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**International
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Court**

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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

Public

**Blé Goudé Defence Submissions answering the Appeals Chamber's questions in
"Decision rescheduling, and directions on, the hearing before the
Appeals Chamber" (ICC-02/11-01/15-1338)**

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. On 30 April 2020, the Appeals Chamber (“the Chamber”) ordered the parties and the Legal Representative for Victims (“LRV”) to provide further submissions¹ arising from the Prosecution’s appeal² against Trial Chamber I’s (“Trial Chamber”) decision granting the Defence for Mr Blé Goudé (“Defence”) and the Defence for Mr Gbagbo’s respective motions for a no case to answer (“Impugned Decision”).³ The Defence hereby presents its answers to the Chamber’s questions.⁴

II. SUBMISSIONS

A. Questions relating to Ground one of the appeal

(i) *Question 1*⁵

2. Article 66(2) of the Statute which enshrines the Prosecution’s burden of proof – a corollary of the presumption of innocence – is the appropriate legal basis for a NCTA decision.⁶ A NCTA decision is granted where a trial chamber concludes that the Prosecution has not discharged its evidential burden by submitting sufficient evidence capable of supporting a conviction with respect to one or more of the charges.⁷ The main rationale is that an accused should not be called upon to answer a charge if, at the end of the Prosecution case, there is insufficient evidence on which a chamber could convict.⁸ Therefore, in the context of NCTA proceedings, a trial chamber’s task of assessing whether a reasonable trial chamber could be satisfied beyond reasonable doubt of the guilt of the accused, is intrinsic to the Prosecution’s burden of proof provided for in article 66(2) of the Statute.⁹

¹ ICC-02/11-01/15-1338.

² ICC-02/11-01/15-1277-Conf.

³ ICC-02/11-01/15-T-232-ENG; ICC-02/11-01/15-1263.

⁴ The Chamber allowed some flexibility by indicating that “questions are intended to guide the parties and victims in their submissions and need not be answered individually”, ICC-02/11-01/15-1338, page 3. Therefore, the Defence will address certain questions in a consolidated form. The Prosecution’s glossary in annex A of its Document in Support of Appeal is included herewith by reference: ICC-02/11-01/15-1277-Conf-AnxA.

⁵ ICC-02/11-01/15-1338, para. 1.

⁶ See also article 67(1)(i), Statute; 15 January 2019 Oral Acquittal Decision, page 3 lines 1-5, page 4, lines 15-16; Judge Henderson’s Reasons, paras 2, 14-15; *Ruto and Sang* NCTA Decision, paras 17-18; *Ruto and Sang* Decision No. 5, para. 23.

⁷ Judge Henderson’s Reasons, paras 14-15.

⁸ *Ruto and Sang*, Decision No. 5, para. 32.

⁹ *Ruto and Sang* NCTA Decision, para. 18. As held by the Trial Chamber in *Jelisić*: “the notion of proof of guilt beyond reasonable doubt must be retained in the operation of Rule 98bis”, *Prosecutor v. Jelisić*, ICTY, Judgement, 5 July 2001, Case No. IT-95-10-A, paras 36-37; *Milošević* Rule 98bis Decision, para. 11; Article 64(2) of the Statute, which provides for the Trial Chamber’s duty to ensure a fair trial and full respect for the

(ii) Question 2¹⁰

3. Although article 74 of the Statute does not expressly indicate whether the term “decision” refers to one necessarily rendered at the end of trial, for the reasons below, it is clear that article 74 applies exclusively to the final judgment of the Trial Chamber on the guilt or innocence of the accused, as distinct from decisions made at the “halfway” NCTA stage, which entail an entirely different legal test.¹¹ First, this conclusion emerges from a textual and purposive interpretation of article 74. As a matter of construction, the term ‘decision’ is singular and preceded by the word “the” throughout article 74; it refers to *one* decision, meaning that which is made at the end of trial on the guilt or innocence of an accused person.¹² This interpretation also emerges when the term “decision” is read in association with other words in article 74.¹³ For instance, an article 74 decision shall be based on a trial chamber’s “evaluation of the evidence and the *entire* proceedings”, a reference to the global assessment of the facts and evidence leading up to a final judgment.¹⁴ Another indication of the drafters’ intention that article 74 only applies to a final judgment on the guilt or innocence of an accused is to be found, when read together with article 81(1) of the Statute.¹⁵
4. *Second*, the above interpretation emerges from the jurisprudence of the Court. All decisions at the Court rendered on the basis of article 74 of the Statute thus far have been denominated ‘Judgment’ and are final decisions made on the guilt or innocence of

rights of the accused, provides an additional legal basis for the NCTA procedure and decision, *See* Judge Fremr’s reasons, where the legal basis was “Article 64, 66 and 67 of the Rome Statute”, *Ruto and Sang* NCTA Decision (Reasons of Judge Fremr), para. 1; ICC-02/11-01/15-1315-Conf (“Defence Response”), paras 11-36.

¹⁰ ICC-02/11-01/15-1338, para. 2.

¹¹ *Ruto and Sang* Decision No. 5, para. 23: “As an initial point, a distinction needs to be made between the determination made at the halfway stage of the trial, and the ultimate decision on the guilt of the accused to be made at the end of the case”; Judge Henderson’s Reasons, para. 13; *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98bis, 21 June 2004 (“*Strugar* NCTA Decision”), para. 10; *See also* Defence Response, paras 113-114.

¹² *Ibid.* *See also* Bemba AJ, paras 52, 105.

¹³ Article 74(2) provides “The Trial Chamber’s decision (...) The decision shall not exceed (...) The Court may base its decision (...)”; Article 74(3) provides that the judges “shall attempt to achieve unanimity in their decision (...)”. Article 74(5) provides that “The decision shall be in writing (...)” (emphasis added).

¹⁴ Article 74(2), Statute. “The indication that the decision shall be based on the ‘entire proceedings’ and on the ‘evidence submitted and discussed before [the Court] at the trial’ and that it shall contain a ‘full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions’ suggest that article 74 is applicable to the decision on the guilt or innocence of the accused. This interpretation is confirmed by the term used in the Spanish version of this provision ‘*fallo*’, which usually designates the judgment”, O. Triffterer and K. Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (2016), (“Triffterer/Ambos”), page 1830; Defence Response, para. 36.

¹⁵ *See* Defence Response, paras 14-16.

accused persons.¹⁶ For instance, in *Prosecutor v Lubanga*, the Trial Chamber held: “[r]egulation 55 sets out the powers of the Chamber (...). One stage is defined in Regulation 55(1) by referring expressly to Article 74 of the Statute which sets out the “Requirements for the decision”, that is, the requirements for the Trial Chamber’s final judgment”.¹⁷ In *Prosecutor v Bemba*, the Appeals Chamber specified that “the decision” was one being made “at the end of the trial”.¹⁸

5. *Third*, the interpretation that article 74 of the Statute solely applies to final judgments emerges in light of the drafting history of article 74. For instance, earlier draft proposals for the Statute used the term “judgment” instead of “decision” in what is now article 74 of the Statute. Significantly, the drafting history reveals that article 74 was drafted with the purpose of governing the modalities for the rendering of a trial chamber’s final judgment on the guilt or innocence of an accused person.¹⁹
6. *Fourth*, this interpretation also clearly emerges from virtually every academic commentary on the Statute. Commentaries consistently refer to article 74 of the Statute as providing for the modalities for the rendering of final judgments by a trial chamber.²⁰

¹⁶ See Triffterer/Ambos, page 1831.

¹⁷ Emphasis added. *Prosecutor v. Lubanga*, Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, 14 July 2009, ICC-01/04-01/06-2049, para. 27. *Prosecutor v. Lubanga*, Minority opinion on the "Decision giving notice to the parties and participants that the legal characterisation of facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 17 July 2009, ICC-01/04-01/06-2054, para 9, 29, where Judge Fulford, stated that “[...] a legal re-characterisation of the facts reached during the trial [...] would in due course become incorporated into the Decision at the end of the case. A conviction of the accused on this basis, would lead – without more – to a fundamental breach of the prohibition contained in Article 74(2), that “[...] [t]he decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.

¹⁸ See also *Bemba* AJ, paras 52, 105. The corollary of article 74 in the ICTY, ICTR and SCSL statutes, which are rules 98ter, rule 88 and rule 88 respectively, all refer to the “judgment”. See *Ruto and Sang* Judge Herrera Carbuccion’s Dissenting Opinion, para. 17.

