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No.: **ICC-02/11-01/15**
Date: **22 May 2020**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

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

Public

Legal Representative's submissions on the questions raised by the Appeals Chamber in its Decision ICC-02/11-01/15-1338

Source: **Office of Public Counsel for Victims**

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

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I. INTRODUCTION

1. Following the Decision issued on 30 April 2020,[1] the Legal Representative[2] hereby files her submissions to the questions raised by the Appeals Chamber in the appeal of the Prosecutor[3] against the decision of Trial Chamber I of 15 January 2019,[4] with reasons issued on 16 July 2019.[5]

II. QUESTIONS ON GROUND ONE OF THE APPEAL

1. Submissions on Question no. 5

2. In light of the impact that 'no case to answer' ("NCTA") proceedings have on the rights and interests of the participating Victims, the Legal Representative will address first question 5.

3. Victims have constantly indicated that NCTA proceedings have the potential of prejudicially affect their interests in seeking justice and knowing the truth about the events they suffered from. If successful, a NCTA motion may indeed deprive Victims of a cogent inquiry into the full extent of their suffering and of a remedy therefor. While a successful NCTA motion has the same effect as a judgment on acquittal at the end of the trial or appeal proceedings, the evidence is to be assessed against a *prima facie* standard of proof. The trial chamber is not to enter findings beyond reasonable doubt on any of the events alleged and suffered by the Victims. Thereby Victims are also deprived of the truth that is to be revealed and established during full proceedings.

4. Accordingly, the rights and interests of the Victims can only be *accommodated* when (i) NCTA proceedings are allowed in exceptional circumstances; (ii) the parties and

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[1] See the "Decision rescheduling, and directions on, the hearing before the Appeals Chamber" (Appeals Chamber), No. ICC-02/11-01/15-1338 A, 30 April 2020.
[2] See the "Decision on victim participation" (Appeals Chamber), No. ICC-02/11-01/15-1290 A, 26 November 2019. See also, the "Directions on the conduct of the proceedings" (Trial Chamber I), No. ICC-02/11-01/15-205, 3 September 2015, p. 24.
[3] See the "Prosecution Document in Support of Appeal", ICC-02/11-01/15-1277-Conf, 15 October 2019", No. ICC-02/11-01/15-1277-Conf A, 15 October 2019 (the "Appeal Brief").
[4] See T-232, pp. 1–5 (the "15 January 2019 Oral Decision") and the "Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019" (Judge Herrera Carbuccia's Dissenting Opinion), No. ICC-02/11-01/15-1234, 15 January 2019 (the "15 January 2019 Dissenting Opinion").
[5] See the "Reasons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion" (Trial Chamber I), No. ICC-02/11-01/15-1263, 16 July 2019 (the "Written Reasons"). See also, the "Opinion of Judge Cuno Tarfusser", No. ICC-02/11-01/15-1263-AnxA, 16 July 2019 ("Judge Tarfusser's Opinion"); the "Reasons of Judge Geoffrey Henderson", No. ICC-02/11-01/15-1263-Conf-AnxB, 16 July 2019 ("Judge Henderson's Reasons") and the "Dissenting Opinion Judge Herrera Carbuccia" (Judge Herrera Carbuccia's Dissenting Opinion), No. ICC-02/11-01/15-1263-Conf-AnxC, 16 July 2019 (the "16 July 2019 Dissenting Opinion").

participants are permitted to make submissions on whether to adopt such a procedure; and (iii) the standard of proof is clearly defined, notice thereof is given beforehand, and it is correctly applied by the trial chamber.

5. It is well established that trial chambers exercise discretion in relation to matters of trial management to ensure that proceedings are fair and expeditious.[6] Before this Court, allowing lengthy and time consuming submissions on a NCTA motion when the sufficiency of the evidence has already been scrutinised at the confirmation of charges stage, would squarely run counter to the requirement of expeditious proceedings. The control exercised by the pre-trial chambers not only bars unmeritorious cases from proceeding but, more importantly, reduces the factual scope of those cases where the Prosecutor does not have any or sufficient evidence to support the prospective charges.[7] This concept has little resemblance with the way the *ad hoc* Tribunals guarded the integrity of the proceedings against unmeritorious allegations having to be met by a defence.[8] Indeed, before the *ad hoc* Tribunals there was no pre-trial scrutiny of the sufficiency of the evidence before confirmation of the indictment similar to that of the Court's Pre-Trial stage.[9]

6. Not only is the Rome Statute silent on any mid-trial review mechanism, but, as set out *supra*, its structure unmistakably obviates the need for a NCTA proceedings at the end of the presentation of evidence by the Prosecution - barring exceptional circumstances undermining the legitimacy of the proceedings in any other way. The institutional mandate of pre-trial chambers encompasses the gatekeeping function of determining whether a case should proceed to trial;[10] and of protecting the rights of the Defence against wrongful and wholly unfounded charges.[11] In the words of the Appeals Chamber in *Mbarushimana* case, "*article*

