Cour Pénale Internationale

International Criminal Court

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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 Document

Defence Submissions pursuant to the "Decision rescheduling, and directions on, the hearing before the Appeals Chamber" (ICC-02/11-01/15-1338)

Source: **Defence Team for Laurent Gbagbo**

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1. Introduction

1. On 30 April 2020, the Appeals Chamber invited "further submissions" from the Parties and participants in response to a series of questions which it put to them,[1] stating that such submissions "would be useful in the determination of the appeal".[2] In the same decision the Appeals Chamber announced that a hearing would be held "during which any necessary elaborations of and/or replies to the written submissions will be heard".[3]

2. The Defence's understanding of the process directed by the Chamber is this: first, 25 pages of necessarily brief and limited submissions on the points which appear most central to the Parties and participants out of the 31 questions and sub-questions put by the Chamber, to be followed by an opportunity at the hearing for each of the Parties and participants to elaborate on those points and take part in discussion of the points the others raise, so as to allow for a general debate, on all relevant points, from which the Bench may reach a sufficiently informed decision.

3. To the Defence's understanding, therefore, the 25 pages of written submissions are in no way meant to exhaust the issues which it considers to be of significance on the present appeal, and, if the Defence is to be able to set out its full position on all of the Chamber's questions, it must be permitted to make further submissions either in court or in writing.

2. Answers to the Chamber's questions on the Prosecutor's first ground of appeal

2.1. Legal framework applicable to no case to answer proceedings

4. It seems worthwhile to preface an answer to the Chamber's first question[4] by considering the *raison d'être* of no case to answer proceedings, which is to safeguard the rights of the person charged. No case to answer proceedings satisfy a clear need:

[1] ICC-02/11-01/15-1338, para. 1.
[2] ICC-02/11-01/15-1338, para. 1.
[3] ICC-02/11-01/15-1338, para. 4.
[4] ICC-02/11-01/15-1338, para. 1.

it would be unfair to require the Defence to present a case where the Prosecutor, at the close of hers, has not put before the Bench sufficiently sound evidence to sustain a conviction. This follows from the fact that the burden of proof rests with the Prosecutor – a procedural corollary of the presumption of innocence. "Beyond doubt, the common anchor for the application of the concept of 'no case to answer' is the presumption of innocence."[5]

5. In this vein, the Trial Chamber in *Strugar* at the ICTY explained that "the fundamental concept is 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."[6]

6. In the words of Trial Chamber V of the Court in *Ruto*:

> The primary rationale underpinning the hearing of a "no case to answer" motion – or, in effect, a motion for a judgment of (partial) acquittal – 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 case. This reasoning flows from the rights of an accused, including the fundamental rights to a presumption of innocence and to a fair and speedy trial, which are reflected in Articles 66(1) and 67(1) of the Statute.[7]

7. The Appeals Chamber in *Ntaganda* confirmed that it was open to a Trial Chamber to conduct a no case to answer procedure "in a manner that ensures that the trial proceedings are fair and expeditious".[8]

8. No case to answer proceedings therefore exist for the sole purpose of the effective protection of the rights of the person charged, in particular the right not to present a case where the prosecution case is deficient and the right not to be subjected to needless protraction of the trial (the consequence of which is usually continued detention pending its outcome).

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[5] Idhiarhi, Samuel. (2015). "A Critique of the Principles of No Case Submission in Criminal Procedure". NJI Law Journal. 11. 115-143.
[6] ICTY, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, "Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 Bis", 21 June 2004, para. 13.
[7] ICC-01/09-01/11-1334, para. 12.
[8] ICC-01/04-02/06-2026, para. 44.

9. What is more, termination of the trial at the end of no case to answer proceedings cannot be regarded, as the Prosecutor contends in her Appeal Brief, as an injustice to the Prosecution.[9] To quote Judge Eboe-Osuji in *Ruto*:

> However, it must be accepted that the complaint of unfairness to the prosecution must be difficult to sustain if the prosecution has been given a fair opportunity to present their own case; and they have done so freely and fully — without any incidence of undue interference. If in those circumstances the prosecution case has remained weak, "fairness" to the prosecution in continuing the weak case becomes a misnomer for a most curious *indulgence* to them. In any judicial process in which the defence have an equal right of participation, and they are not charity guests of the justice system, such an indulgence to the prosecution may quickly convert into unfairness to the defence when called upon to present their case — especially given the lengthy period that may have elapsed already.[10]

10. As the above makes plain, the use of no case to answer proceedings is now settled in the practice of the International Criminal Court. The aim is to protect the rights of the person charged. That aim is the foundation of such proceedings and the starting point for any discussion of the legal regime to be applied thereto.

11. A number of consequences follow from the fact that the Judges of the Court have felt the need to introduce no case to answer proceedings to fill a gap in the Statute and the Rules of Procedure and Evidence.

12. First, since no case to answer proceedings are not contemplated in the Rome Statute, it is, logically speaking, not possible to assert incontrovertibly that a particular provision of the Statute (article 74 for instance) necessarily or automatically applies to such proceedings, contrary to the Prosecutor's contention.

13. The Defence recalls in this regard the Prosecutor's attempt to distinguish the case at bar from *Ruto* (where the Judges did not follow the article 74 requirements to the letter in delivering their no case to answer decision) on the ground that the majority in *Ruto* "vacated the charges" rather than acquitting.[11] However, as the Defence pointed out in its response to the Prosecutor's Appeal Brief,[12] there is nothing to suggest that the Judges in *Ruto* would have proceeded differently had

[9] ICC-02/11-01/15-1277-Conf, para. 262.
[10] ICC-01/09-01/11-2027-Red-Corr, "Reasons of Judge Eboe-Osuji", para. 129.
[11] ICC-02/11-01/15-1277-Conf, para. 35, footnote 83.
[12] ICC-02/11-01/15-1314-Red, para. 48.

they decided to enter an acquittal and not "vacated the charges". In other words there is nothing to suggest that they would have followed the article 74(5) requirements. Moreover, Judge Fremr[13] and Judge Eboe-Osuji[14] both said at the time that they were in favour of an acquittal; they entered none because of the particular circumstances under which the case had proceeded.[15]

14. Second, the issue of the procedure applicable upon a submission of no case to answer has to be approached as follows: although no provision of the Statute is automatically applicable to no case to answer proceedings, the Judges will as a matter of course, in their approach, on a case-by-case basis, draw on such provisions of the Statute as may be of assistance and guidance to them in the conduct of such proceedings.

