

383. Any existing judicial requests for the cooperation of States pursuant to article 57(3)(e) of the Statute are hereby rescinded.

Judge Eboe-Osuji appends to this judgment a separate concurring opinion on grounds one and two of the appeal.[853]

Judge Morrison appends to this judgment a separate concurring opinion on ground one of the appeal.[854]

Judge Hofmański appends to this judgment a separate concurring opinion on ground one of the appeal.[855]

Judge Ibáñez Carranza appends to this judgment a dissenting opinion on grounds one and two of the appeal.[856]

Judge Bossa appends to this judgment a dissenting opinion on grounds one and two of the appeal.[857]

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[852] Decision on Mr Gbagbo's Request for Reconsideration, para. 66. *See also* Judgment on Conditional Release, para. 60.
[853] Annex 1, Separate Concurring Opinion of Judge Eboe-Osui, 31 March 2021, 02/11-01/15-1400-Anx1.
[854] Annex 2, Separate Concurring Opinion of Judge Howard Morrison in relation to the Appeals Chamber's 'Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions' of 31 March 2021, 31 March 2021, 02/11-01/15-1400-Anx2.
[855] Annex 3, Separate Concurring Opinion of Judge Piotr Hofmański in relation to the Appeals Chamber's 'Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions' of 31 March 2021, 31 March 2021, 02/11-01/15-1400-Anx3.
[856] Annex 4, Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, 31 March 2021, 02/11-01/15-1400-Anx4.
[857] Annex 5, Dissenting Opinion of Judge Solomy Balungi Bossa on grounds one and two, 31 March 2021, 02/11-01/15-1400-Anx5.

An annex containing a list of designations and materials used in this judgment is also hereto appended.[858]

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

Judge Chile Eboe-Osuji
Presiding

Dated this 31st day of March 2021

At The Hague, The Netherlands

[858] Annex 6, Cited materials and defined terms, 31 March 2021, 02/11-01/15-1400-Anx6.