[6] See ICTR, Case No. IT-98-42-A, *Nyiramasuhuko et al*., Appeal Judgment, 14 December 2015, para. 295, and *Kanyarukiga*, Case No. ICTR-02-78-A, Appeal Judgment, 8 May 2012, para. 26.
[7] See TRIFFTERER, (O.), "*Rome Statute of the International Criminal Court: a commentary*", 3rd edition, Beck Verlag, München, 2016, pp. 1487-1488 and 1538.
[8] Rule 98*bis* of the ICTY's Rules of Procedure and Evidence. See also ICTY, *Mladić*, Case No. IT-09-92, 98*bis* Judgement, 15 April 2014, Transcript p. 20922, (the "*Mladić* 98*bis* Judgment").
[9] At the ICTY, a pre-trial judge conducted a review of the relevant indictment pursuant to article 19 of the Tribunal's Statute to ascertain whether a *prima facie* case existed against a prospective accused, and whether the "*materials produced by the Prosecutor* […] *appear* […] *to provide grounds which justify charging the accused* […] *with the* […] *counts derived therefrom*". See Article 19 of the ICTY Statute and Rule 61 of the ICTY Rules of Procedure and Evidence. See also *e.g*., ICTY, *Karadžić and Mladić*, Case No. IT-95-5-R61, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996; and ICTY, *Kovačević*, Case No. IT-97-24-PT, Review of Indictment, 23 June 1998. The same review was conducted in the event of subsequent amendments of the indictment.
[10] See COURTNEY (J.) and KAOUTZANIS (C.) (2015), "*Proactive Gatekeepers: The Jurisprudence of the ICC's Pre-Trial Chambers*", Chicago Journal of International Law, Vol. 15(2), 518-558, pp. 520, 521.
[11] See the "Decision on the Confirmation of Charges" (Pre-Trial Chamber I), No. ICC-01/04-01/06-803-tENG, 14 May 2007, para. 37.

61 differs from the relevant ICTY/ICTR rule in two significant ways. First, article 61 imposes a higher evidentiary threshold of 'substantial ground' in place of the ICTY/ICTR's lower 'reasonable grounds' which is used in the context of the issuance of a warrant of arrest under article 58 of the [Rome] *Statute. Second, and more* [sic] *important, the drafters of the Statute did not import the ICTY/ICTR procedures*".[12]

7. Likewise, the decision on the confirmation of charges cannot be reviewed or altered by the trial chamber.[13] While, "[t]*he primary rationale underpinning the hearing of a 'no case to answer' motion* […] *is the principle that an accused should not be called upon to answer a charge when the evidence presented by the Prosecution is substantively insufficient to engage the need for the defence to mount a defence*",[14] it must also be borne in mind that in the ordinary course of events there would be no fundamental change between the evidence already scrutinised at pre-trial stage and that presented at trial.[15]

8. The fact that the evidentiary threshold of "*substantial grounds to believe*" at confirmation stage and "*beyond reasonable doubt*" at trial stage differs does not *per se* militate in favour of conducting a NCTA proceedings after the close of the Prosecution's case. As indicated *supra*, conducting a second, renewed *review* of the sufficiency of the Prosecutor's evidence at that juncture is incompatible with the fair and expeditious conduct of the proceedings, which is the most fundamental duty of the trial chamber.[16]

9. Victims contribute to the fairness of the proceedings by sharing and explaining their sufferings and the consequences of the crimes on their lives, families and communities. They participated in the present case with the hope that justice one day will be rendered. In deciding to entertain NCTA motions, the Trial Chamber violated the Victims' rights to truth and justice because no exceptional circumstances justified said procedure. By failing to define a proper standard of proof, the Trial Chamber deprived Victims of their ability to present views and concerns and to give instructions to their counsel. By discarding without valid grounds the

[12] See the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges'" (Appeals Chamber), No. ICC-01/04-01/10-514 OA4, 30 May 2012, para. 43.
[13] See TRIFFTERER, (O.), *op. cit.*, *supra* note 7, p. 1535.
[14] See the "Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)" (Trial Chamber V(a)), No. ICC-01/09-01/11-1334, 3 June 2014, para. 12 (the "Decision No. 5")
[15] *Idem*, para. 14.
[16] See article 64(2) of the Rome Statute.

account of the five charged incidents, the Trial Chamber also failed to shade light on the events Victims suffered from.

10. In this regard, the Majority failed to properly assess also the extent of the victimisation suffered - a determination that - in light of the outcome of the trial - was more than necessary to the hundreds of Victims concerned. The acknowledgment by the trial chamber of the extent of the victimisation also in case of a successful NCTA motion constitutes an essential step in the Victim's recovery.[17] In this case, Victims noted with deep regret that the Decision did not mention their sufferings and the dramatic consequences of the crimes on them, their families and their communities. They felt that the Chamber's ruling constitutes a further injustice, as if their suffering is not worthy of justice's attention. Because Victims were not entitled to lodge an appeal against the decision granting the NCTA motions, their rights were even more frustrated as they had to rely on the Prosecutor's willingness to appeal and could merely hope that the Prosecution's submissions will take fully into account their rights and interests.

11. Finally, as a judgment on acquittal at the end of the trial or on appeal proceedings, a successful NCTA motion precludes the possibility for Victims to trigger reparations proceedings. This leads to a more general debate on whether the right of Victims to be compensated for the prejudices they suffered from could be somehow accommodated also in the absence of a conviction. In this regard, and as also constantly underlined by the participating Victims, the Legal Representative briefly notes the importance of the involvement of the Trust Fund for Victims in the relevant country as soon as a situation is brought before the Court. In fact, the early design and implementation of assistance programmes would allow addressing in a timely manner the needs of the Victims and their families since the initial stage of the proceedings; and could also contribute to alleviate the Victims' distress in case of the Court's failure to identify and/or convict the perpetrators.[18] Moreover, based on the concept of reparative complementarity, States Parties have a general responsibility to afford redress to Victims who have suffered egregious abuses on their territory.[19]

[17] See, *mutatis mutandis*, the "Legal Representatives of Victims' joint submissions on the consequences of the Appeals Chamber's Judgment dated 8 June 2018 on the reparations proceedings", No. ICC-01/05-01/08-3649, 12 July 2018, paras. 14 *et seq*.
[18] See the activation of the TFV assistance mandate after the acquittal on appeal in the *Bemba* case.
[19] See MOFFETT (L.), Reparative complementarity: ensuring an effective remedy for victims in the reparation regime of the International Criminal Court, *The International Journal of Human Rights*, 2013, Vol. 17, No. 3, pp. 379-384. See also, REDRESS, *No Time to Wait: Realising Reparations for Victims before the International Criminal Court*, pp. 34-35.