¹⁹ See for instance, Triffterer/Ambos, pages 1830-1831: “Article 74(2) spells out the procedural, evidentiary and factual parameters of the decision on the guilt or innocence of the accused”, page 1836. The heading of articles 45 and 72 (which later became article 74) of the *Consolidated Draft* was “Quorum and Judgment”; See also pages 1827-1829, recounting the drafting history with respect to the modalities for the rendering of the judgment or final decision of the trial chamber.

²⁰ See for instance C. Bassiouni and W. Schabas., *The Legislative History of the International Court* (2016), page 440, in which article 74 is presented together with rule 142 “Deliberations” which refers the final judgment made at the end of trial. See W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2016), pages 1129-1135, in commenting on article 74, indicates inter alia, that “[d]ecisions must be delivered in open court. This applies not only to decisions on guilt or innocence, but also those concerning admissibility of a case, the jurisdiction of the Court, sentence and reparations” page 1135. Schabas further notes: The Committee of the Whole included the following in a transmittal letter to the Drafting Committee: ‘The Committee of the Whole informs the Drafting Committee that the phrase “final decision of acquittal or conviction and sentence” should be used to refer to the final decision of the Trial Chamber throughout the Statute, page 1130. W.

(iii) Questions 3 and 4²¹

7. As argued above, the language of article 74 of the Statute precludes from its ambit a NCTA decision by a trial chamber, as the term “decision” refers exclusively to one made at the end of trial, on the guilt or innocence of an accused person, which fundamentally differs from a decision made at the halfway stage the standard of whether a reasonable trial chamber could convict.²² In her dissenting opinion in *Ruto and Sang*, Judge Herrera Carbuccion emphasised that a NCTA, which is a “halfway” decision, is not governed by article 74, which would require a higher evidentiary standard.²³ The mere fact that the outcome of a NCTA may be an acquittal does not trigger the application of the regime of article 74 of the Statute, which was intended to apply solely to final judgments made by the trial chamber on the basis of the totality of the evidence.²⁴
8. The only reasonable interpretation of the phrase “entire proceedings” is one which refers exclusively to trial proceedings in which the Defence has either presented its case or had the opportunity to do so, following the close of the Prosecution’s case. *First*, the plain meaning of the word “entire” signifies proceedings which have “no element or part left out” and that are “whole”.²⁵ In the context of NCTA proceedings which terminate in an acquittal, the Defence does not present its evidence, nor is it given the opportunity to do

Schabas, *An introduction to the International Criminal Court* (2020), page 325: “[t]he English version of Article 74 of the Rome Statute refers to the final determination by the Trial Chamber as its ‘decision’ rather than as its ‘judgment’ (...)” (emphasis added); See also D. Luban et al., *International and Transnational Criminal Law* (2014): “At the trial and judgment phase, Article 74 of the statute describes the requirements for a judicial verdict. It provides in part, that the Trial Chamber’s decision “shall be based on its evaluation of the evidence and the entire proceedings” (...) (emphasis added).

²¹ ICC-02/11-01/15-1338, paras 3-4.

²² *Bemba* AJ, paras 52, 105: the Appeals Chamber specified “the decision”, as one being made at the end of trial by including square brackets: “The decision [of the Trial Chamber at the end of the trial] shall not exceed the facts and circumstances described in the charges and any amendments to the charges.” (emphasis added). The Appeals Chamber also held: “The Appeals Chamber finds that these considerations also apply, in principle, to decisions on the guilt or innocence of the accused under article 74 of the Statute”. This is also implicit in the 2019 Chambers Practice Manual, paras 76 (iv) and 87; *Strugar* NCTA Decision, para. 13: “A decision on a motion pursuant to Rule 98 bis involves no evaluation of the guilt of the accused in light of all the evidence (...)”; *Ruto and Sang* Decision No. 5, para. 23: “Whereas the latter test is whether there is evidence which satisfies the Chamber beyond a reasonable doubt of the guilt of the accused, the Chamber recalls that the objective of the ‘no case to answer’ assessment is to ascertain whether the Prosecution has lead sufficient evidence to necessitate a defence case, failing which the accused is to be acquitted on one or more of the counts before commencing that stage of the trial.”

²³ “(...) the subjective or mental element must be analysed taking into consideration that this is a halfway decision, and not a decision pursuant to Article 74 of the Statute, which would require a higher evidentiary standard vis-à-vis the mental element”, and “a final determination on the precise mode of liability can only be made upon an evaluation of the totality of the evidence submitted in trial pursuant to Article 74 of the Statute”, *Ruto and Sang* Judge Herrera Carbuccion's Dissenting Opinion, paras 67, 75.

²⁴ See above, paras 3-6.

²⁵ “Entire” in the online Merriam-Webster dictionary: <https://www.merriam-webster.com/dictionary/entire> (consulted online on 19 May 2020).

so, as the insufficiency of evidence brought by the Prosecution, in light of its burden of proof pursuant to article 66(2) of the Statute, does not warrant the continuation of trial. Given that they are halted at the halfway stage, trial proceedings can therefore not be deemed to be “whole”.

9. *Second*, the legal standard applicable at the NCTA stage, namely whether there is evidence upon which a reasonable chamber could convict, is fundamentally different than that envisaged in article 74 of the Statute, where the trial chamber is tasked with evaluating the entirety of evidence presented at trial and assess whether the Prosecution has proven its case beyond a reasonable doubt. The phrase “entire proceedings”, when read textually, and in conjunction with article 74(2) (a chamber must “base its decision only on evidence submitted and discussed before it at the trial”), further excludes from its ambit decisions on NCTA motions, as this phrase implies an evaluation on the evidence to determine the guilt or innocence of an accused person, involving a much higher standard.²⁶ Moreover, implicit in the phrase “entire proceedings” is a trial where the Defence has presented its evidence, or was given the opportunity to do so, as opposed to proceedings which were halted at the halfway stage based on a lack of sufficient evidence brought by the Prosecution at the close of its case.
10. *Third*, it is also precisely because the NCTA “does not carry an equal possibility of a conviction at that stage, as it does an acquittal” that article 74 cannot be deemed to apply.²⁷ As previously argued, it is not the end result or the effect of a decision, but rather the nature of the decision, which may or may not trigger the application of article 74.²⁸ It is therefore irrelevant whether the resulting *effect* of a decision, such as an

²⁶ See article 74(2), Statute. *Ruto and Sang* Judge Herrera Carbuccia's Dissenting Opinion, paras 67, 75; Defence Response, paras 113-114.

²⁷ ICC-02/11-01/15-1338, para. 4(b).

²⁸ Defence Response, para. 24, relying *Prosecutor v. Mbarushimana*, Reasons for Decision on the appeal of the Prosecutor of 19 December 2011 against the ‘Decision on the confirmation of the charges’ and, in the alternative, against the ‘Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana’ and on the victims' request for participation, 20 December 2011, ICC-01/04-01/10-483, paras 22-23; *Prosecutor v. Mbarushimana*, “Decision on the admissibility of the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 28 July 2011 entitled ‘Decision on the “Second Defence request for interim release”’, 21 September 2011, ICC-01/04-01/10-438 (OA 2), para. 17, relying on *Prosecutor v. Lubanga*, Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “Décision sur la confirmation des charges” of 29 January 2007”, 13 June 2007, ICC-01/04- 01/06-926 (OA 8), para. 15; *Situation in the Republic of Kenya*, Decision on the admissibility of the “Appeal of the government of Kenya against the ‘Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence”, 10 August 2011, ICC-01/09-78, para. 17, where the Appeals Chamber held similarly, that “[e]ven if the ultimate impact of a decision of a Pre-Trial or Trial Chamber were to affect the

acquittal deriving from a NCTA decision, coincides with one of the effects of a decision made pursuant to article 74, *i.e.* an acquittal pronounced at the end of trial.²⁹

11. *Fourth*, the Trial Chamber's determinations in the *Prosecutor v. Ntaganda* case for considering a NCTA procedure further reinforces the interpretation that the regime of article 74 does not apply to NCTA decisions.³⁰ In *Ntaganda*, the Appeals Chamber emphasised the discretionary nature of a NCTA, to be exercised on a case-by-case basis, and affirms that the considerations involved in a chamber's decision to entertain a NCTA procedure are entirely different than those involved in the rendering of the final judgment at the end of trial pursuant to article 74.³¹ While a NCTA procedure is discretionary in nature and involves considerations of the protection of the rights of the accused, in a situation where there is insufficient evidence which could reasonably sustain a conviction, the rendering of a judgment under article 74, when trial proceedings reach their end, is mandatory rather than discretionary.³²

12. In sum, the only outcomes contemplated in article 74, which would trigger its application, are final judgments on the guilt or innocence of an accused person. Although the *effect* of a successful NCTA motion may lead to the discontinuance of proceedings and an acquittal, this resulting effect does not "by default" trigger the application of article 74, envisaging an entirely different set of circumstances.³³

(iv) Question 5³⁴

13. The victims' rights and interests, as participants, are to be accommodated in the NCTA procedure as in other phases of trial proceedings, namely, through the presentation of their "views and concerns" insofar as victims' "personal interests" are affected, as governed by the Statute, Rules and Regulations of the Court.³⁵ The victims may not,

admissibility of cases, that fact would not, in and of itself, render the decision a 'decision with respect to [...] admissibility' under article 82(1)(a)".

