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No: ***ICC-02/11-01/15***
Date: **11 May 2020**

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 COTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

Confidential

Blé Goudé Defence Response to the "Victims' observations on the issues on appeal affecting their personal interests" (ICC-02/11-01/15-1326-Conf)

Source: **Defence of Mr Charles Blé Goudé**

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

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I. INTRODUCTION

1. The Defence for Mr Charles Blé Goudé ("Defence") hereby presents its Response to the Common Legal Representative of the Victims' ("LRV") "Victims' observations on the issues on appeal affecting their personal interests"[1] ("Observations") dated 8 April 2020.

2. The Defence will show, *first*, that in its Observations, the LRV exceeded the scope of its mandate as provided by the Statute and as ordered by the Appeals Chamber ("Chamber"), by providing arguments which do not consist of "views and concerns" on the issues on appeal affecting victims' "personal interests." Indeed, the LRV has acted as a "second prosecutor". *Second*, the Defence will respond to those specific points raised by the LRV in its Observations which do not merely consist of a repetition of the Prosecution's submissions in its "Document in Support of Appeal" filed on 15 October 2019.[2]

II. PROCEDURAL HISTORY

3. On 15 January 2019, Trial Chamber I ("Trial Chamber"), by Majority, acquitted Mr Blé Goudé and Mr Gbagbo, and provided a public and oral summary of its Judgment ("15 January 2019 Oral Acquittal Decision"), indicating that a full articulation of its reasoning in writing would follow.[3] Judge Herrera Carbuccia issued a dissenting opinion ("15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion").[4]

4. On 1 February 2019, the Appeals Chamber issued its "Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute" conditionally releasing Mr Blé Goudé and Mr Gbagbo from custody.[5]

5. On 16 July 2020, the Chamber issued the Majority's written reasons for the 15 January 2019 Oral Acquittal Decision ("Written Reasons"), which together with the 15 January 2019 Oral Acquittal Decision, form the "Impugned Decision",[6] and Judge Herrera Carbuccia's dissenting opinion.[7]

[1] ICC-02/11-01/15-1326-Conf.
[2] ICC-02/11-01/15-1277-Conf.
[3] ICC-02/11-01/15-T-232-ENG.
[4] ICC-02/11-01/15-1234.
[5] ICC-02/11-01/15-1251-Conf OA14.
[6] *See* ICC-02/11-01/15-1315, para. 2.
[7] ICC-02/11-01/15-1264, including Annexes A, B and C.

6. Following the notification of its Notice of Appeal on 16 September 2019,[8] the Prosecution filed its Document in Support of Appeal.[9]

7. On 26 November 2019, the Chamber issued its "Decision on victim participation" in the appeal, in which it permitted the LRV to "participate for the purpose of presenting their views and concerns in respect of their personal interests in the issues on appeal".[10] The Chamber set a deadline of 30 days from notification for the Defence, the Defence for Mr Gbagbo and the Prosecution to submit any responses thereto.[11]

8. On 6 March 2020, the Defence ("Defence Response") and the Defence for Mr Laurent Gbagbo respectively filed their responses to the Prosecution's Document in Support of Appeal.[12]

9. On 8 April 2020, the LRV filed its Observations.[13]

III. CONFIDENTIALITY

10. The present request is filed on a confidential basis under Regulation 23*bis*(2) since it refers to documents of the same classification. The Defence will file a public redacted version as soon as practicable.

IV. SUBMISSIONS

I. The LRV 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"

11. Recognizing the victims' right to participate in the proceedings insofar as their "personal interests" are affected, the Chamber permitted the participation of the LRV in the appeals proceedings.[14] However, in its Observations, the LRV failed to demonstrate the link between its arguments and the personal interests of victims and has, to a large extent, acted as a "second prosecutor" by merely concurring or repeating arguments put forward by the

[8] ICC-02/11-01/15-1270.
[9] ICC-02/11-01/15-1277-Conf A.
[10] ICC-02/11-01/15-1290 A, paras 8-9.
[11] Ibid, page 3.
[12] ICC-02/11-01/15-1315-Conf A; ICC-02/11-01/15-1314-Conf A.
[13] ICC-02/11-01/15-1326-Conf.
[14] ICC-02/11-01/15-1290 A, paras 8-9.

Prosecution in its Document in Support of Appeal. This not only stands in clear contradiction with the Chamber's decision,[15] but amounts to a violation of the statutory and regulatory framework of the Court, in particular articles 68(3) and 67(1) of the Statute. Moreover, it contradicts the independent role of the victims as established in the Court's jurisprudence.[16]

12. The role of victims participating in ICC proceeding has been carefully limited and circumscribed in the statutory framework of the Court.[17] Significantly, victims are not "parties" to the proceedings; they may only become "parties" at the reparations stage.[18] With respect to the "personal interests" of victims, which is an essential requirement for victims' presentation of their "views and concerns", the Appeals Chamber has ruled that any determination of whether the personal interests of victims are affected in relation to an appeal requires careful consideration on a case-by-case basis. The Chamber must assess in each case whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor.[19]

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[15] ICC-02/11-01/15-1290 A, paras 8-9.

[16] *Situation in the Democratic Republic of the Congo*, Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tENG-Corr, para. 51. See also *Prosecutor v. Kony et al*., Decision on "Prosecutor's Application to attend 12 February hearing", 9 February 2007, ICC-02/04-01/05-155, page 4; *Prosecutor v. Katanga and Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474, para. 155.

[17] For instance, pursuant to rule 89(1) of the Rules, victims need to apply in writing to the Registrar in order to participate in the proceedings and such application may be rejected by the Chamber pursuant to rule 89(2). With respect to the framework in which victims can exercise their right to participate in the proceedings before the Court, victims, through their legal representatives, may attend and participate in the hearings before the Court pursuant to rule 91(2); make opening and closing statements in accordance with rule 89(1); present their views and concerns pursuant to article 68(3) ICC Statute and rule 89; make representations in writing to a Pre-Trial Chamber in relation to a request for authorisation of an investigation pursuant to article 15(3) ICC Statute and rule 50(3) RPE; submit observations in the proceedings dealing with a challenge to the jurisdiction of the Court or the admissibility of a case in accordance with article 19(3) ICC Statute; request a Chamber to order measures to protect their safety, psychological well-being, dignity and privacy in accordance with article 68(1) ICC Statute and rule 87(1); and request a Chamber to order special measures in accordance with Article 68(1) ICC Statute and rule 88(1). See *Prosecutor v. Lubanga*, Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para. 67.

[18] *See* below, paras 15-16.

[19] *Prosecutor v. Lubanga*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, para. 28; *Prosecutor v. Lubanga*, Decision, in limine, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation", 16 May 2008, ICC-01/04-01/06-1335, para. 42; *Prosecutor v. Katanga*, Decision on the application of victims to participate in the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court, 17 January 2013, ICC-01/04-01/07-3346, para. 9; *Prosecutor v. Banda and Jerbo*, Decision on the participation of victims in the appeal, 6 May 2013, ICC-02/05-03/09-470, para. 12; *Prosecutor v. Gbagbo*, Decision on the application by victims for participation in the appeal, 27 August 2013, ICC-02/11-01/11-491, para. 11; *Prosecutor v. Gbagbo*, Decision on the participation of victims

13. It is based on these principles that the Court has ruled that in their applications to participate in any appeal, victims must include a statement in relation to whether and how their personal interests are affected by the issues on the appeal at hand.[20] More specifically, in seeking to demonstrate that their personal interests are affected, victims must generally ensure, *inter alia*, that express reference is made to the specific facts behind their individual applications, and the precise manner in which those facts are said to fall within the issue under consideration on appeal.[21]

14. In the case at hand, the LRV has failed to present a concrete, express and convincing statement of fact to support the link between its observations and the personal interests of victims. Rather, the LRV argued, vaguely, that "[t]he Victims' right to truth, justice and reparations is affected by the errors identified in the Appeal Brief".[22] However, in its Observations, the LRV fails to convincingly show, concretely, how those victims' interests are affected in the context of the issues on appeal.[23]

15. *Firstly*, the Court has emphasized victims' own interest in seeing a defendant being acquitted, if he or she is not responsible of the crimes for which they suffered harm.[24] In *Katanga & Ngudjolo*, the Single Judge held: "[t]he victims' central interest in the search for the truth can only be satisfied if (i) those responsible for perpetrating the crimes for which they suffered harm are declared guilty; and (ii) *those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can continue*.[25] Given the overwhelming weakness of the evidence which ultimately led the Trial Chamber to acquit Mr Blé Goudé of all charges, the victims' endorsement of the Prosecution's appeal issues raised in its Document in Support of Appeal, appears at odds with the victims' interest in the truth and justice. Victims' interests do not always lie in seeing a defendant

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in the Prosecutor's appeal against the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", 29 August 2013, ICC-02/11-01/11-492, para. 10.