15. For example, in a no case to answer context, it is par for the course that a Chamber does not adhere to the letter of article 74(5) – which is not directly applicable to no case to answer proceedings since the Statute does not contemplate them – but that the Chamber instead draws on the substance of that article in delivering a no case to answer decision, because article 74(5) reveals what the drafters of the Statute thought important for Judges to do when delivering a decision, namely to reason their decision and to deliver a decision that is clear ("one decision") and public. In other words the Judges will draw on article 74(5) not because it is strictly applicable to no case to answer proceedings but because it reflects the intentions of the drafters of the Statute.

16. Thus, in the Defence's view, and in answer to the Appeals Chamber's first question, the issue is not so much which articles of the Statute automatically apply to no case to answer proceedings as whether, in the case *sub judice*, the procedure followed by the Judges was consistent with the spirit of the Statute, which was framed to safeguard the rights of the accused.

[13] ICC-01/09-01/11-2027-Red-Corr, "Reasons of Judge Fremr", para. 147.
[14] ICC-01/09-01/11-2027-Red-Corr, "Reasons of Judge Eboe-Osuji", para. 139.
[15] ICC-01/09-01/11-2027-Red-Corr, "Reasons of Judge Fremr", para. 148.

2.2. The Trial Judges adhered to the spirit of article 74(5)

17. With regard to the three main duties which article 74(5) of the Statute casts upon the Judges (the duty to state reasons, the duty to deliver "one decision" and the duty of publicity), it must be noted that the Trial Chamber was exemplary.

18. Regarding the duty to state reasons, there is no question that it was amply discharged in the form of the 950-page "Reasons" delivered by the Majority Judges on 16 July 2019. The Judges gave clear, detailed, specific and exhaustive reasons for the acquittal. At any event, the Defence notes that it has never been the Prosecutor's contention that the written decision lacks reasons. All she contends is that the oral decision of January 2019 should have been reasoned. But that is not what article 74(5) says. Article 74(5) provides that the written decision must be reasoned.[16]

19. In respect of the Judges' duty to issue "one decision", it must be recalled that Judge Tarfusser agreed in full with the factual and legal determinations set out in the Reasons of Judge Henderson,[17] *inter alia* as to the applicable standard of proof.[18] The Reasons issued by the Majority therefore constitute "one decision" within the meaning of article 74(5).

20. It is worth emphasizing in this regard that the Judges here proceeded in exactly the same way as the Judges in *Ruto.* In *Ruto*, the two Judges in the majority issued two separate opinions, Judge Eboe-Osuji stating:

> I have read the reasons of my highly esteemed colleague, Judge Fremr. The evidential review laid out in his reasons amply shows that the case for the Prosecution has been apparently weak. To keep the length of my own reasons more manageable, I need conduct no further evidential review. I fully adopt the evidential review set out in Judge Fremr's reasons.[19]

21. Moreover, still as regards the duty to deliver "one decision", and by way of answer to the Appeals Chamber's question 8,[20] the Defence underlines that there is

[16] ICC-02/11-01/15-1277-Conf, para. 43.
[17] ICC-02/11-01/15-1263-AnxA, para. 1; ICC-02/11-01/15-1314-Red, paras. 17, 97, 121, 202.
[18] ICC-02/11-01/15-1263-AnxA, para. 67; ICC-02/11-01/15-1314-Red, paras. 204-206.
[19] ICC-01/09-01/11-2027-Red-Corr, "Reasons of Judge Eboe-Osuji", para. 1.
[20] ICC-02/11-01/15-1338, para. 8.

nothing in principle which prohibits a Chamber from delivering an oral decision "with reasons following later".

22. Regarding this point, the instances which the Prosecutor, following Judge Carbuccia, portrays as counter-examples are all cases in which the parties had to appeal absent a written decision which came afterwards. In those cases it was held on appeal that the written decision had been composed with the sole aim of responding to the parties' grounds of appeal.[21]

23. In the case at bar it is plain that the only consideration which informed the Chamber and prompted the Judges to enter the acquittal orally with "reasons to follow" was the need to respect to the utmost Laurent Gbagbo's rights, not least his fundamental right to liberty.[22]

24. To find fault with the Judges for having ordered – after their thorough scrutiny of the Prosecutor's evidence against the applicable no case to answer standard – the release of a man whom they knew they must acquit is in effect to find fault with them for not keeping Laurent Gbagbo in detention for another six months, the time it would take to write the Judgment. Otherwise put, it is to find fault with them for not violating Laurent Gbagbo's rights.

25. Lastly, with regard to the form of the oral decision itself, and by way of further answer to the Appeals Chamber's question 8, several remarks are called for.

26. First, the Defence would point out that neither article 74(5) nor any other source in international criminal law gives any insight into exactly what the content of an oral decision must be. The Judges cannot, therefore, be taken to task for not complying with a particular requirement when such requirements are nowhere to be found.

[21] ICC-02/11-01/15-1314-Red, paras. 116-120; ICC-02/11-01/15-1344-Red, paras. 106-109.
[22] ICC-02/11-01/15-T-232-FRA, p. 3, line 24 to p. 4, line 8.