²⁹ Defence Response, para. 32.

³⁰ ICC-02/11-01/15-1338, para. 4(c).

³¹ *Ntaganda* NCTA AD, para 44; *Ruto and Sang* Decision No. 5, paras 22-23.

³² *Ntaganda* NCTA AD, para. 13; *Ntaganda* NCTA Decision, para. 25.

³³ See *Ruto and Sang* Decision No. 5, paras 22-23.

³⁴ ICC-02/11-01/15-1338, para. 5.

³⁵ *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

through their legal representatives, act as a “second prosecutor”, as this would be fundamentally incompatible with the accused’ right to a fair trial.³⁶ Victims’ views and concerns have been accommodated in the instance case.

(v) Questions 6 and 7³⁷

14. ICTY jurisprudence may provide guidance in addressing NCTA proceedings at the Court. The extent of such guidance will, however, depend on the NCTA standard each individual trial chamber will adopt, in light of the *sui generis* nature of the Court.³⁸ The Court has already recognized the reasoning applied by ICTY trial chambers in adjudicating defence NCTA motions with respect to its own NCTA proceedings.³⁹ In the absence of a clear provision in the Court’s statutory framework governing NCTA proceedings, article 21(1)(b) of the Statute provides that the Court shall apply “principles and rules of international law”.⁴⁰ Given its rich body of jurisprudence relating to NCTA proceedings, and certain similarities between trials conducted at the ICTY and at the Court, ICTY decisions provides valuable interpretative guidance in setting the parameters of NCTA proceedings at the Court.
15. However, insofar as the appropriate appellate regime is concerned, ICTY jurisprudence does not offer authoritative guidance in the context of NCTA decisions, given the clarity

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 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”, 29 August 2013, ICC-02/11-01/11-492, para. 10.

³⁶ 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 and page 26 lines 20-21; *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. Victims’ central interest in the search for truth is satisfied, not only when those responsible for the crimes they suffered are declared guilty, but also when those not responsible for such crimes are acquitted, even at the halfway stage, so that the search for those who are criminally liable can continue, *Prosecutor v. Katanga*, 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. 36.

³⁷ ICC-02/11-01/15-1338, paras 6-7.

³⁸ See below, para. 24.

³⁹ For instance, in *Ntaganda*, the Appeals Chamber observed “(...) as stated by the ICTY, a ‘no case to answer’ procedure protects “the right of an accused not to be called on to answer a charge unless there is credible evidence of his implication in the offence with which he is charged. In the context of the Statute, such a procedure is, therefore, most directly connected with the right of the accused “to raise defences and to present other evidence admissible under this Statute” pursuant to article 67 (1) (e) of the Statute and, in addition, with the right “[n]ot to be compelled to testify [...] and to remain silent” pursuant to article 67 (1) (g) of the Statute.”, *Ntaganda* NCTA AD, para. 46. See also Defence Response, para. 23.

⁴⁰ See for instance, *Prosecutor v. Lubanga*, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, para. 28.

of the Statute in this respect.⁴¹ In considering whether a NCTA decision triggers the application of article 81 (direct appeal) or article 82 (requiring prior leave), the statutory framework of the Court is clear and exhaustive in nature:⁴² article 81(1) excludes from its ambit final NCTA decisions, as it only applies to final judgments by the trial chamber on the basis of article 74, as argued above. NCTA decisions are therefore captured by the residual category for appellate review provided in article 82(1)(d) of the Statute. Such an approach is compatible with the hierarchy of applicable sources of law at the Court, as provided for in article 21(1) of the Statute.⁴³

16. In addition to these procedural grounds, there are substantial grounds which warrant the rejection *in limine* of the Prosecution's appeal, notwithstanding the finality of the Impugned decision acquitting Mr Blé Goudé, that is, the fundamental principles of fairness and equality of arms. Relieving the Prosecution of its obligation to seek leave to appeal the Impugned Decision would amount to circumventing the appellate regime provided for in the Statute, contrary to the demands of fairness.⁴⁴ It would place the Defence in a fundamentally unfair position, as it would effectively amount to granting the Prosecution more automatic legal remedies than the Defence in the context of NCTA proceedings. Rather than being grounded in the statutory framework of the Court, such an approach would be result-driven, which is inequitable as the Defence would not have access to the same appellate rights, had the NCTA outcome been different.⁴⁵ In addition, as indicated above, the absence of an explicit provision governing the NCTA *procedure* in the Statute does not justify resorting "by default" to the application of article 74 for

⁴¹ The Court has held that external sources of law can be resorted to when there is a *lacuna* in the written law of the Statute and Rules, See *Prosecutor v. Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, ICC-02/05-01/09-3, para. 44.

⁴² *Prosecutor v. Lubanga*, Decision on the "Registrar's Submissions under Regulation 24bis of the Regulations of the Court In Relation to Trial Chamber's Decision ICC-01/04- 01/06-2800" of 5 October 2011, 21 November 2011, ICC-01/04-01/06-2823, para. 16.

⁴³ Article 21(1)(a) provides that the Court shall apply first and foremost the Statute and the Rules of Procedure and Evidence.

⁴⁴ Defence Response, paras 27-30.

⁴⁵ Defence Response, paras 27-30. See for instance *Prosecutor v. Mbarushimana*, Reasons for Decision on the appeal of the Prosecutor of 19 December 2011 against the 'Decision on the confirmation of the charges' and, in the alternative, against the 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana' and on the victims' request for participation, 20 December 2011, ICC-01/04-01/10-483, paras 22-23; See Defence Response, paras 24-25. See also *Prosecutor v. Mbarushimana*, "Decision on the admissibility of the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 28 July 2011 entitled 'Decision on the "Second Defence request for interim release"', 21 September 2011, ICC-01/04-01/10-438 (OA 2), para. 17, relying on *Prosecutor v. Lubanga*, Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges" of 29 January 2007", 13 June 2007, ICC-01/04-01/06-926 (OA 8), para. 15.

the rendering of a NCTA *decision*. Such an approach not only runs contrary to the wording and spirit of the Statute, but is also fundamentally unfair.⁴⁶

17. Moreover, the possibility of finality of the proceedings in and of itself does not trigger the application of article 74(5) of the Statute. Under the Statute, not all “final” decisions must be entered pursuant to article 74.⁴⁷ For instance, admissions of guilt under articles 64(8)(a) and 65 of the Statute, are governed by the formal requirements of rule 139.⁴⁸ That such a judgment is not pronounced pursuant to article 74(5) does not take away from its resulting legal and binding effect. Furthermore, the Prosecution’s failure to seek leave to appeal within the allocated time frame should not be remedied by the Appeals Chamber simply because it would impose the disability of *ne bis in idem*. In the present case, in the absence of an error of omission in the Statute, remedying the Prosecution’s failure, namely by deeming that the Impugned Decision falls within the ambit of article 74 on the sole basis that its result is an acquittal, is not justified.⁴⁹ If the Prosecution had any doubt as to the applicable appellate regime, it could have achieved certainty by submitting both a request for leave to appeal and a notice of appeal pursuant to rules 154 and 155 simultaneously, or it could have sought judicial guidance from the Chamber.