[21] *Prosecutor v. Joseph Kony et. al.*, "Decision on the participation of victims in the appeal", 27 October 2008, ICC-02/04-01/05-324 (OA 2), para. 13; Situation in Uganda, "Decision on participation of victims in the Appeal", 27 October 2008, ICC-02/04-164 (OA), para. 11; ICC-01/05-01/08-566 (OA 2), para. 15; *Prosecutor v. Gbagbo*, Decision on the application by victims for participation in the appeal, 27 August 2013, ICC-02/11-01/11-491, para. 11.
[22] Observations, para. 3.
[23] Observations, para. 3.
[24] See Judge Henderson's Reasons, para. 7: "the acquittal of the accused should in no way be construed as a denial of the suffering of the victims of the post-electoral crisis". See *Prosecutor v Bemba*, Final decision on the reparations proceedings, ICC-01/05-01/08-3653, 3 August 2018, para. 6
[25] Emphasis added. *Prosecutor v. Katanga*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, para. 36.

be convicted. Given that the Prosecution first ground of appeal related to the modalities and manner in which the Impugned Decision was delivered, a potential link between victims' interests in "truth, justice and reparations" has not been demonstrated. Similar to the first ground of appeal, the LRV submissions with respect to the Prosecution second ground of appeal suffers from similar deficiencies. The LRV submits that the Victims' interests were "critically affected" by the manifest lack of predictability and legal uncertainty during the course of the trial, which resulted in an unfair trial.[26] However, in all of the examples enumerated and expounded upon, the LRV does not point to a single instance of legal uncertainty or predictability with respect to the LRV specifically. For example, the LRV submits that the Trial Chamber did not take clear decisions on objections raised by the parties, participants and/or the LRV, but in all of the examples cited none of the objections were ones raised by the LRV. Moreover, the LRV does not demonstrate how the alleged uncertainty regarding a clearly defined NCTA standard relates to the personal interests of victims. Indeed, the standard that the Prosecution must meet with its evidence to sustain a conviction does not fall within the role of the LRV, but rather the Prosecution.

16. *Secondly,* the LRV observes that the "Majority should have ensured that the 15 January 2019 Oral Decision did not thwart the Victims' right to justice, and ultimately reparations, which is in turn dependent on the right to know the reasons of the judgment and the right to appeal".[27] This argument is perplexing as the verdict of full acquittal of both Mr Blé Goudé and Mr Gbagbo constitutes sufficient knowledge to conclude that there would be no reparations process at the trial stage. The fact that the Written Reasons were issued after the issuance of the 2019 Oral Acquittal Decision in no way affects this outcome in relation to the victims' "right to justice, and ultimately reparations". Victims may only claim reparations pursuant to article 75 of Statute, if a defendant is found guilty by the relevant Trial Chamber.[28] Moreover, the reparations stage, should that stage be reached, is independent from the participation stage, given that the possibility for victims to apply for reparations is not conditional upon previous participation in the proceedings, be it at the pre-trial or at the trial stage.[29] The jurisprudence of the Court also underlines the differentiation between the victims' interests in the "identification, prosecution and

[26] Observations, para. 13.
[27] Observations, para. 71.
[28] *See also* Rules 97, 98, Rules of Procedure and Evidence.
[29] *Prosecutor v. Ntaganda*, Decision Establishing Principles on the Victims' Application Process, ICC-01/04-02/06-67, 28 May 2013, para. 13.

punishment of those who have victims them by preventing their impunity" and the victim' right to reparations.[30]

17. *Thirdly*, with respect to victims' interest in the fairness of proceedings, this too, has not been demonstrated by the LRV. The Defence recalls its arguments presented in its Response, namely the jurisprudence emphasising that "it is usually understood that the right to a fair trial applies first and foremost to a defendant or to the Defence", in particular where a defendant's liberty is at stake.[31] Furthermore, even if the Chamber deems that the personal interests of victims are affected within the meaning of article 68(3) of the Statute at that stage of the proceedings, "the Court is still required, by the express terms of that article (...) to ensure that any participation occurs in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".[32] This fundamental principle that victims' participation must comply with the rights of the Defence to a fair and impartial trial has been consistently applied by the Appeals Chambers of the Court. It is for this reasons that the Chamber and other Appeals Chambers have limited victims' participation at the appellate stage "to presenting their views and concerns respecting their personal interests solely to the issues raised on appeal".[33]

18. *Fourthly*, the LRV fails to convincingly demonstrate how the First and Second Grounds of appeal relate to the victims' right to "truth" and "justice". The LRV claims that the purported errors law and/or procedure "deprive the Victims of a cogent inquiry into the crimes they suffered from and a remedy",[34] without providing concrete substantiation therefor. As previously argued by the Defence, rather than depriving them of a cogent inquiry into the crimes, the participating victims benefitted from receiving the oral verdict

[30] *Prosecutor v. Katanga*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474, 13 May 2008, para. 39.
[31] Defence Response, paras 130-131.
[32] *See* for instance *Prosecutor v. Lubanga*, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, para. 28.
[33] *Prosecutor v. Lubanga*, Decision, in limine, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation", 16 May 2008, ICC-01/04-01/06-1335, para. 50. See also *Prosecutor v. Ngudjolo*, Decision on the participation of anonymous victims in the appeal and on the maintenance of deceased victims on the list of participating victims, 23 September 2013, ICC-01/04-02/12-140, para. 3; *Prosecutor v. Bemba*, Decision on the participation of victims in the appeal against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 15 April 2016, ICC-01/05-01/08-3369, para. 4; *Prosecutor v. Gbagbo*, Application to Participate in the Interlocutory Appeal Filed by the Defence against the "Third decision on the review of Laurent Gbagbo's detention pursuant to article 60(3) of the Rome Statute" of 12 July 2013, 22 July 2013, ICC-02/11-01/11-460, para. 39; *Prosecutor v. Bemba*, Decision on the participation of victims in the appeals against Trial Chamber III's "Decision on Sentence pursuant to Article 76 of the Statute", 1 September 2016, ICC-01/05-01/08-3432, para. 4.
[34] Observations, para. 3.

and summary of the Impugned Decision, in the context of a public hearing which was broadcasted, in Côte d'Ivoire among others, prior to the issuance of the full articulation of the Majority's reasoning in writing.[35] This allowed the LRV to become appraised of the outcome of the Trial Chamber's deliberations at the end of the Prosecution's case, removing the alleged uncertainty about the outcome of a verdict, rather than imposing a longer waiting time until the reasoning was fully articulated in writing.[36]

19. In its Observations, rather than presenting arguments tailored to the victims' personal interests as required, the LRV, to a large extent, merely agreed with the Prosecution's arguments, blurring the fundamental distinction between "parties" and "participants". Not only did the LRV repeatedly concur with the Prosecution's arguments, but it also repeated several of the arguments already presented in the Prosecution's Document in Support of Appeal.[37] Consequently, the LRV assumed the role of a "second prosecutor", which is fundamentally incompatible with Mr Blé Goudé's right to a fair trial.[38]

20. As previously mentioned, victim participation must take place "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".[39] Evidently, such a prejudice would be present when the accused, or, in the present case, the acquitted person, faces two Prosecutors instead of one.