2. Submissions on Questions 1 to 4 and 6 to 7

12. As already underlined *supra*, there is no provision in the Rome Statute that explicitly foresees NCTA proceedings before the Court. However, article 64 of the Statute allows for a broad discretion of the trial chamber in ensuring and facilitating the fair and expeditious conduct of the proceedings, with full respect for the rights of all participants involved.[20]

13. In this sense, and in **addressing section c) of question 4**,[21] the Legal Representative agrees with the Appeals Chamber's finding that, depending on the circumstances of each case, allowing for a NCTA procedure (i) falls within the trial chamber's discretion[22] to "*adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings*";[23] and (ii) might respond to the need of avoiding lengthy trials based on evidence not capable of supporting a conviction. Therefore, it is intrinsically for the benefit of the accused, in accordance with internationally recognised human rights and article 21(3) of the Statute.[24] However, those considerations only relate to the identification of the trial chamber's legal basis to entertain a NCTA motion - *i.e.* article 64 of the Statute - which necessarily differs from the one of the resulting decision.

14. The provision governing the decision that a trial chamber issues pursuant to a NCTA motion would depend on the outcome of such proceedings.[25] In particular, it would depend on whether the trial chamber decides to issue a judgment of acquittal or, instead, to dismiss the motion and continue with the trial. In response to **question 1**, in case of an acquittal following NCTA proceedings the only applicable provision is article 74 of the Statute. In recalling her previous submissions,[26] the Legal Representative notes that, according to the constant ICTY jurisprudence, granting a NCTA motion - and thereby entering a judgement of acquittal at "halfway stage" - has "*the same practical effect as entering a judgement of acquittal at the end of the trial"*.[27] In **addressing question 6**,[28] she underlines, on the contrary, that the ICTY

[20] See in particular article 64(2) and 64(3)(a) of the Rome Statute.
[21] See the "Decision rescheduling, and directions on, the hearing before the Appeals Chamber", *supra* note 1, p. 5.
[22] See the "Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on Defence request for leave to file a 'no case to answer' motion" (Appeals Chamber), No. ICC-01/04-02/06-2026 OA6, 5 September 2017, paras. 44-45 (the "Ntaganda NCTA Appeal Judgment").
[23] See article 64(3)(a) of the Rome Statute.
[24] See the "Victims' Observations on the issues on appeal affecting their personal interests", No. ICC-02/11-01/15-1326-Conf, 20 April 2020, para. 30 (the "Victims' Submissions on appeal").
[25] See the Decision rescheduling, and directions on, the hearing before the Appeals Chamber, *supra* note 1, p. 5, Question 1.
[26] See the Victims' Submissions on appeal, *supra* note 24, paras. 28-31.
[27] See ICTY, *Karadžić,* Case No. IT-95-5/18-T Decision On Prosecution Request for Certification to Appeal Judgement of Acquittal Under Rule 98*Bis*, 13 July 2012, para. 10.

trial chamber did draw a clear and obvious distinction between a decision dismissing a NCTA motion and a judgment convicting an accused at the end of the trial.[29]

15. Contrary to what the Defence suggests,[30] the ICTY jurisprudence - including the one cited in footnote 42[31] - never distinguished acquittals further to a decision granting a no case to answer motion from those entered at the end of the trial. In addition, the ICTY jurisprudence has been constant in finding that only a decision dismissing a NCTA motion requires certification by the relevant trial chamber. Such certification is never required in the case of decision granting a NCTA motion and acquitting an accused.

16. In order to dispel some confusion that it might have been created by footnote 42 of the Defence's submissions,[32] the Legal Representative highlights that in the three cases cited - *Kordić and Čerkez*, *Šešelj* and *Krajišnik* - the relevant chambers explained at length (i) the difference between dismissing a NCTA motion and issuing a final judgment convicting an accused;[33] and (ii) the fact that appeal against a decision dismissing a NCTA – *i.e.* appeals of the accused - always require certification by a trial chamber.[34]

17. Moreover, the ICTY trial and appeals chambers have provided a clear explanation on the difference - in terms of nature and available remedies - between a decision granting and one denying a NCTA motion. As recalled, a decision granting a NCTA motion has been assimilated to a final judgment of acquittal. In the *Blagojević* case, the trial chamber noted that the "*effect of granting, in whole or in part, a motion pursuant to Rule 98*bis *of the Rules is that a judgement of 'acquittal' is entered.*"[35] In the *Karadžić* case, the trial chamber further clarified that "*in that sense, such a judgement cannot be considered a decision, which requires certification before an interlocutory appeal can proceed pursuant to Rule 73(B). Accordingly, as the* Blagojević *Trial Chamber held, it is under Rule 108 that an appeal from*