(vi) Question 8⁵⁰

18. While not expressly contemplated under article 74(5), its text is sufficiently broad to leave to the trial chamber’s discretion the possibility of issuing an oral decision of acquittal or conviction, with reasons following later.
19. The Prosecution’s theory that the Majority failed to enter one decision, by “separating” the verdict from the reasons, is a misinterpretation of the one decision requirement under article 74(5), which is linked to the accommodation of dissenting views, as opposed to the deferral of reasons.⁵¹ The fact that the *full* decision has been delivered in two stages does not make it any less complete nor does it violate its unity. The unity of the decision on the one hand and the deferral of the reasons of a decision at a later stage on the other hand are two independent notions that are not incompatible and that the

⁴⁶ Defence Response, paras 27-31.

⁴⁷ See Defence Response, para. 32.

⁴⁸ *Prosecutor v. Al Mahdi*, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15- 171, page 4.

⁴⁹ The situation at hand is distinguishable from that presented in the *Muthaura* case, *Prosecutor v. Muthaura and Kenyatta*, Decision on the withdrawal of charges against Mr Muthaura, 18 March 2013, ICC-01/09-02/11-698 (“*Muthaura* Decision”), Concurring Separate Opinion of Judge Eboe-Osuji, paras 16-19.

⁵⁰ ICC-02/11-01/15-1338, para. 8.

⁵¹ See e.g. Defence Response, paras 61, 70.

Prosecution seems to conflate, while not providing any doctrine or jurisprudence to support its theory.⁵²

20. The reality is that article 74(5) does not prohibit the issuance of an oral decision with reasons following later. To be complete, a decision must contain under article 74(5) “a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions”, which was the case here. The Trial Chamber used the flexibility of the Statute to defer the issuance of this reasoned statement and confirmed it was in its discretionary powers by stating on 15 January 2019 that “it would have been *preferable* to issue the *full* decision at this time” (emphasis added).⁵³
21. As to the oral decision in the scenario of the reasons following later, it may take the form of a *summary* as specifically contemplated by article 74(5). Article 74(5), however, is completely silent as to the degree of detail the content of a decision’s summary must comply with and should, again, be left to the discretion of trial chambers as suggested by Judge Fremr in the *Ntaganda* case.⁵⁴ Even assuming that such oral statement should include a summary of the Trial Chamber’s findings on the evidence, which is far from being clear from the plain text of the article, statements consisting in identifying the core constitutive elements of the crimes as charged for which the Prosecution has not satisfied *the burden of proof* precisely qualifies as a summary of findings on the evidence.⁵⁵ Trial Chamber I, on 15 January 2019, went beyond merely announcing its verdict, which as stated by the Prosecution, is “a short formula stating whether the accused is convicted or acquitted”.⁵⁶ Therefore, the Prosecution’s frustration of not having certain details mentioned in the Oral Decision can in no event justify a ground for error. For further details on the question of the summary under article 74(5), the Defence respectfully refers the Chamber to its Response.⁵⁷

(vii) Question 9⁵⁸

22. There 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”. The

⁵² See Defence Response, paras 60-64.

⁵³ 15 January 2019 Oral Acquittal Decision, page 3, lines 18-20.

⁵⁴ See Defence Response, para. 51, referring to Judge Fremr’s statement supporting this interpretation.

⁵⁵ 15 January 2019 Oral Acquittal Decision, page 2, line 25 to page 3, line 17.

⁵⁶ Document in Support of Appeal, para. 50 and footnote 110.

⁵⁷ Defence Response, paras 51-54 and 71-73.

⁵⁸ ICC-02/11-01/15-1338, para. 9.

Prosecution has failed to put forward any cogent argumentation to support this claim and its submissions lack coherence.⁵⁹ As is implicit in the Chamber's Question 9, the Prosecution's submissions as to the alleged *ultra vires* nature of the Impugned Decision ignores the fundamental legal standard of whether the alleged errors "materially affected" the decision.⁶⁰ This mandatory legal requirement, inherent to any appeal before the Court and for which the Prosecution, as the Appellant, bears the burden of proof, is a fundamental safeguard to ensure that mere formal errors, which do not affect the operative part of a decision, are not admitted.⁶¹ As such, this requirement provided for in article 83(2) of the Statute cannot be dispensed of under any circumstance, given its explicit and mandatory nature. In addition, the Defence recalls the Appeals Chamber findings in *Ngudjolo* stressing the particular significance of the "materially affected" criterion in the context of an acquittal, which the Prosecution failed to address.⁶²

B. Questions relating to Ground two of the appeal

(viii) Question 10⁶³

23. In the Defence's submission, nothing in the Court's statutory framework binds trial chambers to apply one single standard of proof and approach to the assessment of evidence at the NCTA stage of a trial. It is within the Trial Chamber's discretion to determine which test and approach it will apply, which is tailor-made to the case before it. However, a Trial Chamber's discretion is of course not absolute. Under Article 66 of the Statute, an accused may only be convicted, if the Prosecution is able to prove its case beyond a reasonable doubt. Therefore, when assessing the capability of evidence to support a conviction, the Trial Chamber must bear in mind the reasonable doubt standard. According to Judge Eboe-Osuji, in the *Ruto and Sang* NCTA Decision, the adjudication of NCTA motions must take into account two concerns, namely (1) avoiding any prejudgment of the case in the event a Defence NCTA motion fails, and (2) giving due regard for the Prosecution's evidence in the event a Defence NCTA motion succeeds, and an acquittal is pronounced.⁶⁴ Guided by these two concerns, while bearing in mind the beyond a reasonable doubt standard, a trial chamber has broad discretion in determining

⁵⁹ See Defence Response, paras 136-142; Document in Support of Appeal, para. 117.

⁶⁰ Document in Support of Appeal, paras 21, and Section III.G., paras 98-102.

⁶¹ Articles 81(1)(d) and 83(2), Statute; Defence Response, para. 157.

⁶² *Ngudjolo* AJ, para. 284. The Appeals Chamber held: "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".

⁶³ ICC-02/11-01/15-1338, para. 10.

⁶⁴ *Ruto and Sang* NCTA Decision, (Reasons of Judge Eboe-Osuji), para. 110.

how it will assess the evidence at this ‘halfway’ stage. Therefore, trial judges are not required to take the Prosecution’s evidence at its highest, if the case is patently weak, since such considerations are only of importance in criminal justice systems where the jury is the ultimate arbiter of fact.⁶⁵

24. Affording a degree of flexibility to the Trial Chamber’s determination of the relevant standard and its approach to the evidence in a NCTA proceeding is consistent with the Appeals Chamber’s precedent regarding the broad discretion Trial chambers have in determining whether to entertain a NCTA procedure in a given case pursuant to articles 64(2) and 64(3)(a).⁶⁶ In general, these provisions of the Statute vest trial chambers with broad discretion to adopt procedures to ensure that a trial is conducted fairly and expeditiously. Consequently, trial chambers are laboratories of a *sui generis* inquisitorial and adversarial system of criminal justice, in which each trial chamber can determine whether to allow for witness preparation,⁶⁷ whether to adopt a submission or an admission evidentiary regime,⁶⁸ and whether to strictly define the mode of questioning according to whether the calling or non-calling party is conducting the examination.⁶⁹ Given these procedural divergences from one trial chamber to the next, one single standard and approach to evidence to NCTA proceedings should not be mandated across all trial chambers.

25. In the instant case, Judge Henderson addressed the following three factors, which led the Majority to not apply the traditional common law NCTA standard, as initially adopted by Trial Chamber V(A). *First*, and consistent with the Majority in the *Ruto and Sang* NCTA Decision, Judge Henderson found that nothing in the Court’s procedural framework

⁶⁵ *Ibid.*, para. 96; *See Ruto and Sang* NCTA Decision (Reasons of Judge Fremr) paras 18-19,146.

⁶⁶ *Ntaganda* NCTA AD, para. 44.

⁶⁷ *Compare Prosecutor v. Lubanga*, Decision on the Practices of Witness Familiarisation and Witness Proofing, ICC-01/04-01/06-679; *Prosecutor v. Bemba*, Decision on the Unified Protocol on the practices used to prepare familiarise witnesses for giving testimony at trial, ICC-01/05-01/08-1016; *Prosecutor v. Bemba et al.*, Decision on Witness Preparation and Familiarisation, ICC-01/05-01/13-1252; *Prosecutor v. Ongwen*, Decision on Protocols to be Adopted at Trial, ICC-02/04-01/15-504; *Prosecutor v. Gbagbo & Blé Goudé*, Decision on witness preparation and familiarisation, ICC-02/11-01/15-355, prohibiting witness preparation *with Prosecutor v. Ruto and Sang*, Decision on witness preparation, ICC-01/09-01/11-524; *Prosecutor v. Ntaganda*, Decision on witness preparation, ICC-01/04-02/06-652; *Prosecutor v. Al-Hassan*, Decision on witness preparation and familiarisation, ICC-01/12-01/18-666.