21. This position is well-established in the Court's jurisprudence. The Pre-Trial Chamber I held that "[t]he Statute grants victims an independent voice and role in the proceedings before

[35] Defence Response, paras 72, 131-133.
[36] Defence response, para. 131.
[37] ICC-02/11-01/15-1277-Conf A.
[38] Articles 67(1), Rome Statute.
[39] Article 68(3), Rome Statute. *See* also *Prosecutor v. Lubanga,* Judgment on appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisioire de Thomas Lubanga Dyilo", 13 February 2007, ICC-01/04-01/06-824, para. 55; *Prosecutor v. Lubanga*, Decision, in limine, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled "Decision on Victims' Participation", 16 May 2008, ICC-01/04-01/06-1335, para. 36; *Prosecutor v. Lubanga,* Decision on the participation of victims in the appeal, 6 August 2008, ICC-01/04-01/06-1452, para. 7; *Situation in Darfur,* Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 3 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I's Decision of 6 December 2007, 18 June 2008, ICC-02/05-138, paras. 51 and 60; *Prosecutor v. Katanga*, Decision on the application of victims to participate in the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court, 17 January 2013, ICC-01/04-01/07-3346, para. 6; *Prosecutor v. Banda and Jerbo*, Decision on the participation of victims in the appeal, 6 May 2013, ICC-02/05-03/09-470, para. 11; *Prosecutor v. Gbagbo*, Decision on the application by victims for participation in the appeal, 27 August 2013, ICC-02/11-01/11-491, para. 9; *Prosecutor v. Gbagbo*, Decision on the participation of victims in the Prosecutor's appeal against the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute", ICC-02/11-01/11-492, 29 August 2013, para. 8.

the Court and the Court has found that such independence should be preserved, including *vis-à-vis* the Prosecutor so that the victims can represent their interests".[40] Moreover, allowing victims to participate in the proceedings does not mean that a suspect or accused is facing two prosecutors,[41] because the victims "certainly have no role to support the case of the Prosecution",[42] nor are "objective or subjective allies of the Prosecutor".[43] Although Judge Tarfusser had held that "the views of the victims are more familiar with the position of the OTP than the Defence",[44] familiarity with one party's position is completely different than repeating and clearly supporting the arguments of the Prosecution, without presenting arguments which are tailored to victims' personal interests.

22. As illustrated below,[45] the LRV not only supported the Prosecution's arguments by reiterating the Prosecution's points but also by raising additional alleged errors in relation to these points. The LRV went as far as directly responding to the Defence's arguments,[46] although the Appeals Chamber explicitly requested for the submission of observations and not a response.[47] In other words, where the Prosecution has yet to submit a reply to the Defence's arguments, the LRV attempts to substitute the Prosecution by responding to the Defence's arguments, acting beyond the scope of its mandate and its position as a participant in the appellate proceedings.[48]

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[40] *Situation in the Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 51. See also *Prosecutor v. Kony et al.*, Decision on "Prosecutor's Application to attend 12 February hearing", ICC-02/04-01/05-155, 9 February 2007, page 4; *Prosecutor v. Katanga and Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, 13 May 2008, ICC-01/04-01/07-474-tFRA, para. 155. The Pre-Trial Chamber I referred to the jurisprudence of the European Court of Human Rights where it was affirmed that victims participating in criminal proceedings cannot be regarded as "either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different" European Court of Human Rights, *Berger v. France*, Application No. 48221/99, 3 December 2002, para. 38; *Perez v. France*, Application No. 47287/99 [GC], 12 February 2004, para. 68.
[41] Judge Cotte emphasised that "the legal representatives of the victims are not supplemental prosecutors or part two of the Prosecution", see *Prosecutor v. Katanga and Ngudjolo,* 30 November 2009, ICC-01/04-01/07-T-87-Red-ENG, page 33 lines 14-15. See also *Prosecutor v. Katanga and Ngudjolo,* 11 November 2011, ICC-01/04-01/07-T-333-Red2-ENG, page 36 line 15.
[42] *Prosecutor v. Katanga and Ngudjolo,* Directions for the conduct of the proceedings and testimony in accordance with rule 140, 1 December 2009, ICC-01/04-01/07-1665-Corr, 82; *Prosecutor v. Bemba,* Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023, para. 17. See also *Prosecutor v. Katanga and Ngudjolo,* 30 November 2009, ICC-01/04-01/07-T-87-Red-ENG, page 26 lines 20-21, where Judge Cotte reminded to the LRV that they "are not coming here to reinforce the Prosecution team".
[43] *Prosecutor v. Katanga and Ngudjolo,* 31 March 2010, ICC-01/04-01/07-T-127-Red-ENG, page 41, lines 17-18.
[44] *Prosecutor v. Gbagbo and Blé Goudé,* 29 January 2016, ICC-02/11-01/15-T-10-ENG, page 60, lines 6-7.
[45] See below, Section II.
[46] *See* for instance, Observations, paras 55, 75, 79 and 91.
[47] ICC-02/11-01/15-1290, page 3.
[48] See for instance, Observations, paras 55, 75, 79 and 91.

23. This is yet another demonstration of the LRV acting as a second Prosecutor, by attempting to supplement the Prosecution's arguments, without demonstrating how the arguments affect the personal interests of victims, to the detriment of the rights of the acquitted persons.

II. Defence Response to specific points raised by the LRV in its Observations which do not merely repeat the arguments presented by the Prosecution in its Document in Support of Appeal

24. Since the LRV did not limit itself to observations consisting of "views and concerns" on the issues on appeal affecting victims' "personal interests", the Defence is prejudiced because now it faces two prosecutors to which it must respond. Such a situation unduly prejudices Mr Blé Goudé in that it creates a disbalance in the equality of arms that should govern the present proceedings. In the interests of judicial economy, the Defence will not respond to the repetitions of the Prosecution's arguments raised in the LRV Observations. Therefore, the Defence's choice to not address a given argument raised by the LRV is not an admission on its behalf. Rather, the Defence by the present reply responds first to new arguments raised by the LRV in the Prosecution's first ground of appeal, which will be followed with a reply to new arguments raised in the Prosecution's second ground of appeal. Lastly, the Defence will address the LRV's requested remedy.

A. Prosecution First Ground of Appeal

i. The deferral of the Reasons is not in stark contrast with article 81(3)(c) of the Statute

25. The LRV avers that "[c]ontrary to the Defence's suggestions, failing to provide reasons is clearly illegitimate also when pronouncing an acquittal as it is in stark contrast with article 81(3)(c) of the Statute".[49]

26. First, the Defence is in no event suggesting at paragraphs 49-51 of its Response that the Trial Chamber "failed to provide reasons". To the contrary, the Defence submits that it did.

27. Second, the Defence did submit that particularly in the case of an acquittal, removing the alleged uncertainty about the outcome of a verdict as soon as possible is important and that

[49] Observations, para. 59.

the postponement of the reasons at a later stage after the issuance of a summary of the decision of acquittal, which is not precluded by the Statute, is a way to achieve that goal.

28. Third, the Defence disagrees with the LRV that the postponement of the reasons of a decision of acquittal would, somehow, be in contrast with article 81(3)(c) of the Statute in that a request to maintain the acquitted persons in detention pending appeal could not be adequately demonstrated without the substantive reasons for the acquittal being known. As recalled by the Prosecution itself, "the Prosecution need not have filed its appeal under article 81(1)(a) to request to "maintain the detention of the [acquitted] person pending appeal" under article 81(3)(c)(i). An indication that the Prosecution will be appealing a decision to acquit is sufficient for the purpose of filing an article 81(3)(c)(i) request".[50]

29. Furthermore, the absence of a full reasoned statement did not prevent it from substantiating any request to maintain the acquitted persons in detention and thereafter any appeal on the decision to release them immediately. In fact, the Prosecution did rely on the factors listed in article 81(3)(c) of the Statute to the effect of primarily requesting the conditional release of both acquitted persons, pending an appeal, while not having been informed of the full reasoning of the Trial Chamber in relation to their acquittal.[51] It further relied on these factors when it appealed the Majority's decision to release Mr Blé Goudé and Mr Gbagbo immediately.[52] The reasons for the acquittal would have in any event been irrelevant to assessing whether the factors listed in article 81(3)(c) of the Statute such as, for instance, a concrete risk of flight or the seriousness of the offence charged, which can be assessed independently, could weigh in favour of a decision to maintain detention pending appeal.

