Cour Pénale Internationale

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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
With one public annex

Public redacted version of the "Response of the Defence for Laurent Gbagbo to 'Prosecution Document in Support of Appeal', ICC-02/11-01/15-1277-Conf, filed on 15 October 2019"

Source: **Defence team for Laurent Gbagbo**

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

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Preliminary observation: classification of the Response:

1. This Response was filed confidentially pursuant to regulation 23 *bis*(2) for its reference to confidential filings.

I. Introduction

2. The Prosecutor has appealed against the decision acquitting Laurent Gbagbo of all the charges against him, delivered on conclusion of a no case to answer procedure. After a trial lasting two full years in which the Prosecutor called 82 witnesses and submitted over 4,000 pieces of documentary evidence and 387 hours of video footage, and in which the legal representative of victims was freely able to present her views (even if ultimately she declined to call witnesses), the Judges found that the Prosecutor had no case. Otherwise stated, her evidence was "exceptionally weak"[1] and was incapable of sustaining her allegations or allowing any legally relevant finding to be deduced. To reach that conclusion, the Judges analysed in meticulous detail all the evidence presented to them by the Prosecutor, their reasoning set down in 950 pages of findings.

3. In their Reasons the Majority judges emphasized that what had disturbed them most in the narrative adopted by the Prosecutor was that "the Prosecutor seems to have presented a rather one-sided version of the situation in Côte d'Ivoire."[2] The Majority Judges stated that

[1] ICC-02/11-01/15-T-234-ENG ET WT, p. 4, line 5.
[2] ICC-02/11-01/15-1263-Conf-AnxB, para. 66.

> [a]lthough it would be unfair to suggest that the Prosecutor deliberately withheld important information, her narrative – wittingly or unwittingly – systematically omits or downplays significant elements of the political and military situation. This has resulted in a somewhat skewed version of events that may be inspired by reality but does not fully reflect it.[3]

4. The Majority illustrated that finding by setting out many examples of bias and considered it regrettable in particular that the Prosecutor had not set out the background against which the events to which she referred took place and had not provided relevant information to contextualize those events. The Judges noted for example that the Prosecutor's narrative failed to take into consideration the coup d'état incited by the rebels in 2002 and its consequences, and that it did not describe the overall security situation prevailing in Abidjan during the 2010-2011 crisis. They stated that the Prosecutor's narrative "is also built around a unidimensional conception of the role of nationality, ethnicity, and religion (in the broadest sense) in Côte d'Ivoire in general and during the post-electoral crisis in particular".[4]

5. Similarly, in his separate opinion, Judge Tarfusser stated: "Throughout the trial and until her closing statements, the Prosecutor's failure to meaningfully address facts and circumstances coming on the record through her own witnesses which were not consistent with her own 'case-theory' was striking."[5] He too gave examples of the Prosecutor refusing to allow what really happened in Abidjan during the crisis to come to light, the most striking of which, for Judge Tarfusser, was the Prosecutor's repeated refusal to consider in her narrative the existence and role of the *Commando Invisible*, a rebel army based in Abidjan.[6]

[3] ICC-02/11-01/15-1263-Conf-AnxB, para. 66.
[4] ICC-02/11-01/15-1263-Conf-AnxB, para. 73.
[5] ICC-02/11-01/15-1263-AnxA, para. 104.
[6] ICC-02/11-01/15-1263-AnxA, para. 104.

6. In other words, the Majority Judges were underscoring that the Prosecutor had given them only one aspect of what happened, that is to say, a different reality, contrived from a biased one-sided view of events. The Judges were therefore criticizing the Prosecutor for distorting what happened to suit her, heedless of what her own witnesses had said or of what emerged from the documentary evidence.

7. The Prosecutor's Appeal Brief reflects that approach and lets the Appeal Judges see only one aspect of what occurred.

8. First, it is worth noting that many of the Prosecutor's arguments are tenable only if what took place during the two years of trial is ignored.

9. For example, she suggests several times in the Brief that the Majority Judges brought the trial to an end at the "half-time" stage, as if she had been prevented from submitting all her arguments and evidence and as if the Judges had abused their power. To suggest that the trial had not run its course is tantamount to suggesting that, had it continued, the quality of her evidence might have improved, although it is impossible to know how, since her case was closed. The Defence notes first of all that nowhere does the Prosecutor clarify that notion of "half-time", leaving doubt to linger. Next it should be noted that since the burden of proof lies with the Prosecutor, it makes sense that the Judges should be able to rule on whether the Prosecutor has discharged her obligation to prove the charges as soon as she had closed her case, irrespective of whether or not there is a no case to answer procedure.