⁶⁸ *Bemba et al.* AJ, para. 589.

⁶⁹ *Compare* Rules 85 and 90 of both the ICTR and ICTY’s Rules of Procedure and Evidence delineating the mode of questioning with respect to examination and chief and cross examination of a witness *with* the Article 64 of the Statute giving Trial Chamber’s broad discretion to determine the conduct of the proceedings in conjunction with the Rules of Procedure and Evidence at the ICC where cross and direct examination of a witness are not mentioned.

constrains the trial chamber from assessing the quality of evidence at the NCTA stage of the proceedings.⁷⁰ *Second*, the traditional NCTA standard applies in cases where admissibility rulings are made, and thus there is an assumption that all evidence on the record is both relevant and has some probative value, which was not the case in the instant case where a submission regime was adopted and the evidence was not filtered according to minimum guarantees of reliability, relevance and probative value.⁷¹ Similarly, no limitations were placed on the method of questioning of witnesses, which is common in the common law context in which traditional NCTA motions are made. This resulted in highly leading questions posed by the Prosecution, and thus the Trial Chamber was unable to attach much weight to this evidence.⁷² *Third*, there was no assessment made as to the reliability and the credibility of a high number of statements submitted under rule 68(2) of the Rules, and thus their credibility and reliability could not be assumed.⁷³ Judge Tarfusser, while in principle disagreeing with the applicability of a NCTA procedure in the Court's legal framework, subscribed fully with the legal and factual findings of Judge Henderson's Reasons, and like Judge Henderson found that the exercise entertained by the Trial Chamber was never meant to replicate the "so called *Ruto and Sang* model".⁷⁴

26. The Prosecution in its Document in Support of Appeal is unable to show that given the particularities of this case, the Trial Chamber adopted a standard of proof and an assessment of evidence that exceeded the broad discretion with which it is vested under article 64. Indeed, the Trial Chamber paid due regard to the two aforementioned considerations, it did not prejudge certain issues to the detriment of Mr Blé Goudé's right to be heard, and it conducted a thorough review of the Prosecution's evidence.⁷⁵ Therefore, according to Judge Eboe-Osui "... there [can] be no *legitimate* complaint from the Prosecution if the case is terminated following a thorough review of the Prosecution evidence that correctly reveals the case as too weak to continue."⁷⁶

⁷⁰ Judge Henderson's Reasons, para. 3; *Ruto and Sang* NCTA Decision (Reasons of Judge Fremr), para. 144; Reasons of Judge Eboe-Osui, paras 105, 125.

⁷¹ Judge Henderson's Reasons, para. 4.

⁷² *Ibid.*, para. 6.

⁷³ *Ibid.*, 7.

⁷⁴ Judge Tarfusser's Opinion, para. 67.

⁷⁵ 15 January 2019 Oral Acquittal Decision, page 2, line 25 to page 3, lines 1-2.

⁷⁶ *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osui), para. 112.

27. Here, the Prosecution took issue with the factual findings of the Trial Chamber, and the procedural history of the case. The Prosecution's complaint regarding the procedural history of the case is not legitimate since the Prosecution was at all times on notice that its evidence must meet the beyond reasonable doubt standard. Thus, in the instant case, regardless of the test that should theoretically be applied to NCTA proceedings at the Court, the question of the "sufficiency" of evidence does ultimately engage the issue of error of fact that should satisfy the chosen test.

28. In *Prosecutor v. Delalic et al. (Čelebići)* Appeals Judgment, the ICTY found that where an appellant alleges both that the evidence was not *legally* sufficient to sustain a conviction, which is a situation covered by NCTA proceedings and that the evidence was not *factually* sufficient to sustain a conviction, which is a situation covered by the end of trial, then the legally sufficient test is redundant of the factual sufficiency test.⁷⁷ The ICTY Appeals Chamber reasoned that "if an appellant is not able to establish that the Trial Chamber's conclusion of guilt beyond reasonable a doubt is one which no reasonable tribunal of fact could have reached, it follows that there must have been evidence upon which such a tribunal could have been satisfied beyond a reasonable doubt of that guilt."⁷⁸ Therefore, if the Chamber finds the appeal admissible, then in assessing whether the Trial Chamber erred in its factual findings in the present appeal, the Chamber should apply the same test as for factual errors arising out of an article 74 judgment.

(ix) Question 11⁷⁹

29. The alleged failure to set out a clearly defined standard of proof for 'no case to answer' proceedings and other evidentiary standards for the evaluation of evidence does not *per se* constitute a procedural and legal error. In the event the Chamber determines that article 74 of the Statute applies to NCTA decisions, trial chambers must provide a full and reasoned statement of the Trial Chamber's findings on evidence and conclusions.⁸⁰ The Appeals Chamber has determined that the failure to provide a full and reasoned statement amounts to a procedural error.⁸¹ A reasoned decision must clearly indicate how the trial

⁷⁷ *Delalić et al.*, AJ, para. 435.

⁷⁸ *Ibid.*

⁷⁹ ICC-02/11-01/15-1338, para. 11.

⁸⁰ Article 74(5), Statute.

⁸¹ *Bemba* AJ, para. 49.

chamber assessed the evidence to reach its factual conclusions.⁸² Moreover, the extent of the reasoning will depend on the circumstances of each case.⁸³

30. Here, the Trial Chamber clearly set out the interpretation of the standard of proof and other evidentiary standards in Judge Henderson's Reasons. The Majority dedicated specific sections in Judge Henderson's Reasons to both the standard of review, and the assessment of evidence.⁸⁴ Therefore, ensuring the parties ability to request for appellate review.⁸⁵

(x) Question 12⁸⁶

31. The procedural history of the instant case and Judge Henderson's Reasons clearly show that the Trial Chamber did direct itself to an applicable legal standard.⁸⁷ The Prosecution in its appeal conflates the alleged failure of the chamber to give advance notice of the applicable legal standard with the failure to direct itself, correctly or at all to a standard.⁸⁸ Assuming *arguendo* that the Trial Chamber failed to provide such notice,⁸⁹ such a finding would be insufficient to show that it did or did not have a standard in mind when disposing of the Defence's NCTA motion. The Trial Chamber's decision to not provide in advance its exact interpretation of the standard could be for many reasons, and the Defence does not wish to speculate. However, it is noteworthy that the applicable standard was a live issue in the case,⁹⁰ and therefore it was appropriate for the Trial Chamber to not provide its interpretation until it issued its Written Reasons.⁹¹

(xi) Questions 13-15⁹²

32. Even when assuming *arguendo* that the Trial Chamber initially erred in failing to give the parties advance notice of the applicable legal standard, there is no continuing appealable

⁸² *Ibid*, para. 52.

⁸³ *Ibid*, para. 51.

⁸⁴ Judge Henderson's Reasons, Section I: Nature of the Decision and the Applicable Legal Standard, Section II: Assessment of Evidence, paras 1-52.

⁸⁵ *Bemba AJ*, para. 55.

⁸⁶ ICC-02/11-01/15-1338, para. 12.

⁸⁷ See Defence Response, paras 173-191; The Prosecution does not challenge the standard the Trial Chamber set out in Judge Henderson's Reasons. Document in Support of Appeal, para. 133.

⁸⁸ Document in Support of Appeal, paras 132-136.

⁸⁹ See *contra* Defence Response, paras 173-191.

⁹⁰ See Prosecution's Mid-Trial Brief Cover Filing, para. 9; Gbagbo Conduct of Proceedings Observations, paras. 18-33; Blé Goudé Conduct of Proceedings Observations, paras. 18-19; Prosecution's NCTA Clarification Request, paras 6, 9-12; Prosecution's NCTA Response, paras. 27-44; NCTA Hearing Day 1, pages 4-18; NCTA Hearing Day 6, pages 39-53.

⁹¹ See Defence Response, paras. 198-199.