27. Moreover, it must be noted that the Judges, in their oral decision, set out for the Parties, participants and general public the essence of their judgment. They gave a clear and transparent statement of the determination which the Chamber had reached – acquittal – and the reasons for its decision: the Prosecutor was unable to establish the essential elements of the charges. The Prosecutor takes issue with the Judges for not saying enough, but she does not explain what more they should have said.

28. How long the reading out of the decision should have taken to meet with her satisfaction, or what level of detail would have gained her approval the Prosecutor does not say. In particular, the question arises as to what difference it would have made had the Judges taken a few more minutes to spell out the ingredients of the modes of liability and the elements of the crimes which they thought the Prosecutor had not established, or had they taken a little more time to expound from the bench on why the Prosecutor's evidence was "exceptionally weak".[23] Would a slightly longer oral decision have made the acquittal and the Judges' reasoning more acceptable to the Prosecutor? Clearly not, since in any event she would have had to await the written Judgment to know the detail of the Judges' reasons.

29. This issue of the content of the oral decision is therefore theoretical, academic and above all subjective, as what it really amounts to is asking how long is a piece of string. Were the Appeals Chamber to hold the content of the oral decision against the Trial Chamber, it could do so only on subjective and arbitrary criteria, since there is no basis in the Statute or international practice for determining objectively the required content of an oral decision.

30. Finally, with regard to the duty of publicity, it should be noted that the Chamber entered the acquittal on 15 January 2019 in open court, and that the Reasons issued on 16 July 2019 are publicly available.

31. As to the written decision, the Prosecutor complains that the Judges did not, on that occasion again, deliver an oral summary regarding the Reasons. Granted,

[23] ICC-02/11-01/15-T-234-ENG ET WT, p. 4, line 5.

article 74(5) refers to oral delivery of the decision, but, as the Defence pointed out in its response to the Prosecutor's Appeal Brief, human rights courts have invariably held that the criterion of orality is not to be interpreted strictly and literally; rather the court must ascertain whether the decision in question was made public,[24] which here it was, especially since oral delivery had already taken place on 15 January 2019.

2.3. The place of victims in no case to answer proceedings (question 5)

32. In the Defence's view, the situation is straightforward: where the LRV has been given the opportunity – in the trial proper, in the no case to answer proceedings and in the current appeal proceedings – to present freely the "views and concerns" of the victims she represents, as article 68(3) of the Statute allows her to do, there is no reason to afford the victims particular "accommodation" in respect of the no case to answer proceedings. The victims have had every opportunity to state their views, *inter alia* in the no case to answer proceedings. To accord the victims more than that would be to superordinate them to the Parties.

33. It is worth recalling that, at trial, the LRV chose not to examine most of the witnesses presented as victims of the crisis.[25] Furthermore she chose not to call any witnesses or victims to the stand when it was open to her to do so, after the Prosecutor's case.[26] At that juncture she elected to tender only a single item of evidence even though she could have put more evidence before the Chamber had she thought fit.[27] All of these choices were freely made, within the procedural framework applicable to victim participation.

34. During the no case to answer proceedings, the LRV was able to respond to all Defence and Prosecution filings[28] and had the opportunity to present her views at the hearings in October 2018.[29] The Judges even permitted the LRV's participation in all

[24] ICC-02/11-01/15-1314-Red, paras. 106-110.
[25] ICC-02/11-01/15-1344-Red, para. 77; ICC-02/11-01/15-1344-Anx2-Red.
[26] ICC-02/11-01/15-1088.
[27] ICC-02/11-01/15-1088.
[28] ICC-02/11-01/15-1206-Red.
[29] ICC-02/11-01/15-T-223 FRA ET, p. 25, line 13 to p. 39, line 6.

proceedings concerning the release of the acquitted persons.[30] At the close of the no case to answer proceedings, the LRV did not complain that the rights of the victims she represents had been violated such as to warrant specific "accommodation". There is, therefore, no reason to afford the LRV such accommodation *ex post facto*.

35. The situation during the present appeal has been the same: the LRV has been able to present observations freely at each stage of the appeal and on every question in issue.[31] The standard procedure for victim participation in appeal proceedings has therefore been applied and the victims' rights respected.[32]

36. There is, therefore, no reason to envisage "accommodating" the LRV in the context of the present proceedings on the submission of no case to answer. To afford the victims additional rights would be to give them a role which the drafters of the Statute did not foresee and would alter the character of the proceedings, tipping the balance in the victims' favour and thereby rendering them unfair.

37. To illustrate the point, it cannot be maintained that the entry of an acquittal at the close of no case to answer proceedings is inherently prejudicial to the victims. The victims cannot demand, any more than the Prosecutor can, that proceedings go on indefinitely even when the Judges have found the Prosecutor's evidence to be weak. To claim otherwise on the basis, for example, of a purported "right to reparations" as the LRV does in her response of 8 April 2020[33] would equate, in the final analysis, to accepting that the victims are entitled to conviction of an accused irrespective of what actually happened at trial. They would be entitled to a conviction even where the Prosecutor has not proved her case. This would clearly be a negation of the very foundation of fair and balanced proceedings and the principle of the presumption of innocence in particular.

[30] ICC-02/11-01/15-T-233-Red-FRA CT WT, p. 2, line 4 to p. 4, line 15; ICC-02/11-01/15-1278-Red.
[31] ICC-02/11-01/15-1326-Conf.
[32] ICC-02/11-01/15-1290.
[33] ICC-02/11-01/15-1326-Conf, paras. 3, 4, 71.

3. Answers to the Chamber's questions on the Prosecutor's second ground of appeal

3.1. As to the standard of proof applicable to no case to answer proceedings (question 10)

38. It is appropriate to begin by noting that at no point in her Appeal Brief does the Prosecutor cast doubt on the standard of proof which the Majority Judges adopted in their Reasons.[34] The issue of the standard of proof applied by the Judges therefore seems to fall outside the ambit of the present appeal as delineated by the Prosecutor in her Appeal Brief.