30. As to the probability of success of the appeal, the Trial Chamber considered such factors as (i) the early phase of the proceedings in which the acquittal was entered, demonstrating according to it, 'how exceptionally weak the Prosecutor's evidence [wa]s'[53] or (ii) the absence of unanimity among the Trial Chamber judges, to determine whether detention should be maintained.[54] Once again, these are factors that can be evaluated independently and be assessed before the reasons for the acquittal are submitted. The 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion which was available to the Prosecution

[50] ICC-02/11-01/15-1235, para. 11.
[51] ICC-02/11-01/15-1235, paras 3, 20.
[52] ICC-02/11-01/15-1245.
[53] 15 January 2019 Oral Acquittal Decision, page 4, lines 3-5.
[54] 15 January 2019 Oral Acquittal Decision, page 4, lines 6-10.

could also sufficiently assist the Prosecution in substantiating the probability of success of an appeal, and in fact did assist the Prosecution's arguments.[55]

31. Therefore, the argument of the LRV that the absence of a full reasoning on 15 January 2019 would have prevented the Prosecution from substantiating its request and appeal under article 81(3)(c) should be dismissed as unfounded. In any event, it did not have any impact on the assessment of the Appeals Chamber which decided on the conditional release of the acquitted persons on the basis, *inter alia*, of a risk of flight and the seriousness of the charges.[56]

32. Furthermore, as touched upon above,[57] these submissions illustrate the LRV's attempt to reinforce the Prosecution's own point by providing additional arguments that the Prosecution itself had not raised in its Document in Support of Appeal. This is prejudicial to Mr Blé Goudé as it provides the Prosecution with the unfair advantage of an "ally" supplementing its submissions with further arguments, although the impact of the alleged supplemental error on the alleged victims' personal interest has not been demonstrated. Indeed, the question of whether the alleged failure to provide reasons would be in contrast with article 81(3)(c) of the Statute is not even remotely linked to the alleged victims' right to justice and reparation. The Defence reiterates that alleged victims too benefitted from receiving the verdict and summary of the decision prior to the full articulation of its reasoning in writing, as it allowed them to be appraised of the outcome of the Trial Chamber's deliberations.

33. Thus, in light of the above, the LRV's submissions that the deferral of the Reasons would be in stark contrast with article 81(3)(c) of the Statute should be dismissed as unfounded.

ii. The LRV misinterpreted the Appeals Chamber's decisions in the Bemba and Ngudjolo cases regarding the open court requirement

34. The LRV's interpretation of the Appeals Chamber's decisions in the *Bemba* and *Ngudjolo* cases, in relation to the alleged exceptions to the requirement of a judgment delivery in open court, is misleading.[58]

[55] ICC-02/11-01/15-1235, para. 20.
[56] ICC-02/11-01/15-1251-Conf, paras 59-60.
[57] *See* above, paras 20-24.
[58] See Observations, para. 61, referring to *Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Order concerning notification by way of personal service, 16 December 2008, ICC-01/05-01/08-324, page 3: "Although

35. These Appeals Chamber decisions should not be read as setting out strict limited exceptions to the requirement of a judgment delivery in open court, namely the exceptions of judicial recess and confidentiality. The Appeals Chamber made an important clarification regarding the purpose of the open court requirement, *i.e.* that it is to allow for the publicity of the proceedings. In light of this principle and considering the circumstances of the case, it went on to conclude that such purpose could adequately be fulfilled by alternative way of notification, such as internet, or personal service. Therefore, the LRV's statement that it would be only during judicial recess and for confidentiality reasons that an alternative way would be allowed is a misleading and erroneous interpretation of the Appeals Chamber's ruling and should be disregarded.[59] These decisions merely show that the obligation to pronounce judgments "in open court" has been interpreted widely by the Appeals Chamber to encompass all judgments made publicly.[60]

36. Regardless, the Trial Chamber did deliver a summary of its decision in open court, which, as far as trial chambers are concerned, is a permitted alternative to the delivery of the judgment in open court under article 74(5) of the Statute.

37. Moreover, the Prosecution does not argue, as the LRV does, that "[t]he wording of [rule 144(2)] does not exempt the trial chamber from issuing said reasons also orally, pursuant to the literal tenor of article 74(2) of the Statute".[61] The Prosecution merely argues that the 15 January 2019 Oral Acquittal Decision does not qualify as a summary, which the Defence contests, and that therefore the requirement of the delivery of judgment or summary in open court has not been met.[62]

38. The Defence therefore submits that once again the LRV goes beyond its mandate by presenting arguments that have not been raised by the Prosecution, namely that the Reasons

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rule 158 of the Rules of Procedure and Evidence read with article 83 (4) of the Rome Statute provides that judgments of the Appeals Chamber "shall be delivered in open court", the Appeals Chamber notes that the purpose is, inter alia, to allow for publicity of proceedings. In the circumstances of this case, and noting that the Court is in judicial recess, the Appeals Chamber considers that this can adequately be fulfilled by publishing the Appeals Chamber's Judgment on the Decision on application for interim release on the internet, by notifying the participants as usual in accordance with regulations 31 and 32 of the Regulations of the Court and by notifying the appellant in this appeal, Mr. Jean-Pierre Bemba Gombo, by way of personal service under regulation 31 (3) (d) and (4) of the Regulations of the Court." *See also* Observations, paras 84, 88-89.

[59] Observations, paras 61, 87.

[60] *See* Defence Response, footnote 98.

[61] Observations, paras 84, 88-89. *See also* para.102.

[62] Document in Support of Appeal, paras 43-44.

should also have been the subject of an oral hearing, while not demonstrating how the alleged victims' personal interest would have been affected in this regard.[63]

39. Finally, even assuming that the Reasons should also have been the subject of an oral hearing, in addition to the summary, which the Defence contests since the open court requirement had been fulfilled on 15 January 2019, the purpose of the open court requirement, as recalled by the Appeals Chamber, the publicity of the proceedings, was met. The notification of the Reasons by way of internet sufficed to guarantee the publicity of the proceedings.

40. In fact, all judgments at the ICC are read out in public based on a summary. Additionally, article 74(5), in the last sentence reads: "[t]he decision or a summary thereof shall be delivered in open court". Moreover, article 74(5) does not make reference to the timing. The literal meaning of the provision therefore already confirms that the LRV's observations are to be dismissed.

41. Therefore, the LRV's submissions that the Reasons should have also been delivered in open court as it allegedly did not fall into the two exceptions set out by the Appeals Chamber is a mischaracterisation of the jurisprudence and should be dismissed.

iii. The open court requirement in the form of a summary was fulfilled on 15 January 2019

42. Contrary to the LRV submissions, the Defence at no point stated that "the reading of the conclusions and the verdict contained in the 15 January 2019 Oral Decision [could] be considered "[a] full and reasoned statement" of the findings".[64] The Defence actually expressly said the opposite, that, while the 15 January 2019 Oral Acquittal Decision may not be considered as a fully reasoned statement, this qualified as a summary of the decision.[65] Indeed the Defence pointed out that in the 15 January 2019 Oral Acquittal Decision, the Trial Chamber did not merely limit itself to pronounce the ultimate conclusion and the verdict of its decision, which as stated by the Prosecution, is "a short formula stating whether the accused is convicted or acquitted", but did identify the core constitutive elements of the crimes as charged for which, in the Majority's view, the

[63] *See* Defence Response, paras 71-73, 53.
[64] Observations, para. 79.
[65] Defence Response, para. 53.