⁹² ICC-02/11-01/15-1338, paras 13-15.

error if the Chamber finds that in its decision the Trial Chamber did direct itself correctly as to the applicable standard. The reason such an alleged error must be dismissed on appeal is that it does not materially affect the Trial Chamber's decision.

33. Putting the Prosecution on notice as to the test to be applied would not have changed the ultimate application of that test to the evidence in the instant case, since such an error has no material impact on the Trial Chamber's assessment of the evidence. The evidence before the Trial Chamber would have remained unchanged even when assuming such an error was committed. Therefore, the Trial Chamber would have come to the same conclusion, namely that the Prosecution's evidence was incapable of sustaining a conviction. As Judge Eboe-Osuji noted in his concurring opinion in *Banda and Jerbo*, "a decision does not become unreliable on account of a procedural impurity that did not resonate in its outcome".⁹³ Thus, the alleged initial error of not providing the parties advance notice of the applicable standard should be considered as inconsequential to the Chamber since it fails to show that the decision was materially affected by the error as required under article 83(2).
34. Contrary to the Prosecution's submissions, the procedural errors are not sufficient in themselves to invalidate a decision.⁹⁴ In *Fofana et al.*, the Special Court for Sierra Leone ("SCSL") found that only procedural errors that occasion a miscarriage of justice would "vitiate the proceedings." One example of such a procedural error is one that affects the fairness of the trial.⁹⁵ Given that in the instant case the parties were given every opportunity to make submissions on the applicable standard of proof,⁹⁶ the Prosecution is unable to show that the fairness of the proceedings was affected.
35. Indeed, the Trial Chamber's decision to not fully set out its interpretation of the standard of proof before issuing its decision demonstrates its fairness to the parties in the instant case for the following reasons. *First*, as admitted by the Prosecution, the parties had divergent views as to the standard of review and the assessment of evidence that should be made at the NCTA stage of the proceedings.⁹⁷ Thus, in fairness to the parties, the Trial

⁹³ *Prosecutor v. Banda and Jerbo*, Decision on the Defence Request for a temporary stay in proceedings, ICC-02/05-03/09-410, para. 45, footnote 104.

⁹⁴ See Defence Response, paras 230-232.

⁹⁵ *Prosecutor v. Fofana et al.*, Judgment, 28 May 2008, Case No. SCSL-04-14-A, para. 35.

⁹⁶ See Defence Response, 199.

⁹⁷ See Document in Support of Appeal, para. 136.

Chamber heard and entertained the submissions on the matter.⁹⁸ By not issuing such advance notice on the standard, the Trial Chamber respected the adversarial nature of the proceedings and refrained from predetermining key issues in the case.⁹⁹ Therefore, the Trial Chamber did not commit an error by not providing advance notice of the standard.

36. *Second*, never did the Trial Chamber limit the Prosecution in making its submissions on the standard to be applied. Both the Defence and the Prosecution made submissions on it both before submitting their respective NCTA motion and response, and during the NCTA hearings that followed the written motions.¹⁰⁰ In these circumstances, the Prosecution is also unable to demonstrate any material impact on the proceedings from the alleged failure to provide advance notice of the applicable standard since at all times of the NCTA procedure the Prosecution was treated fairly and was able to present its legal and factual arguments fully.

(xii) Question 16¹⁰¹

37. In the circumstances of this case, assuming the judges of the Majority disagreed on the standard of proof and applicable legal provisions for a NCTA procedure would have no effect on the decision of the Majority and its assessment of the evidence.

38. The impact that a disagreement on the standard of proof or applicable legal provisions may have on the decision of the Majority will depend on the form and degree of such a disagreement as well as the particular circumstances of the case. In the present case, assuming Judge Tarfusser would have a different view on the nature of a NCTA decision or the applicable standard of proof, it would not make the decision of the Majority any less informed nor would it violate its unity.

39. *First*, certainly as a judicial compromise, Judge Tarfusser expressly authorised the NCTA proceedings for the purpose of this decision and consequently ascribed to the evidentiary standard as mentioned in the First and Second Conduct of Proceedings Orders and as reiterated in the 15 January 2019 Oral Acquittal Decision, the 16 January

⁹⁸ See Defence Response, 199. Both Judge Tarfusser and Judge Henderson in the Written Reasons engaged with the Prosecution's submissions as to the applicable standard. Judge Tarfusser's Opinion, paras. 66-74. Judge Henderson's Reasons, paras 1-54. Judge Henderson specifically addressed the Trial Chamber's approach to corroboration, which was first raised by the Prosecution in the Prosecution's NCTA Response. Prosecution's NCTA Response, para. 120.

⁹⁹ *Gaddafi Admissibility AD*, para. 203.

¹⁰⁰ See Defence Response, 199.

¹⁰¹ ICC-02/11-01/15-1338, para. 16.

2019 Decision and finally Judge Henderson's Reasons,¹⁰² the factual and legal findings of which he fully subscribed to for the purpose of the Majority reasoning.¹⁰³ *Second*, as emphasized by Judge Tarfusser, 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.¹⁰⁴ Also, "an 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' [...], would be capable of supporting a conviction of the accused".¹⁰⁵ Both judges agree that it was not the case here.¹⁰⁶ Thus, "[t]here was no evidence in respect of which the Majority's determination as to the need for a defence case would have changed depending on the standard applied".¹⁰⁷ In such a scenario, as expounded upon by the Judge Tarfusser, the standard did not make a difference since there was no evidence presented by the Prosecution to which a standard could have been applied. Therefore, the theoretical disagreements between the judges did not affect in the slightest the assessment of the evidence in the present case since Judge Tarfusser could have disagreed with applying a NCTA procedure and simultaneously find there was no evidence to support the charges without their being an irreconcilable contradiction in the judge's reasoning, and a split from Judge Henderson's Reasons.

40. What matters in the present case is that the Majority's legal and factual findings with respect to the evidence in the case are absolutely not speculative. The 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".¹⁰⁸ Judge Tarfusser fully agreed with Judge Henderson's assessment of the evidence, which revealed *inter alia* that the Prosecution presented no evidence, even circumstantial that would support that the acts and conduct of Mr Blé Goudé amounted to an instruction or other form of coordination of violence that

¹⁰² First Conduct of Proceedings Order, para. 10; Second Conduct of Proceedings Order, para. 10, 15 January 2019 Oral Acquittal Decision, page 4, lines 15-16, 16 January 2019 Decision, page 4, lines 11-16, Judge Henderson's Reasons, paras 14-15.

¹⁰³ Judge Tarfusser's Opinion, paras 1-2.

¹⁰⁴ Judge Tarfusser's Opinion, paras 67, 2.

¹⁰⁵ Judge Tarfusser's Opinion, para. 68.

¹⁰⁶ See e.g. Judge Tarfusser's Opinion, paras 5, 12, 68 and Judge Henderson's Reasons, paras 5, 7, 36, 41, 865, 2039.

¹⁰⁷ Judge Tarfusser's Opinion, para. 68.

¹⁰⁸ Judge Tarfusser's Opinion, para. 4. See Judge Henderson's Reasons, para. 39 (on the witnesses), paras 33, 36 (on documentary evidence), 5 (preliminary remarks).

occurred during the post-electoral crisis.¹⁰⁹ Thus, in light of the above, the Majority's presumed disagreement did not have any material effect on the Majority's decision.

(xiii) Question 17¹¹⁰

41. In the event the Chamber determines that the six examples do not amount to mere disagreements with the evidence, as submitted by the Defence in its response, then the standard of review for factual errors should apply as the Chamber determines the merits of the Prosecution's arguments. While the Prosecution may state that the errors are not factual in nature, the nature of the alleged errors contained in the six examples reveal that the Prosecution is merely attempting to avoid limited review conducted by the Chamber to errors of fact.¹¹¹

42. The procedural posture of this case, namely that an acquittal has been pronounced at the halfway stage of the proceedings instead of at the end of trial should have no bearing on the standard of review that should apply to these alleged errors of fact. The Defence respectfully submits that the ICTY case-law on the matter is of particular relevance. In the appeal of the Prosecutor against the Trial Chamber's acquittal of Mr Karadzic on the count of genocide at the halfway stage of proceedings, the ICTY Appeals Chamber found that an appeal entered at the NCTA stage of the proceedings is an appeal governed by the standard of appellate review for alleged errors of law and alleged errors of fact under article 25.¹¹² The same reasoning should apply here. In the event the Chamber determines that the appeal of the Prosecution is admissible, and that article 81 applies to the present appeal, then the standard of review for errors of fact under article 81 should also apply, particularly the standard of review relating to errors of fact in the event of an acquittal.¹¹³

(xiv) Questions 18-19¹¹⁴

43. When determining whether a trial chamber committed an error of fact in a judgment of acquittal, the Chamber must give a margin of deference to the factual assessments of the trial chamber made at the conclusion of the defence case.¹¹⁵ The deference accorded to

¹⁰⁹ Judge Tarfusser's Opinion, para. 68. Judge Henderson Reasons detail the gaping lacunas in the Prosecution's case regarding Mr Blé Goudé's alleged contributions and the charged crimes, which the Prosecution does not challenge in its appeal. See Defence Response, paras 224-229.