39. Moreover, the Defence notes that the standard of proof adopted by the Majority is consistent with that adopted in *Ruto*, the only other case in which this Court has had to adjudicate no case to answer proceedings. In *Ruto*, Judge Fremr[35] and Judge Eboe-Osuji[36] both took the view that the examination of the Prosecutor's evidence had necessarily to involve an assessment of the quality of that evidence, regard being had to its credibility and probative value.

40. Specifically, Judge Eboe-Osuji explained at length how it was inherent to the judge's task, in the context of no case to answer proceedings, to undertake a proper assessment of the strength of the Prosecutor's evidence.[37]

41. Judge Eboe-Osuji also explained that this standard, which encompasses assessment of the strength of the evidence, was fully compatible with the idea that the Prosecutor's evidence had to be taken "at its highest":

> For purposes of a no-case submission made at the conclusion of the prosecution case in a trial at the ICC, to say that the prosecution's evidence is to be taken "at its highest" need not amount to standing the prosecution's evidence up on a pedestal, despite its feet of clay. Appropriately considered in context, the meaning of the expression begins with the correct appreciation of the prosecution's case as a whole, taking its strengths and

[34] ICC-02/11-01/15-1277-Conf, para. 126.
[35] ICC-01/09-01/11-2027-Red-Corr, "Reasons of Judge Fremr", paras. 17-19, 144.
[36] ICC-01/09-01/11-2027-Red-Corr, "Reasons of Judge Eboe-Osuji", paras. 113, 115, 121, 122, 124.
[37] ICC-01/09-01/11-2027-Red-Corr, "Reasons of Judge Eboe-Osuji", paras. 72, 105, 113, 123, 124, 127-129.

> weaknesses into account. Having offset the weaknesses against the strengths, the exercise next requires a correct appraisal of what is left of the case at its remaining highest point.[38]

42. In the case at bar the Majority Judges did no more than expound upon the standard of proof adopted by the Judges in *Ruto*.

3.2. As to whether the Judges should have "give[n] the parties advance notice" of the standard of proof they were going to apply

43. The Appeals Chamber's questions 12 and 13 refer to a possible "failure of the Trial Chamber to give the parties advance notice of the applicable legal standard".[39] Several remarks must be made in this respect.

44. First, in the view of the Defence, the procedure adopted by the Trial Chamber was a normal procedure. As pointed out in the Defence response to the Prosecutor's Appeal Brief, the Parties and participants have, in the course of the proceedings, had the opportunity to present freely and at length their views on the standard of proof applicable to no case to answer proceedings.[40] The Judges settled the issue of the standard of proof on the basis of the Parties and participants' submissions and set out in detail, in their ultimate decision, their reasons as to the standard adopted. A correct and normal procedure was therefore followed.

45. The Defence notes that the identical procedure was followed in *Ruto*. In that case the Trial Chamber delivered, on 3 June 2014, a decision on the conduct of the no case to answer proceedings which set out, *inter alia*, the standard of proof to be applied.[41] In their no case to answer motions of 26 October 2015, both Defence teams invited the Trial Chamber to reconsider its decision of 3 June 2014 and to factor credibility and probative value into its assessment of the Prosecutor's evidence.[42] Subsequently the Prosecutor, both in writing[43] and at the hearings held during the no

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[38] ICC-01/09-01/11-2027-Red-Corr, "Reasons of Judge Eboe-Osuji", para. 124.
[39] ICC-02/11-01/15-1338, paras. 12-13.
[40] ICC-02/11-01/15-1314-Red, paras. 157-165.
[41] ICC-01/09-01/11-1334, para. 32.
[42] ICC-01/09-01/11-1990-Corr-Red, ICC-01/09-01/11-1991-Red.
[43] ICC-01/09-01/11-2000-Red2.

case to answer proceedings,[44] and the Legal Representative of Victims[45] were able to set out for the Chamber their views on the standard of proof which they thought should be adopted. Ultimately the issue was – as in the case at bar – disposed of in the no case to answer decision, where, as noted above, the two Judges in the majority held that it was appropriate to have regard to probative value and credibility in assessing the Prosecutor's evidence.[46] To be clear, even though the standard of proof was being canvassed *inter partes*, at no point during the no case to answer proceedings in *Ruto* did the Judges give the Parties "advance notice" of the standard of proof they were going to apply in their no case to answer decision.

46. Second, it has to be recalled that neither the Prosecutor nor the LRV show, in their written submissions, how the lack of "advance notice" of the standard of proof relied on occasioned the slightest prejudice to them or created any uncertainty whatsoever. The Prosecutor had, by then, already presented all of her evidence to the Chamber at trial with regard to the standard of proof beyond reasonable doubt, by definition higher than the no case to answer standard. Being put on "advance notice" of the standard adopted in the no case to answer proceedings would have made no difference to that state of affairs. Moreover, the Prosecutor had the opportunity to "defend" her case at length during the no case to answer proceedings, since she explained to the Chamber in the course of nearly a thousand pages,[47] and for hours in court,[48] why her evidence was credible, reliable, authentic and so forth. Hence, here again, she suffered no prejudice.

47. Third, the fact of the matter is that the Prosecutor in her Appeal Brief invariably confuses two things: (1) the Chamber did not give the Parties and participants "advance notice" of the standard of proof it would apply; and (2) the

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[44] ICC-01/09-01/11-T-209, ICC-01/09-01/11-T-210, ICC-01/09-01/11-T-211, ICC-01/09-01/11-T-212.
[45] ICC-01/09-01/11-2005-Red.
[46] ICC-01/09-01/11-2027-Red-Corr, "Reasons of Judge Fremr", paras. 17-19, 144, "Reasons of Judge Eboe-Osuji", paras. 113, 115, 121, 122, 124.
[47] ICC-02/11-01/15-1207-Conf-Anx1.
[48] ICC-02/11-01/15-T-224-CONF-FRA CT; ICC-02/11-01/15-T-225-CONF-FRA CT; ICC-02/11-01/15-T224-CONF-FRA CT.