Prosecution had not satisfied the burden of proof.[66] Therefore, the Defence also disagrees with the LRV's argument that, assuming a summary of the Chamber's findings on the evidence would be "expressly" required under article 74(5) of the Statute, the Chamber would not have met that requirement.[67]

43. Moreover, the Defence reiterates that Article 74(5) of the Statute is completely silent as to the degree of detail a decision's summary must comply with. In the *Ntaganda* case, Judge Fremr read out a summary of the judgment, specifying that it served "to convey those findings made in the judgment to be considered most relevant to the accused and the public", thereby confirming the judges' discretion to consider what is most relevant.[68]

44. Thus, the LRV's arguments that the Majority failed to provide a summary pursuant to article 74(5) should be dismissed.

iv. The hearing on continued detention was not the sign that the Majority did not issue an informed decision

45. According to the LRV, the hearing on the continued detention of both accused held on 13 December 2018 would be a definite sign that the Majority would not have analysed all the facts and evidence before issuing the 15 January 2019 Oral Acquittal Decision one month later.[69] The LRV's reasoning is not based on any concrete elements and should be dismissed as pure speculation. At the time of this aforementioned hearing, it had already been four (4) months since the Trial Chamber had received all parties' written submissions in the NCTA proceedings.[70] The last oral submissions of the parties, which were mainly a reiteration of the parties' written submissions, were dated 22 November 2018, *i.e.* two (2) months before the 15 January 2019 Oral Acquittal Decision.

46. The LRV ignores that the Trial Chamber first and foremost rendered its oral decision with written reasons to follow because it had arrived at a Majority verdict following judicial deliberations, which it sought to communicate as soon as possible.[71]

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[66] Defence Response, para. 52, referring to 15 January 2019 Oral Acquittal Decision, page 2, line 25 to page 3, line 17.
[67] Observations, paras 92-93.
[68] *See* Defence Response, para. 51 referring in its footnote 87 to *Prosecutor v. Bosco Ntaganda*, Transcript of 9 July 2019, ICC-01/04-02/06-T-265-ENG ET, page 3, lines 19- 20.
[69] Observations, para. 108.
[70] The Gbagbo and Blé Goudé Defence NCTA Motions were filed on 23 July 2019.
[71] 15 January 2019 Oral Acquittal Decision, page 4, lines 7-9, stating: "[…] 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".

47. Moreover, the LRV contradicts itself. While arguing that the Majority would not have completed its analysis of all the facts and evidence when it issued the 15 January 2019 Oral Acquittal Decision, it also avers at paragraph 70 of its Observations that "the right to liberty of the Defendants should have been catered by conditionally releasing them, while finalising the written reasons and, thereafter, pronouncing in a public hearing the acquittal and the reasons therefor". With this particular statement, the LRV seems to acknowledge that the Majority had completed its analysis by 15 January 2019 and was in a position to render a verdict, as a decision to acquit is a pre-requisite to the right of liberty the LRV is referring to.

48. Therefore, in light of the above, the LRV's suggestion that the 15 January 2019 Oral Acquittal Decision would not have been informed is misplaced and unfounded.

v. The Trial Chamber did not breach the principle of legality

49. The LRV argues that "a decision to acquit grounded on two different legal bases is in breach of the principle of legality and raises at a minimum uncertainty as to the parties' and participants' legal situation".[72] *First*, as a preliminary matter, the LRV observes that the Defence "denies" and "downplays" the purported disagreement between the Majority judges, thereby misrepresenting the Impugned Decision.[73] However, the LRV incorrectly states that the legal basis for the decision being article 66 is only contained in Judge Henderson' reasons, thereby only reflecting the opinion of one judge.[74] As recognised by the LRV, Judge Henderson's Reasons constitute the majority's analysis of the evidence, and not only that of Judge Henderson.[75] Moreover, the legal basis of article 66 was also articulated in the majority 2019 Oral Decision of Acquittal.[76] As such, the legal basis for the Impugned Decision was articulated on both occasions and the Defence did not mislead the Chamber.[77]

50. *Second*, the LRV's reliance on several European Court of Human Rights ("ECtHR") jurisprudence to support its argument that the Impugned Decision breached the principle of legality is misplaced. It is not disputed by the Defence that the "principle of legal certainty

[72] Observations, para. 27.
[73] Observations, para. 26.
[74] Observations, para. 26.
[75] Observations, 19; ICC-02/11-01/15-T-232, para. 29.
[76] ICC-02/11-01/15-T-232-ENG, page 4, lines 14-19.
[77] Observations, para. 26; Defence Response, paras 11-21.

is a fundamental aspect of the rule of law".[78] The principle of legality was respected by the Trial Chamber in the case at hand, by grounding the Impugned Decision in article 66(2) of the Statute.[79] Moreover, the cited case of *Legrand,* rather than undermining, supports the Defence's position. In this case, the ECtHR reiterated the principle established in *Atanasovski v The former Yugoslav Republic of Macedonia* that "case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement".[80] The case of *CR v United Kingdom cited* by the LRV, which dealt with the evolution of the definition of "marital rape" in the United Kingdom, recognized that "[h]owever clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation" and that "the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition".[81] In the case at hand, the Court did not "depart from their well-established case-law" and the principle of legality was fully respected.[82] The situation faced by the Trial Chamber, namely the severe insufficiency of evidence leading to the acquittal of two defendants on the basis of NCTA motions by the Defence, was unprecedented before the Court and it is therefore necessary for the Trial Chamber to rely on existing relevant precedent, while at the same time, paving the way and contributing to the development of the caselaw.

vi. *The Impugned Decision does not trigger an automatic right to appeal*

51. Contrary to the LRV's suggestion, the Defence does not dispute the effect of the Impugned Decision, which is to end proceedings.[83] The Defence merely disagrees with the LRV's argument that "[i]t is the final nature of an acquittal decision that determines its direct appellate review",[84] as it runs contrary to the Court's jurisprudence referred to by the Defence in its Response – with which the LRV does not engage – which supports a finding

[78] *Hoare v. United Kingdom*, Decision No. 16261/08, 12 April 2011, para. 52, cited in Observations, para. 27, footnote 50.
[79] Defence Response, paras 11-21.
[80] *Atanasovski v. The former Yugoslav Republic of Macedonia,* 36815/03, 14 January 2010, para. 38.
[81] *C.R. v. United Kingdom*, No. 20190/92, Judgment, 22 November 1995, para. 34, cited in Observations, para. 27, footnote 50.
[82] *Hoare v. United Kingdom*, No. 16261/08, Decision, 12 April 2011, para. 54, cited in Observations, para. 27, footnote 50.
[83] Observations, para. 29.
[84] Observations, para. 30.

that it is the nature and not the outcome of the decision which governs the applicable appellate regime.[85]

vii. The Impugned Decision is compatible with internationally recognized human rights

52. The LRV claims that the Majority' rendering of its written reasons six months after the issuance of the oral decision "is inconsistent with the internationally recognised human rights to a reasons decision stated by the Appeals Chamber".[86] However, it is undisputed by the Defence that a Trial Chamber decision must be supported by reasons and that this is a principle consistent with internationally recognized human rights and the appellate jurisprudence of the Court.[87] The cited judgements in *Lubanga* concerned the sufficiency of *written reasons*. In the case at hand, as previously argued,[88] the Chamber clearly provided sufficient reasons, by way of its extensive and detailed Written Reasons, in combination with the oral verdict and summary issued orally.[89] The victims' "right to know reasons of the judgment and the right to appeal" was secured by the Trial Chamber, by its issuance of almost 1000 pages of Majority reasoning.[90] The Trial Chamber's approach was thus entirely compatible with internationally recognized human rights.[91]