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[28] See the Decision rescheduling, and directions on, the hearing before the Appeals Chamber, *supra* note 1, p. 6, Question 6.
[29] See ICTY, *Kordić & Čerkez*, Case No. IT-95-14/2, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, paras. 11 and 27. See also, ICTY, *Šešelj*, Case No. ICTY-03-67, Transcript of Rule 98*bis* Judgment, 4 May 2011, page 16830, lines13-22.
[30] See the "Defence Response to the 'Prosecution Document in Support of Appeal'", No. ICC-02/11-01/15-1315-Conf A, 6 March 2020, para. 24, fn 42 (the "Blé Goudé Response").
[31] *Ibid.*
[32] *Ibid.*
[33] See ICTY, *Kordić & Čerkez*, Case No. IT-95-14/2, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, paras. 11 and 27; ICTY, *Šešelj*, Case No. ICTY-03-67, Transcript of Rule 98*bis* Judgment, 4 May 2011, page 16830, lines 13-22.
[34] See ICTY, *Krajišnik*, Case No. IT-00-39-AR98bis, Decision on appeal of Rule 98*bis* decision, 14 October 2005, paras. 5-6.
[35] See ICTY, *Blagojević and Jokić*, Case No. IT-02-60-T, Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber's Judgement on Motions for Acquittal Pursuant to Rule 98 *bis*, 23 April 2004, paras. 11–13 (the "*Blagojević* Decision").

'a judgement including a judgement rendered pursuant to Rule 98bis' should be brought. This is to be contrasted with a decision to dismiss a Rule 98bis motion, which does not involve the Chamber rendering a judgement on the guilt of an accused, and remains a decision, from which certification is required in order to appeal. As the Appeals Chamber has held, all interlocutory appeals are subject to the certification procedure under Rule 73, including denials of a Rule 98bis motion for acquittal".[36]

18. The ICTY appeals chamber validated the trial chamber's conclusions in the *Karadžić* case and recalled that "*an appeal against an acquittal entered at the Rule 98*bis *stage of a case is an appeal against a judgement. Thus, in an appeal of a Rule 98*bis *judgement of acquittal, the proceedings are governed by Article 25 of the Statute and by the standards of appellate review for alleged errors of law and alleged errors of fact*".[37]

19. It is thus the final nature of an acquittal decision and, as suggested by the Appeals Chamber,[38] the applicability of the *ne bis in idem* regime that determines its nature of final judgment and its direct appellate review. While following a refusal for leave to appeal an interlocutory decision, a party can usually raise the relevant issues before the Appeals Chamber at a later stage, as part of the final appeal against the verdict,[39] there would be no such opportunity in proceedings such as the present ones.

20. In conclusion, the ICTY case-law - mirrored in the Court's relevant jurisprudence[40] - provides full guidance on the matter before the Appeals Chamber. Article 74 of Statute is the provision governing final judgments, including judgments of acquittal following successful NCTA motions. As such, they are also subject to direct appellate review.

3. Submissions on Questions no. 8 and 9

21. A trial chamber can only issue an oral decision of acquittal or conviction when the reasons follow *shortly* after the pronouncement. Such decision shall contain "[a] *full and*

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[36] ICTY, *Karadžić,* Case No. IT-95-5/18-T Decision On Prosecution Request for Certification to Appeal Judgement of Acquittal Under Rule 98*Bis*, 13 July 2012, para. 10. See also, the *Blagojević* Decision, *supra* note 35, para. 10 (emphasis added).
[37] See IRMCT, *Karadžić*, Case No. IT-95-5/18-AR98bis.l, Judgement, 11 July 2013, para. 9.
[38] See the Decision rescheduling, and directions on, the hearing before the Appeals Chamber, *supra* note 1, p. 6, Questions 6 and 7.
[39] See the "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" (Appeals Chamber), No. ICC-02/04-01/05-408-OA3, 16 September 2009, paras. 46-47. See also, the "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'" (Appeals Chamber), No. ICC-01/04-02/12-271-Corr, 7 April 2015, paras. 3, 247.
[40] See the Decision No. 5, *supra* note 14, para. 22: "[t]*he effect of a successful 'no case to answer' motion would be the rendering of a full or partial judgment of acquittal*".

reasoned statement of the Trial Chamber's findings on the evidence and conclusions"; explain, even in summary form, how it assessed the evidence and which facts it found to be relevant in coming to its conclusions;[41] and indicate with sufficient clarity the basis of its conclusion under article 74(5) of the Statute, in order to allow the useful exercise of the right to appeal and to enable the Appeals Chamber to properly exercise its function.[42]

22. Article 74(5) of the Statute establishes four mandatory requirements for a decision to convict or to acquit, namely (i) a decision "*in writing*"; (ii) with "*a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions*"; (iii) delivered "*in open court*"; and (iv) comprising "*one decision*" with "*the views of the majority and the minority*".