Judges supposedly did not know, when delivering their decision in January 2019, what standard of proof to apply. There is no logical relationship between these two propositions. It does not follow from an absence of "advance notice" that, when they analysed the Prosecutor's evidence and delivered their decision in January 2019, the Judges had not adopted a standard of proof.

48. In this respect, and by way of answer to the question about a possible "failure of the Trial Chamber to 'direct itself' (correctly or all) as to the applicable legal standard",[49] the Defence recalls that there is nothing in the record of the case to suggest that when the Judges analysed the Prosecutor's evidence and decided to acquit Laurent Gbagbo they had not adopted a specific standard of proof, nor anything to show that they had not analysed the Prosecutor's evidence against that particular standard.

3.3. As to the Prosecutor's allegation of disagreement between the Majority Judges (question 16)

49. First, it must be emphasized that there is no indication that the Majority Judges disagreed as to the standard of proof. On the contrary, Judge Tarfusser clearly and expressly agreed in full with the factual and legal determinations set out by Judge Henderson in his Reasons.[50] The consensus between the two Judges encompassed the standard of proof, as Judge Tarfusser very clearly explained in his separate opinion.[51]

[49] ICC-02/11-01/15-1338, para. 12.
[50] ICC-02/11-01/15-1263-AnxA, para. 1.
[51] ICC-02/11-01/15-1263-AnxA, para. 67.

50. Thus, although Judge Tarfusser does refer to the standard of proof beyond reasonable doubt[52] as capable in theory of applying to no case to answer proceedings, he nonetheless makes clear that, in the case at bar, he and Judge Henderson agree entirely on the approach to the evidence:

> What matters, more and beyond labels and theoretical approaches, is that the Majority's view is soundly and strongly rooted in an in-depth analysis of the evidence (and of its exceptional weakness) on which my fellow Judge Geoffrey Henderson and I could not be more in agreement.[53]

51. Judge Tarfusser goes on to articulate with the utmost clarity his conclusion that, on the "standard applied" – that is, according to the standard defined in the written Reasons of Judge Henderson – there was no support for the Prosecutor's allegations.[54] The Majority Judges are therefore in full agreement, having followed the same approach, applied the same standard and reached the same conclusions in the case before them. Accordingly, Judge Tarfusser's remarks of a theoretical nature regarding the standard of proof beyond reasonable doubt need not be debated, given his explanation that, in his – and Judge Henderson's – view, the Prosecutor did not meet the lower standard which the Majority had adopted. If she did not meet the lower standard, it follows that she did not meet the higher standard, that of proof beyond reasonable doubt.

52. Second, it must be underscored that what the Prosecutor attempts to portray as the expression of "disagreement" is an entirely routine practice in international criminal law. It is usual for a majority judge, in a separate or concurring opinion, to state the slight differences in the approach he or she would have taken. Numerous examples of this practice are to be found among the Court's previous decisions.

53. For example, in *Ruto*, Judge Fremr stated that he agreed with Judge Eboe-Osuji's view concerning the choice to declare a mistrial rather than acquitting, but explained in his separate opinion that an acquittal could equally well have been

[52] ICC-02/11-01/15-1263-AnxA, para. 2.
[53] ICC-02/11-01/15-1263-AnxA, para. 67.
[54] ICC-02/11-01/15-1263-AnxA, para. 68, emphasis added.

delivered, even in the circumstances of *Ruto*.[55] Also in *Ruto*, Judge Eboe-Osuji stated that he subscribed in full to Judge Fremr's analysis of the evidence,[56] but also seemed to suggest in his separate opinion that the Judges' role in assessing the Prosecutor's evidence at the no case to answer stage should be wider than the role specified by Judge Fremr.[57]

54. In another instance, Judge Fulford explained in a separate opinion to the *Lubanga* trial judgment his decision to follow the rest of the Bench's interpretation of article 25(3)(a) for the sake of fairness of the proceedings, while at the same time making clear that that interpretation was "unsupported by the text of the Statute"[58] and expatiating on his own reading of article 25(3)(a).

55. By way of further example, Judge Mindua joined the Pre-Trial Chamber's decision denying the Prosecutor leave to open an investigation into the situation in Afghanistan, but appended a separate opinion in which he expressed disagreement with his colleagues as to the permissible scope of such an investigation had one been authorized.[59]

56. All of these examples make clear that it is commonplace for judges recording their agreement with the majority to express in a separate or concurring opinion slight divergence, and in some instances theoretical disagreement, as to the Chamber's approach to a particular issue, without calling into question the decision itself. The Judges in the case at bar therefore did nothing out of the ordinary, and it is difficult to comprehend the exact nature of the complaint which the Prosecutor has with them. On top of that, the Prosecutor is silent as to whether the individual views which the Judges expressed had any impact whatsoever on the decision or on the standard of proof adopted.

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[55] ICC-01/09-01/11-2027-Red-Corr, "Reasons of Judge Fremr", paras. 147-148.
[56] ICC-01/09-01/11-2027-Red-Corr, "Reasons of Judge Eboe-Osuji", paras. 1-2.
[57] ICC-01/09-01/11-2027-Red-Corr, "Reasons of Judge Eboe-Osuji", para. 136.
[58] ICC-01/04-01/06-2842, "Separate Opinion of Judge Adrian Fulford", para. 3.
[59] ICC-02/17-33-Anx-Corr, paras. 1-3.