53. Furthermore, in its Observations, the LRV observes that the ECtHR has consistently explained that the form of pronouncement to be given to the judgment (oral or written) depends on the special features of the proceedings at hand.[92] A review of the ECtHR jurisprudence relied upon by the LRV supports the Defence's previous submissions according to which the delivery of the Impugned Decision was compatible with internationally recognized human rights, namely that it took into account the special features of the case at hand.[93] For instance, in *Lamanna v Austria*, the ECtHR recalled that it "has applied the requirement of the public pronouncement of judgments with some degree of flexibility" and in that particular case, despite the judgment not having been pronounced publicly, nonetheless did not violate article 6(1) because "the purpose of Article 6 § 1,

[85] Defence Response, paras 24-25. See ICC-02/11-01/15-1314-Conf, paras 53-59; Observations, paras 28-29.
[86] Observations, paras 76-70.
[87] Observations, paras 76-70.
[88] Defence Response, 38-57.
[89] Defence Response, paras 38-57.
[90] Observations, para. 71.
[91] Defence Response, paras 125-135.
[92] Observations, para. 77.
[93] Defence Response, paras 125-135.

namely subjecting court decisions to public scrutiny" had been observed.[94] In the case of *B. and P.,* relied upon by the LRV, the ECtHR recalled that the "form of publicity given under the domestic law to a judgment must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1".[95] In this case, the ECtHR concluded that the Convention did not require making available to the general public the judgments in that case, and that there had been no violation of Article 6(1).[96] The ECtHR found that "a literal interpretation of the terms of Article 6 § 1 concerning the pronouncement of judgments would not only be unnecessary for the purposes of public scrutiny but might even frustrate the primary aim of Article 6 § 1, which is to secure a fair hearing".[97]

54. Similarly, in the cited case of *Werner v Austria*, the Court also reiterated the principle that "the form of publicity to be given to the 'judgment' under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question."[98] In that case the decisions of the Vienna Regional Court and Court of Appeal were served on the applicant in writing and were not delivered at public sittings. Given the particular circumstances of that case, the ECtHR held that "in view of the fact that no judicial decision was pronounced publicly and that publicity was not sufficiently ensured by other means, the Court, like the Commission, concludes that there has been a breach of Article 6 § 1 in this respect".[99] That case is clearly distinguishable from the case at hand, where the Trial Chamber delivered its verdict and summary of its decision publicly, followed by extensive and detailed written reasons.[100]

55. By contrast to the *Werner* case, in the case of *Pretto and Others v Italy*, relied on by the LRV in its Observations, the ECtHR held that having regard to the Court of Cassation's limited jurisdiction, depositing the judgment in the court registry, which made the full text

[94] *Lammana v. Austria*, Judgment No. 28923/95, 10 July 2001, paras 31-32, cited in Observations, para. 46, foonote 91.
[95] *B. and P. v. United Kingdom*, Judgment, Nos. 36337/97 and 35974/97, 24 April 2001, para, 45.
[96] *B. and P. v. United Kingdom*, Judgment, Nos. 36337/97 and 35974/97, 24 April 2001, para, 45 cited in Observations, para. 46, footnote 91.
[97] *B. and P. v. United Kingdom*, Judgment, Nos. 36337/97 and 35974/97, 24 April 2001, para. 48; *See also Szücs v. Austria, where the* ECtHR also iterated the principle according to which "in each case the form of publicity to be given to the 'judgment' under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 § 1. Observations, para. 46, footnote 91.
[98] *Werner v. Austria*, No. 21835/93, Judgment, 24 November 1997, para. 55; Observations, para. 46, footnote 91.
[99] *Werner v Austria*, No. 21835/93, Judgment, 24 November 1997, para. 60.
[100] See *inter alia*, Defence Response, paras 38-57.

of the judgment available to the public, was sufficient to satisfy the requirement of article 6(1) ECHR.[101] In the opinion of the Court, the object pursued by article 6(1) of the Convention in this context – namely, to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial – was no less achieved by a deposit in the court registry, making the full text of the judgment available to everyone, than by a reading in open court of a decision, such reading sometimes being limited to the operative provisions.[102]

56. In *Axen v Germany,* the ECtHR held that the public delivery of a decision of a supreme court was unnecessary given that the judgments of the lower courts had been pronounced publicly.[103] The ECtHR found that the "object pursued by Article 6 para. 1 (art. 6-1) in this context – namely, to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial – was achieved during the course of the proceedings taken as a whole".[104] Similarly, again, in the case of *Sutter v Switzerland* case, the ECtHR held that public delivery of a decision of the Military Court of Cassation was unnecessary, as public access to that decision was ensured by other means, namely the possibility of seeking a copy of the judgment from the court registry and its subsequent publication in an official collection of case-law.[105]

57. Moreover, in both the *Sutter* and *Axen* cases, the ECHR observed that "many member States of the Council of Europe have a long-standing tradition of recourse to other means, besides reading out aloud, for making public the decisions of all or some of their courts, and especially of their courts of cassation, for example deposit in a registry accessible to the public."[106] In both cases, the ECtHR found that the absence of a public hearing for delivering judgment did not contravene article 6(1) ECHR.[107]

[101] *Pretto and Others v Italy*, No. 7984/77, Judgment, 8 December 1983, paras 27-28. *Werner v. Austria*, No. 21835/93, Judgment, 24 November 1997, in Observations para. 46, footnote 91.
[102] *Pretto and Others v Italy*, No. 7984/77, Judgment, 8 December 1983, paras 27-28.
[103] *Axen v Germany*, Appl. No. 8273/78, Judgment, 8 December 1983, para. 32; Observations, para. 46, footnote 91.
[104] *Axen v Germany*, Appl. No. 8273/78, Judgment, 8 December 1983, para. 32; Observations, para. 46, footnote 91.
[105] *Axen v Germany*, Appl. No. 8273/78, Judgment, 8 December 1983, para. 34; Observations, para. 46, footnote 91.
[106] *Sutter v Switzerland,* No. 8209/78, Judgment, 22 February 1984, para. 33; *Axen v Germany*, Appl. No. 8273/78, Judgment, 8 December 1983, para. 31; Observations, para. 46, footnote 91.
[107] *Sutter v Switzerland,* No. 8209/78, Judgment, 22 February 1984, para. 34; *Axen v Germany*, Appl. No. 8273/78, Judgment, 8 December 1983, para. 32; Observations, para. 46, footnote 91.

58. In light of the above, it is clear that the Trial Chamber complied with the consistent principles emerging from the ECtHR with respect to the delivery of the Impugned Decision. In delivering the Impugned Decision, the Trial Chamber took into consideration the particular circumstances of the case, including the complexity of the case, the volume of evidence, the fact that the fundamental liberty of two accused persons were at stake, as well as the lack of compelling evidence brought by the Prosecution to support the charges throughout trial, which warranted that the delivery of the verdict and summary of the judgment in open court, followed by detailed written reasons.[108] The Trial Chamber's approach was entirely compatible with the statutory framework of the Court and the Court's jurisprudence relied upon by the LRV, but also with the consistent jurisprudence of the ECtHR cited in the Observations. The Trial Chamber considered the "entirety of the proceedings conducted" in deciding the manner in which the Judgment would be delivered.[109]

59. Furthermore, the LRV observes that the "provision of a timely written and reasoned judgment in public is necessary to (i) protect an individual from arbitrariness; (ii) maintain public confidence in the courts, and (iii) ensure the right to an appeal, in particular regarding the essential elements of the case heard by the court at hand".[110] Rather than repeating its extensive submissions as to how all of the aforementioned criteria have been fulfilled by the Trial Chamber, the Defence will limit its response to submitting that, again, the jurisprudence relied upon by the LRV only further supports the Defence's arguments that the Impugned Decision conformed to internationally recognized human rights. For instance, in the cited portions of the *Taxquet v Belgium* case,[111] which concerned a jury trial, the ECtHR held that although the Convention does not require jurors to give reasons for their decision and "that Article 6 does not preclude a defendant from being tried by a law jury even where reasons are not given for the verdict" (…) "[n]evertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given".[112] The delivery of the 15 January Oral Acquittal Decision alone would have satisfied this requirement, given that the Trial Chamber provided a summary of reasons for the verdict. That decision was, however,