23. The requirements in article 74(5) - as any other provision of the Statute - must be applied and interpreted in a manner "[c]*onsistent with internationally recognised human rights*" pursuant to article 21(3) of the Statute,[43] and the rights of the accused to a fair trial, as detailed in article 67 of the Statute.[44] The Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights have clarified that the provision of a timely written and reasoned judgment in public is necessary to (i) protect an individual from arbitrariness;[45] (ii) maintain public confidence in the courts,[46] and (iii) ensure the right to an appeal,[47] in particular regarding the essential elements of the case heard by the court at hand.[48]

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[41] See the Victims' Submissions on appeal, *supra* note 24, paras. 80-83.
[42] *Idem*, paras. 56-57.
[43] See the Ntaganda NCTA Appeal Judgement, *supra* note 22, para. 46.
[44] See the "Judgment on the Appeal of Mr Germain Katanga Against the Decision of Trial Chamber II of 21 November 2012 Entitled 'Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons'" (Appeals Chamber), No. ICC-01/04-01/07-3363 OA13, 27 March 2013, para. 86.
[45] See ECtHR, *Taxquet v. Belgium*, Appl. No. 926/05, Judgment (Grand Chamber), 16 November 2010, paras. 90-91. See also, I-ACtHR, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Series C No. 170, Preliminary Objections, Merits, Reparations and Costs, 21 November 2007, para. 107; I-ACtHR, *Yatama v. Nicaragua*, Series C No. 127, Preliminary Objections, Merits, Reparations and Costs, 23 June 2005, paras. 152-153; ECtHR, *Werner v. Austria*, Appl. No. 21835/93, Judgment (Chamber), 24 November 1997, para. 54; ECtHR, *H. v Belgium*, Appl. No. 8950/80, Judgment (Plenary), 30 November 1987, para. 53; and ECtHR, *Pretto and Others v. Italy*, Appl. No. 7984/77, Judgment (Plenary), 8 December 1983, para. 27.
[46] See ECtHR, *Cerovšek and Božičnik v. Slovenia*, Appl. Nos. 68939/12 and 68949/12, Judgment (Chamber), 7 March 2017, para. 40. See also I-ACtHR, *J. v. Peru*, Series C No. 275, Preliminary Objections, Merits, Reparations and Costs, 27 November 2013, para. 217; ECtHR, *Fazliyski v. Bulgaria*, Appl. No. 40908/05, Judgment (Chamber), 16 April 2003, para. 64; ECtHR, *Szücs v. Austria*, Appl. No. 20602/92, Judgment (Chamber), 24 November 1997, para. 42; ECtHR, *Diennet v. France*, Appl. No. 18160/91, Judgment (Chamber), 26 September 1995, para. 33.
[47] See ECtHR, *Taxquet v. Belgium*, Appl. No. 926/05, Judgment (Grand Chamber), 16 November 2010, para. 91; I-ACtHR, *Apitz Barbera* et al. *v. Venezuela*, Series C No. 182, Preliminary Objections, Merits, Reparations and Costs, 5 August 2008, para. 78; ECtHR, *Hirvisaari v. Finland*, Appl. No. 49684/99, Judgment (Chamber), 27 September 2001, para. 30; ECtHR, *García Ruiz v. Spain*, Appl. No. 30544/96, Judgment (Grand Chamber), 21 January 1999, para. 26; HRC, *Hamilton v. Jamaica*, CCPR/C/50/D/333/1988, "Views", Communication

24. The aforementioned tribunals have also established that, although it is acceptable for a first instance court to pronounce reasons for a decision sometime after its adoption, as long as this does not deny the applicant's right to effectively exercise his or her right to lodge an appeal,[49] the decision must give reply to the main arguments submitted by the parties.[50] The same approach has been adopted by the *ad hoc* Tribunals and by the Extraordinary Chambers in the Courts of Cambodia ("ECCC").[51] The ECCC pre-trial chamber in particular found that, while delivering reasons at a later date may in certain circumstances fulfil the obligation to issue reasoned decision, this approach cannot apply to final procedural acts following which the issuing authority is *functus officio*.[52] The requirement to accompany the judgment by a reasoned opinion is also envisaged by the Rules of Procedure and Evidence of the Special Tribunal for Lebanon, recently amended to limit the time available to the judges to issue the reasons of their judgments. In particular, whereas the original version of rule 168 of the Rules provided the judges with a margin of time for issuing their reasons ("*as soon as possible*"),[53] since April 2019 said provision solely provides that "[t]*he judgement* […] *shall be accompanied by a reasoned opinion, in writing*".[54]

25. **Question 9** will be addressed *infra* together with **question 14**.

No. 333/1988, 25 March 1994; and ECtHR, *Hadjianastassiou v. Greece*, Appl. No. 12945/87, Judgment (Chamber), 16 December 1992, paras. 33-37.

[48] See ECtHR, *Carmel Saliba v. Malta*, Appl. No. 24221/13, Judgment (Chamber), 29 November 2016, para. 73; ECtHR, *Tatishvili v. Russia*, Appl. No. 1509/02, Judgment (Chamber), 22 February 2007, para. 58; ECtHR, *Kuznetsov and Others v. Russia*, Appl. No. 184/02, Judgment (Chamber), 11 January 2007, para. 83; and ECtHR, *Donadzé v. Georgia*, Appl. No. 74644/01, Judgment (Chamber), 7 March 2006, para. 35.

[49] See ECtHR, *Jodko v. Lithuania*, Appl. No. 39350/98, Decision, 7 September 1999, para. 1. See also, HRC, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para. 49.

[50] See ECtHR, *Taxquet v. Belgium*, Appl. No. 926/05, Judgment (Grand Chamber), 16 November 2010, para. 91. See also ECtHR, *Boldea v. Romania*, Appl. No. 19997/02, Judgment (Chamber), 15 February 2007, paras. 28-30, and ECtHR, *Buzescu v. Romania*, Appl. No. 61302/00, Judgment (Chamber), 24 May 2005, para. 63.