10. Another example is that the Prosecutor suggests in her Brief that the Majority Judges were able to acquit Laurent Gbagbo only because they had adopted no standard of proof whatsoever at the time they delivered their decision in January 2019. That stance amounts to erasing the two years of trial during which, day in day

out, the Judges heard and observed the witnesses, took their accounts into consideration, analysed the documentary evidence put before them and as a matter of course therefore, day by day, formed an idea of the overall quality of the Prosecutor's evidence. When the Prosecutor claims that the Judges were not "fully informed" when they made their decision in January 2019, she is denying that they had any analytical capacity during those two years.

11. As a last example, when the Prosecutor argues that during the no case to answer procedure the Judges failed to inform the Parties of the standard of proof they were going to apply, thereby preventing her from properly presenting her evidence, she is once again erasing the two years of trial. During those two years she was able to submit her evidence as she best saw fit in order to reach the beyond reasonable doubt standard, which was the standard applicable during the trial. Since that is the highest standard, the Prosecutor cannot now claim that she might have submitted her evidence differently, given that the no case to answer standard is by definition a lower standard than that of beyond reasonable doubt. The Prosecutor was therefore not prejudiced in any way.

12. Second, the Prosecutor presents only one facet of the way the law stands by portraying as accepted the legal framework that she has decided should apply to the delivery of a decision that there is no case to answer.

13. It should first be noted that, since the Statute does not provide for any such procedure (and therefore lays down no detailed requirements for rendering decisions in no case to answer procedures), the applicable legal framework is by definition left to the discretion of the Judges. Since the no case to answer concept does not exist in the Statute, it stands to reason that the Judges drew by analogy on those provisions of the Statute which could make sense in that context, such as

article 81 and article 74(5). The mere fact that the Judges draw on a particular article does not mean that every detail of the provisions of those articles thereby becomes directly applicable by law to a no case to answer procedure.

14. Next it is to be observed that, by following the same approach taken by their predecessors in *Ruto* (the only other ICC case in which a no case to answer procedure was introduced), the Majority Judges made the Court's decisions on the subject consonant, thereby ensuring legal certainty in respect of the procedure. They drew on the *Ruto* case both as regards the standard of proof and as regards the form of the decision and the detailed requirements for its delivery. However, without advancing a proper argument, the Prosecutor dismisses as irrelevant the Judges' use of the precedent that the *Ruto* case represents.

15. Third, the Prosecutor claims that the Judges had not adopted any standard of proof in January 2019. This is purportedly borne out by the fact that they were silent on that point in the January decision and only addressed the matter explicitly in the written Reasons in July. In other words, according to the Prosecutor, the fact that the Judges adopted a two-stage approach illustrates that her argument is sound. The Prosecutor is thereby "forgetting" that the Judges proceeded that way to safeguard Laurent Gbagbo's fundamental right to liberty (that is to say, to prevent him remaining in prison for the time needed to compose the written Reasons). Moreover, that argument is curious since there is nothing to suggest that the Judges had not adopted a standard of proof in January 2019. It should be duly noted therefore that the Prosecutor misrepresents how the Judges proceeded.

16. Fourth, the Prosecutor tries to give the impression that the Majority Judges disagreed on the standard of proof and were therefore unable to reach joint conclusions.

17. Judge Tarfusser nevertheless stated clearly in the first paragraph of his separate opinion:

> I fully concur with the Majority outcome of this trial. I could not be more in agreement with my fellow Judge Geoffrey Henderson in believing that acquitting both accused is the only possible, and right, outcome for these proceedings. For the purposes of the Majority reasoning, I confirm that I subscribe to the factual and legal findings contained in the "Reasons of Judge Henderson".[7]

In his opinion Judge Tarfusser then went on to make dozens of references to those written Reasons and cited them many times. That being so, to suggest that the consensus between the Judges was merely a façade is tantamount to imputing motives to them.

18. Fifth, it is helpful to analyse the factual examples that the Prosecutor gives in her second ground of appeal. In those examples she systematically distorts how the Judges went about analysing her evidence, with the aim of showing that they erred in assessing her evidence. To cast the Judges' approach in a poor light, the Prosecutor presents only a tiny part of their endeavours concerning a particular point or allows only one aspect thereof to be seen; or "forgets" any reasons the Judges may have given in order to characterize a conclusion as arbitrary; or attaches disproportionate significance to a single detail of the Judges' reasoning (see section IV below of this Response).