3.4. As to whether the Prosecutor must prove that the error she alleges materially affected the decision in order for the Judges to consider that error on appeal (question 14)

57. In the Defence's view, the answer to this question is clear: the appellant must always establish that the alleged error affected the impugned decision.

58. This is apparent, in the first place, from the Rome Statute itself which provides that appellate interference is warranted only where "the proceedings appealed from were unfair **in a way that affected the reliability of the decision** or sentence, or that the decision or sentence appealed from was **materially affected** by error of fact or law or procedural error".[60] It is worth noting that the English version of the article is clearer than the French, in providing that the error must have "materially affected" the impugned decision. Hence, whether the error alleged is one of procedure, law or fact, the appeal cannot be entertained unless the alleged error is shown to have had a direct impact on the decision itself.

59. On that basis the Court has consistently held that the appellant is duty-bound "to clearly identify the alleged error and to indicate, with sufficient precision, how this error would have materially affected the impugned decision".[61]

60. Specifically as to errors of fact, where they arise, the Court has been equally clear. The Prosecutor, when appealing against an acquittal, must show not only that no reasonable Chamber could have made the impugned finding of fact but also that the error alleged directly affected the determination reached by the Judges – here, the acquittal.[62]

[60] Article 83(2) of the Statute, emphasis added.
[61] ICC-01/04-01/06-3121-Red, paras. 20, 30; ICC-01/04-02/12-271-Corr, paras. 251, 284; ICC-01/05-01/08-962, para. 102; ICC-02/04-01/05-408, paras. 48, 51. See also ICC-01/09-01/11-307, para. 87; ICC-01/09-02/11-1032, para. 22; ICC-01/04-01/10-283, para. 18; ICC-02/11-01/11-321, para. 44.
[62] ICC-01/04-02/12-271-Corr, para. 26.

61. The arguments advanced by the Prosecutor in her Appeal Brief, with the aim of enabling her to shirk her duty to show that the errors she alleges materially affected the impugned decision, are unpersuasive.

62. For instance, the Prosecutor relies on the following passage of a dissenting opinion from the *Ngudjolo* Appeal Judgment:

> In this regard, we believe it is compelling to underline that when an alleged error consists in a trial chamber's failure to adopt a course of action, an appellant will by definition never be in a position to indicate, with any precision, how this error would have materially affected the impugned decision. Accordingly, the demonstration of the erroneous nature of the inaction must be considered sufficient to substantiate the ground of appeal based on it.[63]

63. It is noteworthy, first, that the only support which the Prosecutor is able to muster for her argument is a dissent. Secondly, it must be noted that the reasoning of the dissenting Judges in *Ngudjolo* can absolutely not be transplanted to the case at bar. As matters stand, the appellant is not in any way precluded from showing the effect of an alleged error on the impugned decision because, through some fault of the Judges, she lacks the information to do so. Here the Prosecutor has all the information necessary (the 950-page Reasons of the Majority Judges) to show that, as she sees it, the decision of acquittal was affected by the errors alleged.

64. Nevertheless the Prosecutor asserts that "an appellant appealing against an almost 1000-page decision acquitting accused persons in a complex case such as the present one – involving multiple predicate factual findings – cannot be expected to demonstrate that the final disposition of the case would necessarily have been different".[64]

65. This is an astonishing assertion, since that is precisely what is expected of a Party on appeal. An appellant must establish that the errors it alleges the Judges made affected the decision and that, without those errors, the outcome of the proceedings would have been different. The size of the acquittal decision – which, it must be recalled, is a consequence of the considerable size of the case presented by

[63] ICC-01/04-02/12-271-AnxA, para. 30.
[64] ICC-02/11-01/15-1277-Conf, para. 260.

the Prosecutor – cannot serve the Prosecutor as an excuse absolving her of her duty to perform a detailed and assiduous analysis of the decision so as to pinpoint the errors which she believes affected it. If the Prosecutor needed more time to conduct such an analysis it was her responsibility to apply to the Appeals Chamber forthwith for further time. It is not open to her to assert after the event that, because the exercise is complex, there is no legal need for her to undertake it.

3.5. As to the nature of the "factual examples" on which the Prosecutor relies in her second ground of appeal

66. In the final part[65] of her second ground of appeal, the Prosecutor attempts to illustrate on the basis of six "factual examples" the consequences, at the level of fact, of the manner in which the Judges assessed the evidence and of the errors of law and procedure which she alleges they made.

67. The questions which the Appeals Chamber now puts to the Parties and participants are as follows: (1) "Is the Prosecutor in fact alleging errors of fact?";[66] and (2) "Against what standard of review should the six examples of factual findings be assessed?"[67] (question 17).

68. To answer the Chamber's questions, it is necessary first to try to understand the Prosecutor's rationale.

69. In its response to the Appeal Brief, the Defence drew attention to the ambiguity of the Prosecutor's approach. At no point does she explain the precise purpose of these "factual examples" vis-à-vis her ground of appeal, and her actual intention seems to be to lure the Appeals Chamber tacitly into the realm of fact.[68]

70. In her Brief, the Prosecutor made no effort to explain how the factual examples she invokes might bear any connection whatsoever to the ground of appeal. As a

[65] ICC-02/11-01/15-1277-Conf, "IV.B.4. The Majority's errors are manifest in the following examples".
[66] ICC-02/11-01/15-1338, para. 17.
[67] ICC-02/11-01/15-1338, para. 17.
[68] ICC-02/11-01/15-1314-Red, para. 219.

purported illustration of the allegation that, in January 2019, the Judges had not adopted a standard of proof, she relies on the claim that the Judges made incorrect findings of fact in their written Reasons of July 2019. But how are those two propositions connected? The fact is that the Prosecutor in no way establishes that the decision of July 2019 reveals a want of agreement as to the standard of proof to be applied in January 2019.