[108] Judge Henderson's Reasons, paras 5, 7, 9-10; ICC-02/11-01/15-T-232-ENG.
[109] *Pretto and Others v. Italy*, No. 7984/77, Judgment, 8 December 1983, para. 27, cited in Observations, para. 46, footnote 91.
[110] Citations omitted. Observations, para. 45.
[111] Observations, para 45, footnote 87.
[112] *Taxquet v Belgium*, No. 926/05, Judgment, 16 November 2010, para. 90.

supplemented by the Written Reasons. Another example is the cited paragraph of the *Chapparo Alvarez and Lapo Iniguez v Ecuador* case, which concerned defendants' rigths. In that case, the Inter-American Court of Human Rights emphasized the importance for national courts to ensure that defendants' rights are protected by providing sufficient grounds "to permit the interested parties to know the reasons why the restriction of their liberty is being maintained".[113]

60. In sum, a review of the international human rights jurisprudence relied upon by the LRV in its Observations does not support its claims that "internationally recognized human rights cannot alter the content of legal texts of the Court, but are of assistance in applying and interpreting the latter" is inapposite.[114]

viii. The LRV failed to show how the alleged errors materially affected the Impugned Decision and how this alleged failure relates to the personal interests of victims

61. As to the legal criterion that the purported errors on appeal must "materially affect" the Impugned Decision, the LRV's arguments are unconvincing.[115] In its Observations, the LRV submits that the Impugned Decision "would have been totally different" had the Trial Chamber not erred in its application of article 74. The LRV submits namely that had the Trial Chamber not committed the procedural and legal errors, "there is a high likelihood" that it would not have issued "the sparse 15 January 2019 Oral Decision and would have carefully considered all the evidence before discontinuing the case".[116] However, the LRV not only fails to present facts which convincingly show how these considerations affect the personal interests of victims, but also how in the absence of the alleged errors, the Impugned Decision would have been "substantially different".[117] Moreover, its reasoning is not only unsubstantiated but also circular, ie. the LRV's submission amounts to arguing that had the Trial Chamber not made an error, it would not have made an error.

62. The LRV further observed, moreover, that had the Trial Chamber issued its full reasons on 15 January 2019, it would have allowed parties an "immediate opportunity to mount their

[113] *Chapparo Alvarez and Lapo Iniguez v Ecuador,* Series C No. 170, Preliminary Objections, Merits, Reparations and Costs, 21 November 2007, para. 107, cited in Observations, para. 45, footnote 87.
[114] Observations, paras 88-89.
[115] *Prosecutor v Kony et al*. Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19(1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, 16 December 2008, para. 83.
[116] Observations, para. 105.
[117] *See* Defence Response, paras 159-162.

appeals, if any, and the Appeals Chamber would have exercised its review in relation to the findings in question in a more timely fashion", which would have "materially affected" the decision.[118] However, the parties were not in any way prejudiced, given that the deadline for appealing the 15 January 2019 Oral Acquittal Decision started to run from the moment the Written Reasons were rendered.[119] In other words, the timeline for parties to mount an appeal against the Impugned Decision would have been the same, regardless of the date at which the deadline would have started to run. The Impugned Decision, and the parties' opportunity to launch an appeal, were therefore not materially affected in any way by the manner in which the Impugned Decision was delivered.[120]

63. Moreover, the LRV's observation that in an alternative scenario, whereby the Trial Chamber would have rejected the Defence NCTA motions, the purported errors would have materially affected the Defence's ability to immediately file an appeal against that decision, which in turn would have led to the Defendants remaining in detention until at least the issuance of the written reasons of the judgment is perplexing.[121] The LRV does not explain how this is at all related to the victims' interests. These considerations relate rather to the Defence's interests, in a purely speculative and alternative scenario, which is not only irrelevant, but also exceeds the scope of the LRV's mandate to present views and concerns affecting the personal interests of victims.[122]

64. The jurisprudence cited by the LRV from the cases of *Prosecutor v Bemba* and *Prosecutor v Bemba et al,* are not directly relevant to the issues at hand. Those cases concerned, *inter alia*, the sufficiency of *written* reasons issued by the Trial Chamber.[123] Moreover, the principles emerging from those cases support, rather than undermine the Defence's arguments. The Appeals Chambers reiterated in those cases, *inter alia*, that a trial chamber "has a degree of discretion as to what to address and what not to address in its reasoning" and that "not every actual or perceived shortcoming in the reasoning will amount to a breach of article 74(5) of the Statute".[124] Moreover, the Human Rights Committee views in *Hamilton v Jamaica* relied upon by the LRV is clearly distinguishable from the case at

[118] Observations, para. 106.
[119] ICC-02/11-01/15-T-232-ENG, page 5, lines 2-3.
[120] *See* Defence Response, paras 157-167.
[121] Observations, para. 107.
[122] *See* above, paras 11-23.
[123] Observations, footnotes 184-185.
[124] *Prosecutor v. Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, ICC-01/05-01/08-3636-Red, paras 51-54, relied on in Observations, footnotes 184-185.

hand, in that it concerned a situation where a tribunal had convicted the author of murder, and sentenced him to the death penalty. The conviction was appealed and the appellate tribunal had rejected the appeal without issuing any written reasons. The author therefore did not have any recourse to a higher instance.[125] In the instant case, the Trial Chamber clearly complied with the requirement of providing a reasoned decision, with the issuance of the Written Reasons, in conjunction with the pronouncement of verdict summary of reasons provided in the 15 January Oral Acquittal Decision.[126]

65. Furthermore, the LRV observes that "changes in the jurisprudence (…) must be well-known or at least reasonably foreseeable – so that the principle of legality is not breached".[127] In the case at hand, there were no "changes in the jurisprudence" and the LRV fails to explain which "changes" would have been made. Rather, the Trial Chamber was faced with an unprecedented legal situation at the Court, paving the way for decisions of acquittal on the basis of NCTA motions by defendants of the Court, on the basis of established jurisprudence and the Court's statutory framework.

B. Prosecution Second Ground of Appeal

ix. The LRV's submissions 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

66. The LRV presents arguments, which are unrelated to the second ground of appeal, should not be considered since they go beyond the issues that are on the appeal, and thus are outside the scope of the LRV's views and concerns on the issues on appeal in the present case.

67. The LRV merely provides another interpretation of the evidence with respect to the five incidents, which has no bearing on whether or not the Chamber had a clear standard in mind when it acquitted Mr Blé Goudé.[128] Additionally, the LRV puts forward alleged errors of

[125] *Hamilton v. Jamaica*, CCPR/C/50/D/333/1988, Communication No. 333/1988, 25 March 1994, para. 9.1., cited in Observations, footnote 184.
[126] *See* Defence Response, para 38-120.
[127] Observations, para. 109.
[128] Observations, para. 132 (submitting that with respect to the first incident the majority erred when it did not find there was a policy to rape female pro-Ouattara demonstrators since a finding of policy is not required); Observations, para.135 (submitting that Judge Henderson applied a different standard with respect to the second incident than the one stated he applied in the introduction of his reasons); Observations, para. 155 (demonstrating that the LRV's interpretation of the evidence with respect to the third incident is incompatible with Judge Henderson's "theory" on it); Observations, para. 161 (arguing that Judge Henderson's approach to the evidence

fact that the Prosecution did not allege, and thus her submissions fall clearly outside the scope of views and concerns of victims on the issues on appeal.

68. The LRV alleges that Judge Henderson erroneously concluded that the violence on 25 February 2011 began before Mr Blé Goudé's speech. *First*, this alleged error is one that the Prosecution expressly chose to not address when it submitted "although establishing the starting time of the clashes was relevant to assess the separate question of whether Mr Blé Goudé was responsible for this incident, it was unnecessary to determine if the witnesses were generally consistent about the clashes themselves".[129] *Second*, the LRV chooses in its Observations to make submissions with respect to this question, without first showing how it is related to the second ground of appeal, and in what capacity the personal interests are affected by the Chamber's according more weight to the Police commissioner's report than to other evidence. *Third*, the LRV ignores the clear evidence that the clashes began prior to 25 February 2011. Therefore, these submissions should be dismissed by the Appeals Chamber.