19. Sixth, and, through a mirror-image effect, so to speak, the Prosecutor, pursuing the same line of argument as at the trial, continues to maintain that her evidence, taken "as a whole", is sufficient to sustain her allegations. That position is

[7] ICC-02/11-01/15-1263-AnxA, para. 1.

no longer tenable now that the Judges have determined otherwise over 950 pages, on the basis of a meticulous analysis of all her evidence. As the Judges observed:

> Simply listing a large number of individual factual claims and corresponding evidence and arguing that everything must be assessed holistically is not sufficient. A holistic assessment of evidence should not become an evidentiary black box and Chambers should not have to guess about the particulars of the Prosecutor's evidentiary arguments.[8]

20. The fact that the Prosecutor has not at any time taken account of what the Judges said and persists in regarding all her evidence as having weight and therefore all her allegations as well founded shows that in her Appeal Brief she is not arguing one particular point or another but is instead stating her predetermined position on the events that took place in Côte d'Ivoire.

21. Seventh, and in the same vein, the Prosecutor suggests several times in her Appeal Brief that a lower standard of proof should be applied to her evidence, especially where she claims that evidence is corroborated. In other words, the Prosecutor is arguing here that if she cannot reach a given standard of proof, the applicable standard should be lowered until her evidence is accepted. Why would she do that? Probably because she believes she is in the right. Ultimately, her line of argument amounts to criticizing the Judges for applying a standard of proof at all.

22. The Defence would note at this stage that, contrary to what the Prosecutor suggests, the Judges were particularly benevolent in their approach to her evidence given that they took the evidence "at its highest"[9] and frequently disregarded the contradictions that they had identified between the witnesses' accounts in order to

[8] ICC-02/11-01/15-1263-Conf-AnxB, para. 87.
[9] ICC-02/11-01/15-1263-Conf-AnxB, para. 30.

ascertain whether it was nevertheless possible to infer valuable information from those accounts.

23. Eighth, in order to circumvent the soundness of the arguments of the Majority Judges, the Prosecutor even goes so far as to distort the arguments she herself advanced at the trial. Frequently in her Brief she expounds new arguments seeking to persuade the Judges that her evidence is sound. There are abundant examples of this (see, below, introduction to section IV of this Response). It is sufficient to give only one at this stage: since the Judges found that the only witness presented by the Prosecutor as a direct witness of the mortar fire coming from Camp Commando on 17 March 2011 did not corroborate the Prosecutor's narrative, in her Brief the Prosecutor floats, for the first time, the idea that the witness in question may not have been present during all the shelling, thereby conceding that she in fact has no direct witness to the alleged incident.

24. Ninth, the Prosecutor submits that an appellant is not required to establish that any errors by the trial judges had an impact on the content of the decision made by that court:

> […] [A]n 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.[10]

The Prosecutor thereby misrepresents the nature of appeal proceedings, in which it stands to reason that the appellant is required to establish not only the existence of the errors it alleges but also that those errors had consequences on the court's decision.

[10] ICC-02/11-01/15-1277-Conf, para. 260.

25. Not only does the Prosecutor find it very difficult to prove that the errors she alleges had any impact whatsoever on the acquittal, she also completely abandons that argument when she states that she has no wish to challenge the acquittal. In her Brief she makes clear that the Appeals Chamber is not being asked

> to apply the factual standard of review overall and declare, on that basis, that the Majority's overall conclusions on the five charged incidents (and the chapeau elements for crimes against humanity) were unreasonable, such that it led to a miscarriage of justice warranting reversal of the acquittals.[11]

That wording is unambiguous. The Prosecutor is questioning neither the general conclusions reached by the Majority Judges nor the acquittal itself. That admission that the approach followed by the Trial Chamber was correct necessarily raises the question of the true *raison d'être* of the appeal.

26. Tenth and last, by claiming that a mistrial declaration may be an appropriate remedy, the Prosecutor is offering the Appeals Chamber a mistaken view of the applicable legal framework. First of all, from a legal perspective, that remedy is not available on appeal (see, below, section V of this Response). Further, even if it were, it would not be the appropriate remedy given that – according to the *Ruto* precedent – it applies in completely different circumstances, when external interference may have affected the conduct of the proceedings. In *Ruto*, the trial was terminated on account of the weakness of the Prosecutor's evidence, but no acquittal was handed down because the Prosecutor's case may have been affected by external interference. Here the Prosecutor does not refer to external interference anywhere in her Appeal Brief. There is therefore no reason to declare a mistrial in this case in view of the unambiguous finding by the Majority Judges: the Prosecutor alone is responsible for the weakness of her case since it was the Prosecutor herself who freely determined how to mount her case and present it to the Judges.