¹¹⁰ ICC-02/11-01/15-1338, para 17.

¹¹¹ *Ngudjolo* AJ, para. 22; *Bemba* AJ, para. 42. See Document in Support of Appeal, para. 260.

¹¹² *Karadžić* AJ, para. 9.

¹¹³ See *Ngudjolo* AJ, paras 25-26.

¹¹⁴ ICC-02/11-01/15-1338, paras 18-19.

¹¹⁵ *Bemba* AJ, para. 39, citing the *Lubanga* and *Ngudjolo* Appeals Judgments; *Bemba* Judges Van den Wyngaert and Morrison Separate Opinion, para. 14.

the trial chamber is not infinite, and under the precedent of this Appeals Chamber, the Chamber should only interfere with the factual findings of a trial chamber if it determines that no reasonable trial chamber would have made such a finding.¹¹⁶ Recently, in the Appeals Judgement in *Bemba*, the Majority of the Chamber found that the margin of deference to the factual findings of a trial chamber must be approached with extreme caution. It further found that the deference given to a Trial Chambers findings may be limited “...when a reasonable and objective person can articulate *serious doubts* about the accuracy of a given finding, and is able to support this view with specific arguments, this is a strong indication that the trial chamber may not have respected the standard of proof and, accordingly, that an error of fact may have been made.”¹¹⁷

44. This appellate ruling does not extend to appeals made by the Prosecution on a judgment of acquittal. The Court limited this holding to appeals of convictions, when it distinguished between situations in which trial chambers are not convinced of guilt beyond a reasonable doubt with respect to a finding and situations in which they are.¹¹⁸ The Appeals Chamber reasoned that when a trial chamber is not convinced of guilt beyond a reasonable doubt it refrains from entering any factual finding.¹¹⁹ However, when the trial chamber is convinced of such guilt, it does enter factual findings. Therefore, when the appeal is of a conviction, the Appeals Chamber is able to identify the findings the trial chamber made beyond a reasonable doubt. If it has doubts as to these findings, it must overturn them.¹²⁰ By proceeding in such a way the Appeals Chamber does not substitute its factual findings for those of the trial chamber, but rather applies the standard of proof.¹²¹ In the event of an acquittal, the Appeals Chamber is unable to identify such factual findings of the Trial Chamber, and whether they can be called into doubt, and thus the conventional appellate deference should apply to the factual findings in judgments of acquittal at the end of a defence case.¹²²

¹¹⁶ *Ngudjolo* AJ, para. 26; see also *Bemba* AJ, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, ICC-01/05-01/08-AnxI-Red (“*Bemba* AJ Dissenting Opinion of Judges Monageng and Hofmański”), paras 5-6.

¹¹⁷ Emphasis added. *Bemba* AJ, para. 45; see also *Bemba* AJ Dissenting Opinion of Judges Monageng and Hofmański.

¹¹⁸ *Bemba* AJ, para. 46.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² See *Bemba* AJ Dissenting Opinion of Judges Monageng and Hofmański, para. 6.

45. Appellate deference should also apply to factual assessments of judgments of acquittal resulting from a NCTA motion, but not for all the same reasons as for acquittals resulting from the conclusion of the defence case. One of the main reasons Appellate Chambers give deference to the factual findings of a trial chamber proceeding from a judgment of acquittal at the end of a defence case, is that trial chambers are best placed to assess the reliability and the credibility of evidence, which includes the benefit of observing the witnesses as they testify.¹²³ Such a consideration usually does not arise in an appeal of an acquittal at the NCTA stage of the proceedings since traditionally the trial chamber does not make assessments of credibility and reliability of evidence, and gives credence to the Prosecution's evidence unless it is incapable of belief.
46. However, deference to the factual assessment of the Trial Chamber should be given at the NCTA stage for the following reasons (1) the Chamber conducting a *de novo* review of the evidence, would in essence be a new trial, but without the acquitted person, now accused, being able to exercise his right to present evidence under Article 67 of the Statute,¹²⁴ (2) such a *de novo* review would be in contravention with the corrective nature of appellate proceedings at the Court,¹²⁵ and (3) the risk of inaccurate assessments would be great since the Appeals Chamber would not be able to familiarize itself with case records of such length and complexity that are common at the Court.¹²⁶
47. The extent of this deference should have the same limits as defined by the Appeals Chamber in the Prosecution's appeal of *Ngudjolo* judgment of acquittal. Therefore, not only must the Prosecution show that no reasonable trial chamber would have made such factual assessments, but also when such factual assessments are corrected, all doubt as to the acquitted person's guilt must be eliminated. Such a test does not unduly prejudice the Prosecution at the halfway stage of the proceedings. Given that NCTA motions are made at the conclusion of the Prosecution's presentation of evidence, the Prosecution is unable to show any prejudice resulting from such a standard of review. Under Article 66 of the

¹²³ *Prosecutor v. Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 12 January 2014, ICC-01/04-01/06-3121-Red ("*Lubanga* AJ") para. 24; *Bemba* AJ Dissenting Opinion of Judges Monageng and Hofmański, para 6.

¹²⁴ *Bemba* AJ Dissenting Opinion of Judges Monageng and Hofmański, para. 7: "If the Appeals Chamber were to assess all evidence *de novo*, according no deference to the first-instance findings, the appellate proceedings would necessarily turn into a second trial".

¹²⁵ The corrective nature of the appellate proceedings is both confirmed by the statutory requirements that an alleged error materially impact the proceedings under article 83(2) and by the jurisprudence of this court. See *Lubanga* AJ, para. 56.

¹²⁶ See *Bemba* AJ Dissenting Opinion of Judges Monageng and Hofmański, paras 6-7.

Statute, the Prosecution must produce evidence which proves that the accused is guilty beyond a reasonable doubt, this statutory requirement must be met at the close of the Prosecution's case.

48. The particular circumstances of this case should not change the deference that the Appeals Chamber gives to the factual assessments of the Trial Chamber. However, the particular circumstances of this case give another basis for according such appellate deference to the Trial Chamber's factual assessments. In the instant case, the Trial Chamber unanimously and *proprio motu*, asked the Defence whether it wished to file a NCTA motion at the close of the Prosecution's case.¹²⁷ Additionally, the Trial Chamber invited the Prosecution to present a Trial brief, in which at the close of its case it could detail how the evidence was sufficient to sustain the charges.¹²⁸ These actions indicate that during the course of the trial, after having heard the testimony of over 80 witnesses and reviewed thousands of pages of documentary evidence, the Trial Chamber in unanimity agreed that the case which was confirmed to trial was not the case in evidentiary terms that the one they observed at trial. Since the Trial Chamber was in a unique position to observe the shortcomings of the Prosecution's evidence, according such appellate deference in the present case should also be done for this reason.

C. Questions relating to the remedy

(xv) Question 20¹²⁹

49. The Defence notes that the questions regarding the requested remedy are mainly directed at the Prosecution.¹³⁰ Rather than answering each question individually, which would in essence repeat many of the submissions the Defence made in its Response, the Defence will only provide submissions with respect to matters that it did not raise in its Response. With its request for a mistrial, the Prosecution attempts to broaden its powers by implying that a potential withdrawal of charges is a matter of prosecutorial discretion.¹³¹ The Defence submits that neither the Court's statutory framework nor its jurisprudence allow for such broad discretion.

¹²⁷ First Conduct of Proceedings Order, paras. 10-14.

¹²⁸ Ibid, para 10.

¹²⁹ ICC-02/11-01/15-1338, para. 20.