[51] See ECCC, *Nuon Chea and Khieu Samphan*, Case No. F36, Appeal Judgement, 23 November 2016, paras. 202-208, and ECCC, *Im Chaem*, Case No. 004/1/07-09-2009, Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, paras. 32-35. See also, ICTR, Case No. ICTR-00-56B-A, *Bizimungu*, Judgement, 30 June 2014, para. 18; ICTR, *Karera*, Case No. ICTR-01-74-A, Judgement, 2 February 2009, para. 20; ICTY, *Nikolić*, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006, para. 96; ICTY, *Milutinović et al.*, No. IT-05-87-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković's Provisional Release, 1 November 2005, para. 11; ICTY, *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, para. 41; and ICTY, *Furundžija*, Case No. IT-95-17/1-A, Judgment, 21 July 2000, para. 69.

[52] ECCC, *Im Chaem*, Case No. 004/1/07-09-2009, Considerations on the International Co-Prosecutor's Appeal of Closing Order (Reasons), 28 June 2018, paras. 32-35.

[53] See STL, Rules of Procedure and Evidence, STL/BD/2009/01, 20 March 2009, rule 168(B).

[54] See STL, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.10, 10 April 2019, rule 168(B).

III. QUESTIONS ON GROUND TWO OF THE APPEAL

1. Submissions on Questions no. 10 to 16

26. In addressing **question 10**, a trial chamber at the stage of NCTA proceedings should apply the standard as developed by the ICTY and adopted in Decision No. 5 in the *Ruto and Sang* case[55] - "*whether the case of the Prosecution has broken down or whether there is sufficient evidence upon which a reasonable Trial Chamber could convict the Accused"*.[56]

27. The relevant jurisprudence of the *Ruto and Sang* and the *Ntaganda* cases identifies the applicable standard as "*whether or not, on the basis of a* prima facie *assessment of the evidence, there is a case, in the sense of whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber* could *convict the accused*".[57] In other words, "*whether there is evidence on which a reasonable Trial Chamber* could *convict*"[58] or "*whether the evidence presented, when taken at its highest, would require any partial acquittal*".[59] The chamber's determination pursuant to the standard above is theoretical in nature ("*if accepted*"), and based on a superficial assessment of the evidence submitted at trial up until the end of the Prosecution's case ("*prima facie*" or "on the first appearance"), as the chamber cannot establish at that stage whether it "*could*" (with certainty) convict the accused on the basis of the evidence presented only by the Prosecution[60] (and the Victims). Any ruling on NCTA motions would therefore have to be proved (or disproved)[61] at the end of the case, and on the basis of a decision pursuant to article 74 of the Statute.[62]

28. Accordingly, because "*the objective of the 'no case to answer' assessment is to ascertain whether the Prosecution has lead* [sic] *sufficient evidence to necessitate a defence case*",[63] a NCTA motion "*does not entail an evaluation of the strength of the evidence presented, especially as regards exhaustive questions of credibility or reliability*".[64] In short,

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[55] See the Decision No. 5, *supra* note 14, paras. 23-24.
[56] See the "Dissenting Opinion of Judge Herrera Carbuccia", No. ICC-01/09-01/11-2027-AnxI, 5 April 2016, para. 2.
[57] See the Decision No. 5, *supra* note 14, para. 23 (emphasis in original).
[58] *Idem*, para. 32 (emphasis in original).
[59] See the "Decision on Defence request for leave to file a 'no case to answer' motion", (Trial Chamber VI), No. ICC-01/04-02/06-1931, 1 June 2017, para. 28.
[60] See ICTY, *Karadžić*, Case No. IT-95-5/18, 98*bis* Judgement (Trial Chamber II), 28 June 2012, Transcript pp. 28732-28733. See also ICTY, *Mladić* 98*bis* Judgment, *supra* note 8, pp. 20922-20923, and ICTY, *Hadžić*, Case No. IT-04-75-T, 98*bis* Judgment, 20 February 2014, Transcript p. 9102 *et seq*.
[61] See ICTR, *Muvunyi*, Case No. ICTR-2000-55A-T, Decision on Tharcisse Muvunyi's Motion for Judgement of Acquittal Pursuant to Rule 98*bis*, 13 October 2005, para. 40; SCSL, *Norman et al*., Case No. SCSL-04-14, Decision on Motions for Judgment of Acquittal pursuant to Rule 98, 21 October 2005, para. 45.
[62] See the Dissenting Opinion of Judge Herrera Carbuccia, *supra* note 56, para. 17.
[63] See the Decision No. 5, *supra* note 14, paras. 23, 24, 32, 39 (emphasis added).
[64] *Ibid*.

"*the standard* [is] *one of 'existence' rather than 'weight'*" of the evidence, taking the latter "*at its highest*".[65] Therefore, what the chamber must deal with at that juncture of the proceedings is the effect of the evidence if it were to be believed, rather than whether it is believable. In reaching such determination the legal and factual components of the alleged crimes and the individual criminal responsibility of the accused must be considered.