[11] ICC-02/11-01/15-1277-Conf, para. 129.

27. In reality, as will be apparent when reading the analyses by the Defence, the Prosecutor has set out grounds of appeal that are founded solely on a belief in the rightness of her cause instead of on what really happened during the no case to answer procedure and what the Judges really said in the acquittal decision.

II. Response to the first ground of appeal: contrary to the Prosecutor's assertion, the Majority acquitted Laurent Gbagbo in accordance with the spirit and the letter of the Rome Statute

28. In her Appeal Brief, the Prosecutor submits that the rules for delivering an acquittal decision in a no case to answer procedure are exactly the same as the rules applicable to the delivery of an acquittal decision on conclusion of a trial (the rules set out in article 74 of the Statute). According to the Prosecutor, any departure from the letter of article 74 would render the acquittal decision null and void.

29. That ground of appeal must be rejected for several reasons. First, because the Prosecutor has not shown that all the provisions of article 74 apply in their entirety to the delivery of a decision made following a no case to answer procedure. Second, because the Prosecutor does not concern herself with the spirit of article 74. And yet that article is founded on the idea that respect for the rights of the accused is particularly crucial at the juncture of handing down a decision ending a trial, and the Chamber was consistent with that idea when it acquitted Laurent Gbagbo. Third, it must be rejected because the Prosecutor has not shown that the provisions of the Statute, including article 74, were not complied with.

30. The Prosecutor is in fact seeking to give the impression that Laurent Gbagbo was acquitted as a result of the Judges misapplying the rules.

31. However, the reality is that the Chamber placed Laurent Gbagbo's fundamental rights, in particular his right to liberty, at the heart of the approach it took when delivering its decision. In addition, the acquittal decision took the form of a clear, detailed and exhaustive document, in which each element addressed during the trial was scrupulously and meticulously examined and discussed by the Judges. In the light of the 950 pages of the analysis carried out by Judge Henderson and endorsed by Judge Tarfusser it is hard to argue, as the Prosecutor does, that the acquittal decision was not reasoned. Those Reasons were published on 16 July 2019, making it likewise difficult to argue that the Judges did not fulfil the publicity obligation they have when issuing decisions. The Prosecutor, for her part, was able to exercise her right of appeal in the normal way, within the time limits laid down by the Statute, from the date on which the Majority's written reasons were notified. Accordingly, it must be found that the procedure followed by the Majority respected the rights of the Accused, the rights of the public to be informed, the rights of the Prosecution and the rights of the other Parties and participants in general.

32. The procedure followed by the Majority must therefore be recognized for what it is – a valid procedure that the Judges were right to apply to a submission of no case to answer. Not only has the Prosecutor failed to furnish anything capable of casting doubt on the validity of that procedure but the remedy that, in her first ground of appeal, she proposes that the Appeals Chamber should adopt – reversal of the acquittal decision – does not correspond in the slightest to the errors alleged. Why is that so? First, because errors of form in the delivery of a decision cannot call into question the merits of an acquittal decision after two years of trial which were held under exemplary conditions. Second, even if, for the sake of argument, the Prosecutor was right in saying that the Chamber failed to comply with certain requirements for delivering the decision, that would nevertheless not be a sufficient

reason to reverse the acquittal since the circumstances of delivery the decision did not go to the fairness of the proceedings because the Prosecutor was able to put forward her arguments on appeal.

1. From a technical standpoint, contrary to the Prosecutor's arguments, article 74 does not apply to the delivery of a decision following a no case to answer procedure

33. The first ground of the Prosecutor's Appeal Brief is based on the premise that the Trial Chamber should have applied the terms of article 74(5) literally. The Prosecutor states that

> [a] valid and lawful acquittal must be entered under article 74 — the statutory provision governing decisions of acquittal —and it must comply with the requirements of that provision. The Statute and the Rules contain no other provision under which a Trial Chamber may acquit an accused.[12]

34. At no time has the Prosecutor established why the provisions of article 74 of the Statute should apply literally to a decision made on conclusion of a no case to answer procedure. In her Appeal Brief the Prosecutor merely presents an opinion rather than setting out any real argument.

1.1. The Majority clearly stated that the decision was not rendered under article 74 of the Rome Statute (paragraphs 34 to 39 of the Prosecutor's Brief)

35. In her Appeal Brief the Prosecutor claims that, although in January 2019 the Majority Judges were agreed that their acquittal decision was not based on article 74, in July 2019 Judge Tarfusser changed his mind and stated that the legal basis for rendering the decision was article 74.[13]

[12] ICC-02/11-01/15-1277-Conf, para. 34.
[13] ICC-02/11-01/15-1277-Conf, para. 39.