¹³⁰ Indeed, all the sub-questions of the Appeals Chamber relate to the overarching question of what remedy the Prosecution is seeking. See ICC-02/11-01/15-1338, para. 20.

¹³¹ Document in Support of Appeal, para. 266.

50. The Prosecution's powers to amend or withdraw charges are tailored to each stage of the proceedings,¹³² and become more restricted the closer a case gets to the trial stage.¹³³ Article 61(9) of the Statute expressly provides that, after the trial's commencement, only the Prosecution may withdraw the charges¹³⁴ with the permission of the Trial Chamber.¹³⁵ This provision, however, does not squarely address the situation where charges are withdrawn after the confirmation decision but before the commencement of the trial. According to Judge Eboe-Osuji, despite the Statute's silence on the matter,¹³⁶ the Prosecutor must request leave to withdraw the charges at that stage. Any other interpretation would be inconsistent with the Statute and the equality of the parties,¹³⁷ as it would allow the Prosecutor to enjoy greater power over a defendant, by putting "a prolonged lien on the defendant's freedom from fear and the right to good name, beyond what is strictly permissible".¹³⁸ Consequently, in the extraordinary event that the mistrial is declared, the case cannot be left "in the hands of the Prosecutor" and her unfettered discretion to decide the future of Mr Blé Goudé.

51. Through the guise of a purported mistrial, the Prosecution is creating ways to evade an acquittal so it can get a second chance, at some unknown point in time, to do its case again.¹³⁹ The Prosecution's actions reveal that the decision to acquit was correct since the Prosecution is unable, after nine years, to state whether it can adduce sufficient evidence to sustain a conviction against Mr Blé Goudé. If the Prosecution concludes, after the mistrial, that the charges must be withdrawn and requests leave to do so, then clearly the Prosecution's request for a mistrial would be a mere tool to render article 20 of the Statute inapplicable,¹⁴⁰ to pursue prosecutions *ad infinitum* against Mr Blé Goudé.

¹³² After the presentation of the Document Containing the Charges and before the confirmation hearing, the Prosecutor may withdraw one or more charges, without prior authorization from the Pre-Trial Chamber. After the confirmation, but before the trial's commencement, the Prosecution may amend the charges pursuant to article 61(9)), see *Muthaura* Decision, para. 10.

¹³³ *Lubanga* AJ, para. 53.

¹³⁴ *Muthaura* Decision, para. 7; *Prosecutor v. Ruto and Sang*, Order regarding the content of the charges, 20 November 2012, ICC-01/09-01/11-475, para. 4.

¹³⁵ *Lubanga* AJ para. 53.

¹³⁶ *Muthaura* Decision (Concurring Separate Opinion of Judge Eboe-Osuji), para. 12.

¹³⁷ *Ibid*, para. 11.

¹³⁸ *Ibid*, para. 30.

¹³⁹ Defence Response, paras 244-247; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript of 6 February 2020 ("*Gbagbo and Blé Goudé* Transcript"), ICC-02/11-01/15-T-237-CONF-ENG-CT, pages 51-52.

¹⁴⁰ *Prosecutor v. Kenyatta*, Decision on Prosecution's application for a further adjournment, 3 December 2014, ICC-01/09-02/11-981, para. 56; *Prosecutor v. Kenyatta*, Decision on the Prosecution's request for leave to appeal, 9 March 2015, ICC-01/09-02/11-1004, para. 27; *Prosecutor v. Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance

52. With respect to the possibility of the Prosecutor requesting a retrial, the Defence submits that it would inevitably come at the expense of Mr Blé Goudé's rights and the overall proceedings. *First*, a retrial cannot be entertained without the Prosecution affirmatively asking for a retrial in its appeal brief. The Appeals Chambers of the *ad hoc* tribunals, did not consider on their own motion, i.e. without a relief request of a party to that effect, whether ordering a new trial would have been an appropriate remedy; in *Prosecutor v. Gotovina et al.*, the Appeals Chamber decided to reverse the conviction and acquit the accused, as requested, without even considering the possibility of a new trial.¹⁴¹
53. *Second*, domestic jurisprudence has set out several factors that need to be considered before ordering a retrial, including, *inter alia*, the strength of the case; the length of time between the alleged offence and the new trial, and its prejudicial effect on the accused; whether a new trial would impermissibly allow the prosecution to "patch up" a defective case; the interests of the accused, and in particular whether it would be unduly oppressive to put the accused to the expense and worry of a further trial; whether the accused has been released from custody; and the expense and length of a further trial.¹⁴²
54. The Prosecution declared that it is still uncertain "whether a full second prosecution remains possible in the circumstances",¹⁴³ and such determination will only be possible once the judgment on the appeal is delivered.¹⁴⁴ This statement clearly indicates that the Prosecution views a retrial as a chance to redo its case, as indicated by Judge Eboe-Osuji.¹⁴⁵ Allowing the Prosecution to start anew will not serve the interest of justice.¹⁴⁶ On the contrary, it will undoubtedly compromise the fairness of the proceedings, by putting Mr Blé Goudé to the expense and worry to find exculpatory evidence after almost

under Article 87(7) of the Statute', 19 August 2015, ICC-01/09-02/11-1032, para. 76; *Prosecutor v. Kenyatta*, Decision on the withdrawal of charges against Mr Kenyatta, 13 March 2015, ICC-01/09-02/11-1005, para. 9.

¹⁴¹ *Prosecutor v. Gotovina et al.*, Judgment, ICTY-06-90-A, 16 November 2012; see also *Ndindiliyimana et al. v. Prosecutor*, Judgment, ICTR-00-56-A, 11 February 2014.

¹⁴² *Gilham v. The Queen*, [2012] NSWCCA 131 (2012), para. 649. Based on these factors, Judge Robinson concluded in *Gotovina* that a retrial should not be ordered because its burden would be unduly oppressive for the Appellants; a re-trial would be lengthy and expensive; and an unduly long time would have elapsed between the date of the alleged offence and the new trial, see *Prosecutor v. Gotovina et al.* (Separate Opinion of Judge Patrick Robinson), ICTY-06-90-A, 16 November 2012, para. 19.

¹⁴³ *Gbagbo and Blé Goudé* Transcript, page 52, lines 3-4.

¹⁴⁴ *Ibid*, pages 51-52.

¹⁴⁵ *Ibid*, page 45 lines 4-6 and page 46 lines 2-7.

¹⁴⁶ *Ibid*, page 44 lines 10-13. See also *Prosecutor v. Aleksovski*, Judgment, ICTY-95-14/1-A, 24 March 2000, para. 153: although the Appeals Chamber found that the Trial Chamber applied the wrong test for determining the applicability of Article 2, it declined to reverse the verdict of acquittal, did not favour remitting the case to the Trial Chamber for re-examination, nor would make its own determination of the facts, "as neither course would serve a useful purpose".

a decade since this case has started.¹⁴⁷ Furthermore, the case came to an end before the Defence presented its case, therefore granting the Prosecution's request would put Mr Blé Goudé in a worse position than he was in before submitting the NCTA motion since he would not have benefited from his right to present a defence case.¹⁴⁸

55. *Finally*, the expeditiousness of the proceedings cannot be guaranteed. Should a new trial take place, another five to ten years will pass until the case comes to an end, all at the expense of both Mr Blé Goudé's rights and truth-finding function of the Court, in light of the lapse of time. In the *Director of Public Prosecution v. Cosier*, the Court granted the appeal but ruled that a retrial should not take place because of the time lapsed.¹⁴⁹ Similarly, the Court in the present case should not permit a retrial of Mr Blé Goudé and reject the Prosecution's request.

III. CONCLUSION

56. For all the reasons above, and those previously set out by the Defence, the Chamber should dismiss the appeal against the Impugned Decision.

Respectfully submitted,



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

Dated this 22 May 2020

At The Hague, the Netherlands

¹⁴⁷ Defence Response, para. 251. See also *Crist v. Bretz* (1978) 437 U.S. 52: "retrial will mean repeating painful and embarrassing testimony, together with the possibility that the earlier "trial run" will strengthen the prosecution's case. At a retrial, for example, prosecution witnesses may be better prepared for the rigors of cross-examination".

¹⁴⁸ Defence Response, paras 249-250.

¹⁴⁹ *Director of Public Prosecution v. Christopher Cosier*, Q.B.D., 5 April 2000.