69. Lastly, the LRV contends that Judge Henderson erroneously provided a set of alternative hypotheses of how the relevant events occurred.[130] The LRV submits that the alleged error lie in Judge Henderson not assessing the evidence on the basis of the Prosecution's narrative.[131] First, this alleged error is wholly divorced from the second ground of appeal, and consists of a disagreement with the Majority's assessment of the evidence. Second and more importantly, the submission is fundamentally flawed because of its circular reasoning. Assessing the Prosecution's evidence on the basis of the Prosecution's narrative would assume the existence of what the Prosecution had the burden to prove, namely that its narrative was supported by the evidence, and thus there was sufficient evidence to sustain a conviction against Mr Blé Goudé. As the Chamber emphasized in Judge Henderson's Reasons, "the Chamber does not have any responsibility to attempt to "rescue" the Prosecutor's case against the accused."[132] Therefore, the Majority found that when the

was inconsistent and unreasonable, and that the evidence supports the Prosecution's narrative with respect to the fourth incident); Observations, para 172 (Submitting that the Majority committed several errors of fact when assessing the evidence on the rapes committed in connection with the fifth incident).
[129] Document in Support of Appeal, para. 224.
[130] Observations, para. 147.
[131] Ibid.
[132] Judge Henderson's Reasons, para 9.

evidence does not sufficiently support the Prosecution's narrative it may discontinue the trial and enter an acquittal.[133]

x. The LRV's argument regarding the Chamber's inconsistent approach to anonymous hearsay evidence amounts to a mischaracterization of its approach

70. The LRV submits that when the Chamber found that it could not rely on anonymous hearsay to conclude there was an alleged policy to rape pro-Ouattara supporters, the judges were inconsistent with their previous stated approach to anonymous hearsay.[134] Such a conclusion cannot be drawn on the basis of the LRV's submissions. In support of this argument, the LRV cites Trial Chamber I's "Decision on requests for leave to appeal the 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and (68(3))'".[135] In this decision refusing to grant the Defence leave to appeal, the Chamber reasoned that there was no exclusionary rule with respect to a Chamber submitting anonymous hearsay. The LRV assumes that by refusing leave to appeal, the Chamber would accord weight to it. This is a false assumption, and thus does not show any inconsistency on behalf of the Majority. *Authorizing* the submission of hearsay evidence is something different from *accepting* it as evidence.

71. Indeed, Judge Henderson criticized the Trial Chamber' decision to adopt a submission regime because it flooded the case record with evidence that was not sufficiently authenticated or was so lacking in probative value that it could not meaningfully assist the Chamber in determining any material issues.[136] Thus, the Trial Chamber was obligated to consider all evidence submitted in disposing of the case, though in an ordinary NCTA procedure certain evidence would have been excluded. Judge Henderson emphasized this when he reasoned "the Chamber must engage in a full review of the evidence submitted and relied upon by the Prosecutor."[137] Therefore, contrary to the LRV's submissions, the Trial Chamber never excluded anonymous hearsay, and therefore it did not contradict its previous stated approach to anonymous hearsay. Indeed, it considered all the evidence

[133] Ibid.
[134] Observations, para. 132.
[135] ICC-02/11-01/15-612, para. 17.
[136] Judge Henderson's Reasons, para. 4. *See* Judge Henderson's Reasons, paras 20-51.
[137] Judge Henderson's Reasons, para. 8.

submitted in the case, and found that the Prosecution had not adduced sufficient evidence to sustain a conviction.

C. THE REQUESTED REMEDY

xi. The LRV's submission that a mistrial must be declared to remedy the unfairness of the proceedings is wholly unsubstantiated

72. The LRV requests that a mistrial be declared because numerous alleged errors of law and procedure affected the fairness of the proceedings.[138] In support of this argument, the LRV does not raise one instance in which it was not allowed by the Trial Chamber to present its views and concerns. Indeed, it was the LRV's choice to not present evidence, despite having been given the opportunity by the Trial Chamber. Rather than showing concrete examples of the Chamber not giving the participating Victims a voice in these proceedings, the LRV bases its arguments on mere speculation and perceptions. According to the LRV the Victims perceived that the attitude of the bench, especially of the Presiding Judge, was more favourable to the Defence. Perceptions based on decisions favouring one party over another are not sufficient to show any bias of the Trial Chamber. Indeed, if that were the case, most accused would be able to show that a Trial Chamber is biased against them, since in a functioning criminal legal system more accused are convicted than are acquitted. Moreover, in the instant case, the Presiding Judge was highly critical of the Defence, and issued several decisions rejecting Defence requests. In Judge Tarfusser's Reasons, the Judge dedicated an entire section of his Opinion to pointing out what he believed were the shortcomings of both Defence teams, and their poor choice of strategy with respect to the NCTA motion.[139]

73. Another perception on which the LRV bases its arguments is that the Majority lacked an understanding of the historical and political background of the Ivorian post-electoral crisis, especially the ethnic targeting of certain individuals. This submission does not pass muster. The Chamber was acutely aware that the historical political context that underlay the charges was complex and found that the Prosecution's narrative did not take this into account.[140] The Chamber found that the Prosecution's narrative told a one-sided story that

[138] Observations, para. 177.
[139] Judge Tarfusser's Opinion, paras 87-88.
[140] Judge Henderson's Reasons, paras 71-77.

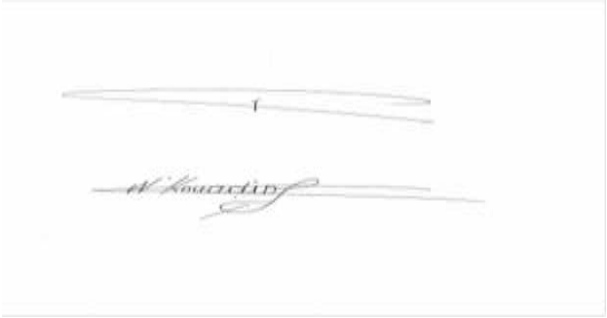
was built on a "unidimensional conception of the role of nationality, ethnicity, and religion (in the broadest sense) in Côte d'Ivoire in general and the post-electoral crisis in particular".[141] Thus, disagreeing with the Prosecution's narrative regarding the historical political context cannot be equated with misunderstanding it. Therefore, the LRV's submissions in this regard should be dismissed.

74. Lastly, the Defence is puzzled by the LRV's request that a mistrial be declared while simultaneously requesting that proceedings be reinitiated against Mr Blé Goudé. A declaration of a mistrial would leave the case in the hands of the Prosecution, and thus leaving uncertain the possibility of future proceedings against Mr Blé Goudé. Therefore, it is inapposite for the LRV to support this remedy, while at the same time requesting that a new trial commence. The Defence's position is that a mistrial cannot be declared at this stage of the proceedings, and that such a declaration would be fundamentally unfair as stated in its Response to the Prosecution's Document in Support of Appeal. Therefore, these submissions of the LRV should not be taken into account.

V. CONCLUSION

75. In conclusion, the LRV exceeded the scope of its mandate as provided by the Statute and as ordered by the Chamber, by failing to provide concretely how the issues on appeal affect victims' personal interests. By acting as a "second prosecutor" the LRV undermines Mr Blé Goudé's fundamental right to a fair trial. Moreover, as illustrated above, the LRV's observations on specific points raised in its Observations are unconvincing and misconceived, and should therefore be discarded or be given little weight by the Chamber.

Respectfully submitted,



Mr Knoops, Lead Counsel and Mr N'Dry, Co-Counsel

[141] Ibid, para. 73.

Dated this

11 May 2020

At The Hague, the Netherlands