71. The Appeals Chamber must see from this that, contrary to the Prosecutor's assertion, these "factual examples" do not in any way illuminate the Prosecution's ground of appeal, since they offer no insight into what happened in January. Accordingly the Appeals Chamber should not entertain these "factual examples", as they in fact have nothing to do with the Prosecutor's ground of appeal.

72. Were the Appeals Chamber, for the sake of argument, to entertain these "factual examples" otherwise than in relation to the second ground of appeal, the Judges should approach them with utmost circumspection.

73. First it must be observed that the Prosecutor, by asserting in her Appeal Brief that errors of fact were not in issue,[69] ultimately did not apply any particular standard there in analysing the Chamber's findings of fact which she contests. She confined herself to expressing "mere disagreement" with some of the findings of fact made by the Majority, repeating in her Appeal Brief the same arguments which she advanced in the no case to answer proceedings, as though there had been no decision of acquittal, and as though what the Judges had said on the points of fact she discusses had been of no moment. However, on appeal the Prosecutor should have discussed the Judges' reasoning and endeavoured to show how it was flawed by unreasonable analysis, on their part, of her evidence. In other words the Prosecutor should have applied the standard required on appeal in supporting her claims.

[69] ICC-02/11-01/15-1277-Conf, paras. 128-130.

74. The Prosecutor does not, therefore, overcome the appellate standard of review of an alleged error of fact, according to which:

> Appellants alleging factual errors need to set out in particular why the Trial Chamber's findings were unreasonable. In that respect, repetitions of submissions made before the Trial Chamber as to how the evidence should be assessed are insufficient if such submissions merely put forward a different interpretation of the evidence.[70]

75. It is of note that the Prosecutor – to whom it falls, as the appellant, to delineate the ambit of the appeal – has not put before the Appeals Bench the ingredients necessary to establish an error of fact according to the requisite standard. That being the case, it is not for the Appeals Chamber to take the Prosecutor's place and embark on its own analysis of the Majority Judges' factual reasoning.

76. Second, were the Appeals Chamber nonetheless to go about analysing these "factual examples" vis-à-vis the error of fact standard, it should, to answer its questions 18 and 19,[71] apply the principle of "deference" which this Court has consistently upheld.[72] The principle of deference lays down that an Appeals Chamber

> will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it.[73]

77. Application of the principle of deference is warranted for two reasons. First, an appeal before an international criminal court or tribunal is not a second trial, in contradistinction to what happens before some domestic courts. In this sense the appeal serves a purpose that is purely one of correcting errors made by the Trial Chamber; it does not authorize the Appeals Judges to take the place of the Trial Judges, particularly where issues of fact are concerned. Specifically, and because it is not a new trial, the Appeals Judges cannot reject the Trial Judges' findings of fact simply because they would have taken a different approach to a particular piece of evidence. To allow the Appeals Judges to supplant the Trial Judges as finders of fact

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[70] ICC-01/04-01/06-3121-Red, para. 33.
[71] ICC-02/11-01/15-1338, paras. 18-19.
[72] ICC-01/04-01/06-3121-Red, para. 21; ICC-01/04-02/12-271-Corr, para. 22.
[73] ICC-01/09-01/11-307, para. 56. See also ICC-01/09-02/11-274, para. 55; ICC-01/04-02/12-271-Corr, para. 22.

would be to invest in them inordinate power and would *de facto* deprive the Parties of the possibility of seeking a remedy before a higher court, since, in the face of a new reading of the evidence, they would have no remedy should they regard that reading as unreasonable.

78. Secondly, application of the principle of deference is warranted because it is the trial judges who are best placed to assess the evidence presented. They are present at the proceedings year in, year out; they hear and observe the witnesses; they discuss the admission of evidence; they may adjudge the strength or weakness of a particular piece of evidence when tendered and they understand how the parties and participants' positions develop. They are best placed to have a comprehensive view of the case. For all of these reasons they are best placed to make substantiated findings of fact. It is difficult for an appeals bench to acquire in a short space of time the same in-depth knowledge of a case that the trial judges have, especially in a case of this complexity and size. Moreover, the appeals judges' knowledge is necessarily second-hand, since they will not have been present during the proceedings and are entirely reliant on the transcripts and videos of the hearings.

79. Third, it is important for the Appeals Chamber to note that the Prosecutor has not ventured to show that the errors alleged in relation to these "factual examples" affected the impugned decision (see above).

80. Even assuming *arguendo* that it is within the Appeals Chamber's power to determine on its own motion – absent a showing by the Prosecutor – that an alleged error affected the impugned decision[74] (a questionable stance since, were the Appeals Chamber to step in for the appellant by setting out a line of argument in her stead, it would in effect be "correcting" the Appeal Brief for the appellant, thus undermining the fairness of the proceedings), it must be noted that in this instance none of the "factual examples" put forward by the Prosecutor are capable of calling the

[74] ICC-01/05-01/08-3636-Anx3, paras. 81-90.

impugned decision into question since none of them have any connection to Laurent Gbagbo's individual responsibility.

4. Answers to the Chamber's questions about the remedy sought by the Prosecutor (mistrial)

4.1. As to the exact remedy sought by the Prosecutor

81. The Appeals Chamber puts to the Parties and participants this question: "What remedy is the Prosecutor seeking in this appeal, bearing in mind the different submissions that have been made?"[75] The Appeals Chamber also remarks that the Prosecutor applied for a mistrial in her Appeal Brief of 15 October 2019[76] but seems subsequently to have revised her position at the hearing of 6 February 2020, at that point seeking a new trial.[77]

82. In the Defence's view, the situation is clear. In her Appeal Brief, the Prosecutor explicitly moved the Appeals Chamber to declare a mistrial, stating unequivocally that

> instead of requesting the Appeals Chamber to order the continuation of the trial before the Trial Chamber—which is no longer constituted and in relation to which one of the Judges is no longer a judge at the Court—, or asking the Appeals Chamber to order a new trial (which would be a possible remedy), the Prosecution requests the Appeals Chamber to declare a mistrial. This will leave the case in the hands of the Prosecutor to decide on its future course and how justice may best be served in this case.[78]

The Prosecutor's language leaves no room for doubt: a mistrial is sought "instead of […] a new trial".