29. Consequently, and in addressing **question 11**, the failure to set a clear define standard of proof for NCTA proceedings amounts to a *legal and procedural error*. It is indisputable that a chamber cannot properly determine whether a fact or state of affairs exists without applying the relevant standard of proof to that determination. Moreover, in the absence of a clear provision within the Court's legal texts specifying such a standard, it is the chamber's duty to inform all participants on how the relevant proceedings will unfold in order to achieve certainty.[66] In the *Ayyash et al.* case, the appeals chamber found that a trial chamber's failure to identify and articulate a standard of proof when making a factual determination, constitutes ***an error of law*** which invalidates its assessment of the facts and the overall impugned decision - to the point of rendering moot all the remaining grounds raised on appeal.[67]

30. In addressing **question 12**, the failure of the Trial Chamber to direct itself (correctly or at all) as to the applicable standard *and* the failure to give all participants advance notice are two distinct errors. The overall failure of the Chamber in dealing with the NCTA proceedings, including the failure to provide notice to all participants, is mainly rooted on its inability to agree on the applicable standard and to properly articulate it – before and when issuing the Decision. In addition, the lack of notice about the applicable standard is also a standalone error which further impacts on the fairness of the proceedings and on the outcome of the decision.[68]

31. The scenario suggested in **question 13** cannot apply to the present appeal as the Trial Chamber was not able to articulate a common applicable standard and instead looked at the evidence against three different thresholds.[69] Accordingly, and in response to **question 16**, the ensuing consequence is that the evidence was not properly assessed and that the Decision is

[65] *Idem*, para 24; and the Dissenting Opinion of Judge Herrera Carbuccia, *supra* note 56, para. 18.
[66] See the "Dissenting Opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova in the Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings'" (Appeals Chamber), No. ICC-01/04-01/07-2297 OA10, 29 July 2010, para. 60.
[67] See STL, *Ayyash et al.*, Case No. STL-11-01/T/AC/AR126.11, Decision on Badreddine Defence Interlocutory Appeal of the 'Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings', 11 July 2016, para. 41.
[68] See the Victims' Submissions on appeal, *supra* note 24, paras. 110-126.
[69] *Idem*, paras. 123-126.

invalid. This result would not change even if the Appeals Chamber were to find that one of the Judges of the Majority actually applied the correct standard.

32. In this sense - and **in addressing jointly question 14 and 9** - the errors identified in the First and Second Grounds of appeal have a common root. The Majority failed to issue a decision meeting the mandatory requirements of article 74(5) and to identify and articulate a common standard of proof because of its inability to agree on (i) the very nature of and legal basis for issuing the Decision; (ii) the standard to be applied; (iii) the approach to evidence, and (iv) how to reach a verdict on the ultimate question of guilt of the two Defendants. While such fractured views are obviously acceptable between the Majority and the dissenting Judge, a disagreement of this magnitude within the Majority invalidates the Decision. The Majority cannot simply agree on the outcome of the proceedings (*i.e.* acquittal in this case), without agreeing on the reasons why the two Defendants are to be acquitted and how to reach such a conclusion. In the absence of consensus thereon, the Majority should have refrained from issuing any such decision, the Defence's motions should have been dismissed and the trial should have continued.[70]

33. In turn, the Trial Chamber's violation of the mandatory requirements of article 74(5) of the Statute also renders the relevant Decision '*null and void*' as it was taken outside the applicable legal framework and is therefore invalid.[71] Accordingly, the Decision is *null and void* because of the separate and cumulative effects of the two identified errors. Those errors also had a clear impact on the possibility to deliver justice. Not every act of non-compliance will result in the nullification of the act complained of; but acts amounting to violations of a fundamental rule of fairness and occasioning a miscarriage of justice must always be

[70] See STL, *Ayyash et al*., Case No. STL-18-10-MISC.2/AC F0006, Decision on Appeal against Decision of President convening Trial Chamber II (Appeals Chamber), 13 December 2019, paras. 16-24. See also, *U.S. Supreme Court United States v. Perez*, 22 U.S. 9 Wheat. 579 (1824), at 580.

[71] See the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU'" (Appeals Chamber), No. ICC-01/04-01/06-2582 OA18, 8 October 2010, paras. 48 and 57-58. See the "Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing" (Pre- Trial Chamber I), No. ICC-01/04-01/07-621, 20 June 2008, para. 63 ("*the Chamber, as the ultimate guarantor of the fairness of the proceedings and the rights of the suspects, may engage in a* proprio motu *analysis of the legality of such agreements* [concluded by the Prosecutor not to disclose documents under article 54(3)(e) of the Rome Statute]. *If all or part of such agreements are found to be contrary to the statutory framework provided for by the Statute and the Rules, some of their confidentiality clauses may be declared* ***null and void***" – Emphasis added). See also, ICTY, *Kupreškić et al.*, Case No. IT-95-16, Decision on Appeal by Dragan Papić against ruling to proceed by deposition, 15 July 1999, para. 14.

nullified.[72] In the case at hand, the violations are so egregious and the fairness of the overall trial process so heavily compromised, that it is evident how justice was not served.

34. However - should the Appeals Chamber be minded to look at the material impact of the identified errors - the Legal Representative submits that those errors are also as such to materially affect the decision in the sense that the Trial Chamber *"would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error"*. [73]

2. Submissions on Questions no. 17 to 19

35. The six examples of inconsistent, unclear and unreasonable factual assessments analysed by the Prosecution are a clear expression of the errors of law and procedure listed in the Victims' previous submissions[74] and likewise identified in the Appeal Brief. In other words, the Prosecution is not pleading errors of fact and the examples are used to support the conclusion that the failure of agreeing on, articulating and applying a common standard also vitiated the Decision. In accordance with the practice before the Court, the trial chamber deserve appellate deference regarding its factual assessment "*unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts*".[75] While the applicable standard

[72] See ICTR, *Rwamakuba*, Case No. ICTR-98-44-T, Decision on the Defence Motion concerning the illegal arrest and illegal detention of the Accused (Trial Chamber), 12 December 2000, para. 45 and operative part [as upheld by the Appeals Chamber, Appeal Against Dismissal of Motion Concerning Illegal Arrest and Detention, 11 June 2001] *Cf.* ICTR, *Barayagwiza*, Decision (Appeals Chamber), 3 November 1999, paras. 106 and 112. See in this sense, DORIA (J.), GASSER (H.-P.), BASSIOUNI (M.C.), The Legal Regime of the International Criminal Court, Martinus Nijhof Publishers, Leiden – Boston, 2009, p. 999.