83. In those circumstances, the stance taken by the Prosecutor at the hearing of 6 February 2020 is surprising to say the least:

> In addition, there has been no change in the Prosecutor's position with respect to the remedy that we seek in our appeal. The Prosecutor intends to continue proceedings against Mr Gbagbo and Mr Blé Goudé. This means that if her appeal succeeds, the Prosecutor intends to retry Mr Gbagbo and Mr Blé Goudé.[79]

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[75] ICC-02/11-01/15-1338, para. 20.
[76] ICC-02/11-01/15-1338, para. 20.
[77] ICC-02/11-01/15-1338, para. 20.
[78] ICC-02/11-01/15-1277-Conf, para. 266.
[79] ICC-02/11-01/15-T-237-CONF-ENG CT, p. 37, lines 15-18.

84. In the Defence's view, what clearly amounts to a change of position – the Prosecutor's disavowals notwithstanding – must, in a legal sense, be taken as an attempt to amend the Appeal Brief orally, at a hearing on an entirely different subject than the merits of the appeal, and without any legal justification. Such an attempt cannot succeed.

4.2. As to whether mistrial is an available remedy on appeal

85. Regarding the Appeals Chamber's question 20(ii),[80] the Defence refers to the submissions it made on this issue in its response to the Prosecutor's Appeal Brief.[81] Simply put, there is no legal basis for seeking a declaration of mistrial on appeal. The Rome Statute is clear as to the remedies available on appeal,[82] and the decisions of international courts and tribunals make equally clear that mistrial cannot constitute an appropriate remedy at the conclusion of appellate proceedings.[83]

86. Even were the Appeals Chamber to hold that it may in principle declare a mistrial on appeal, the Defence would underscore that this concept, as set out and applied in *Ruto*, is inapplicable to the case at bar.[84]

87. Accordingly, the Defence takes the view that it is not open to the Appeals Chamber to declare a mistrial in the case at bar.

88. Furthermore, insofar as the Prosecutor does not cast doubt on the acquittal – stating in her Appeal Brief that she is not asking the Appeals Chamber "[…] to apply the factual standard of review […] and declare, on that basis, that the Majority's overall conclusions […] were unreasonable, such that it led to a miscarriage of justice warranting reversal of the acquittals"[85] – to move the Chamber for a declaration of mistrial amounts to an abuse of process since Laurent Gbagbo, although acquitted,

[80] ICC-02/11-01/15-1338, para. 20.
[81] ICC-02/11-01/15-1314-Red, section V.
[82] Article 83(2) of the Rome Statute.
[83] ICTY, *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, IT-08-91-A, "Decision on Mićo Stanišić's Motion Requesting a Declaration of Mistrial and Stojan Župljanin's Motion to Vacate Trial Judgement", para. 33.
[84] ICC-02/11-01/15-1314-Red, para. 26.
[85] ICC-02/11-01/15-1277-Conf, para. 129.

would not enjoy the *non bis in idem* protections which the Statute affords him and would be at the mercy of the Prosecutor. Put another way, the Prosecutor is asking the Appeals Chamber to forge a sword of Damocles for her to hang over Laurent Gbagbo's head in perpetuity.

4.3. As to the feasibility of a retrial consistent with Laurent Gbagbo's fundamental rights (questions 20(a)(iii) and 20(b))

89. In the Defence's view, the situation is clear. There are insurmountable legal and practical obstacles to retrial.

90. First, even if the Appeals Chamber were to set aside the judgment on the basis of the errors alleged by the Prosecutor, it would make no difference to the substance of the acquittal decision, which, it must be recalled, the Prosecutor does not challenge (see above). Even in that scenario, the finding on which the acquittal rests – that the Prosecutor's evidence was "exceptionally weak"[86] – would still stand. That being so, how to envision authorization being afforded to the Prosecutor to relitigate on the basis of the same case, lest the same causes give rise to the same effects?

91. Furthermore, it is hard to imagine that the Prosecutor will find "better" evidence than she did in years of unhindered investigation assisted by the Ivorian authorities. There is no reason to suppose that she will find evidence to strengthen her case tomorrow when she has been unable to present persuasive evidence after all these years of investigation. What the trial has made abundantly clear is straightforward: such evidence does not exist. What is more, the defects in the Prosecutor's evidence, as revealed throughout the trial and underscored by the Judges in their reasons, are incurable. Is the Prosecutor miraculously going to piece together chains of custody that she was not in a position to reconstruct 10 years ago, transform anonymous hearsay into direct witness testimony or discover elusive ballistic or forensic evidence which was shown not to exist when the investigation was in its incipiency? Clearly not.

[86] ICC-02/11-01/15-T-234-ENG ET WT, p. 4, line 5.

92. Second, the Prosecutor would be afforded another bite at the apple, as though she were at liberty to revisit the same allegations, irrespective of the outcome of the trial, consigning the person she prosecutes to a lifetime of apprehension and anxiety. This would be a clear violation of Laurent Gbagbo's rights.

93. Third, it would not be in the interests of justice to order a retrial, since the same causes would produce the same effects and the outcome would inevitably be the same as in the first trial. Put in the plainest terms: to order a retrial would be to make Laurent Gbagbo bear the consequences of the Prosecutor's failures, for many more years to come. Such a state of affairs would be the antithesis of justice.

[signed]

Emmanuel Altit
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Dated this 22 May 2020
At The Hague, Netherlands