[73] See the "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'" (Appeals Chamber), No. ICC-01/04-169 OA, 13 July 2006, para. 84. See also, the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'" (Appeals Chamber), No. ICC-02/05-03/09-295 OA2, 17 February 2012, para. 20; the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber), No. ICC-01/04-01/06-3121-Red A5, 1 December 2014, paras. 18-19; the "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'" (Appeals Chamber), No. ICC-01/04-02/12-271-Corr A, 7 April 2015, paras. 20, 285; the "Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, 8 March 2018, paras. 90, 283, 285, 299; and the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/08-3636-Red A, 8 June 2018, para. 36.

[74] See the Victims' Submissions on appeal, *supra* note 24, paras. 1-15.

[75] See the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'", *supra* note 73, para. 39. See also, the "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'", *supra* note 73, para. 117; the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the

of proof is different,[76] the limits of deference remain the same in case of judgments of acquittals following NCTA proceedings or at the conclusion of the Defence case. Nonetheless, because of the specific circumstances of this appeal, the Appeals Chamber is called to carefully scrutinise the Trial Chamber's factual determination in order to determine whether the alleged error of law and procedure have been committed.

IV. QUESTIONS ON THE REMEDY

36. Given the gravity of the identified errors and their impact on the overall fairness of the proceedings, a declaration of "*mistrial*" is the most appropriate remedy. The miscarriage of the trial process by the Trial Chamber, in violation of article 64(2) of the Statute, cannot be addressed otherwise. In addition, a positive finding in this sense must entail that proceedings will restart against both Defendants. Accordingly, the remedies requested by the Prosecution need not to be considered in the alternative. In light of the circumstances of this case, entering a declaration of mistrial should be the first step and ordering new proceedings the natural consecutive step to be taken by the Appeals Chamber.

37. The trial chamber's authority to declare a mistrial "*follows by necessary implication from the imperatives of article 64(2)*"[77] of the Statute, which provides that it 'shall ensure that a trial is fair and expeditious'- the same provision cited in defence of recognizing NCTA motions.[78] As explained by Judge Eboe-Osuji, the trial chamber can rely on implied powers to recognize a domestic procedural mechanism only "*when such domestic methods do not contradict the Court's own legal texts*".[79]

38. In turn, pursuant to article 83(1) of the Statute, in appeals from acquittal or conviction or on sentence, the Appeals Chamber has "*all the powers of the Trial Chamber*". Rule 149 of the Rules of Procedure and Evidence further clarifies that, for the purposes of an appeal, norms applicable to pre-trial and trial chambers concerning proceedings and evidence are to

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Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals Chamber), No. ICC-01/09-01/11-307 OA, 30 August 2011, para. 56; the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals Chamber), No. ICC-01/09-02/11-274 OA, 30 August 2011, para. 55; and the "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the 'Defence Request for Interim Release'" (Appeals Chamber), No. ICC-01/04-01/10-283 OA, 14 July 2011, paras. 1 and 17.

[76] See *supra* paras. 26-28.

[77] See the "Public redacted version of Decision on Defence Applications for Judgments of Acquittal" (Trial Chamber V(a)), No. ICC-01/09-01/11-2027-Red-Corr, 16 June 2016, Reasons of Judge Eboe-Osuji, para. 190 (the "Reasons of Judge Eboe-Osuji").

[78] *Idem*, para. 134.

[79] *Idem*, para. 192.

be applied *mutatis mutandis* to proceedings before the Appeals Chamber. Consequently, the Appeals Chamber has also the power to entertain a motion for a declaration of mistrial sought by the Prosecution for violations of article 64(2). Especially so when the unfairness of the proceedings is so egregious that not only affected the reliability of the trial chamber decision, but caused an overall miscarriage of the trial process.[80]

39. In addressing **question 20 (iii) and (iv)**, the Legal Representative recalls that generally mistrials are not covered by the double jeopardy clause. If a judge dismisses the case or concludes the trial without deciding the facts in the defendant's favour, for example by dismissing the case on procedural grounds or by failing to reach a verdict,[81] the case may be retried. According to Judge Eboe-Osuji, the Chamber has the authority to declare a mistrial without prejudice if there is a "*manifest necessity*" for doing so, and does not require fault-finding against a party in the case.[82] The Appeals Chamber must do so also to set the standard of fairness and expeditiousness for future cases before this Court.

40. Lastly the Legal Representative notes that the Prosecution is best placed to answering about the practical and logistical consequences of a declaration of mistrial – such as the setting of new proceedings - and she reserves her right to eventually elaborate on the issue should a hearing be held. However, Victims have clearly expressed the view that a declaration of mistrial must be followed by the continuation of the proceedings against both Defendants so that they can pursue their quest for Justice.

Respectfully submitted.

Paolina Massidda

Principal Counsel

Dated this 22nd day of May 2020

At The Hague, The Netherlands

[80] See the Victims' Submissions on appeal, *supra* note 24, para. 5 *et seq*.
[81] See *U.S. Supreme Court United States v. Perez*, 22 U.S. 9 Wheat. 579 (1824), at 580.
[82] See the Reasons of Judge Eboe-Osuji, *supra* note 77, paras. 181 and 183.