36. However, it emerges both from the decision of January 2019 and from the written opinion of each of the Judges issued in July 2019 that Judge Henderson and Judge Tarfusser were in agreement that, from a technical point of view, the acquittal decision did not fall under article 74.

37. In relation to the decision of January 2019, the Prosecutor concedes in paragraph 39 of her Brief that the Judges had ruled out article 74 in January 2019.[14]

38. In the written reasons of 16 July 2019, Judge Henderson clarified that

> [w]hile the practical effect of a decision that there is no case to answer leads to an acquittal, it has not been settled in the Court's jurisprudence, whether or not such a decision ought to be rendered pursuant to article 74 of the Statute. […] given the issue to be determined in this procedure, article 74 does not appear to provide the appropriate basis to render such decisions on motions for "no case to answer".[15]

39. Judge Tarfusser – who, it will be recalled, expressly stated that he concurred with the conclusions of Judge Henderson[16] – does not situate delivery of the decision under article 74. The only reference he made to that article in July 2019 is intended to clarify the logical link between the concept of an acquittal and the beyond reasonable doubt standard, since in his view any acquittal is founded on application of the beyond reasonable doubt standard (article 66(3) of the Statute).[17] At no time however did Judge Tarfusser suggest that the acquittal decision should fall squarely within article 74.

40. Both in January and in July, therefore, Judge Tarfusser and Judge Henderson took particular care not to put themselves squarely in the article 74 framework.

[14] ICC-02/11-01/15-1277-Conf, para 39.
[15] ICC-02/11-01/15-1263-Conf-AnxB, para. 13.
[16] ICC-02/11-01/15-1263-AnxA, para. 1.
[17] ICC-02/11-01/15-1263-AnxA, para. 65.

Accordingly therefore, in contrast to the assertions of the Prosecutor in her appeal brief,[18] there was continuity, rather than a contradiction, between the position of the Judges in January and their position in July.

1.2. In *Ruto*, the Judges used article 64(2) of the Statute as the legal basis for a no case to answer decision and did not refer to article 74

41. At the time of that case, in his separate opinion, Judge Eboe-Osuji clearly gave article 64(2) of the Statute as the sole legal basis for a no case to answer decision,[19] including in order to "terminate weak or borderline cases at the close of the case for the Prosecution",[20] that is to say, in order to acquit.

42. In her attempt to gloss over the *Ruto* decision, which is nevertheless the precedent that needs to be taken into consideration, the Prosecutor does not even discuss it in the body of her appeal brief and merely states in a footnote that

> Trial Chamber V(A)'s Decision on Defence Application for Judgments of Acquittal in the *Ruto and Sang* case (*Ruto and Sang* NCTA Decision) does not constitute an exception to that rule. Although that decision was not entered under article 74(5) and does not comply with all the requirements of that provision, Trial Chamber V(A) did not acquit Mr Ruto and Mr Sang. Instead, it vacated the charges against Mr Ruto and Mr Sang "without prejudice to their prosecution afresh in the future".[21]

The Prosecutor's reasoning here does not stand up: she plays with words, exploiting the fact that, in her view, the Judges did not enter an acquittal within the meaning of the Statute. Nevertheless, however one approaches the decision and whatever label it is given, in both cases the decision brought the trial to an end.

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[18] ICC-02/11-01/15-1277-Conf, para. 39.
[19] ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, paras. 126-134.
[20] ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, para. 134.
[21] ICC-02/11-01/15-1277-Conf, para. 35, footnote 83.

43. It is worth noting in that respect that both Judge Eboe-Osuji and Judge Fremr stated in their separate opinions that, in their view, the rationale for the no case to answer procedure demanded that an acquittal be entered where the defence had shown that there was no case to answer.

44. Judge Eboe-Osuji observed that "[o]rdinarily, the finding that the case for the prosecution has been weak should result in a judgment of *acquittal*, according to the applicable principles of no-case adjudication".[22] According to Judge Fremr: "The normal consequence of a finding that there is no case to answer for Mr Ruto or for Mr Sang, would be for an acquittal of the accused to be pronounced".[23]

45. Therefore, according to both those Judges, who cited article 64(2) as the framework for the no case to answer procedure, an acquittal could be handed down without taking the article 74 route.

46. In the *Ruto* case it is apparent from the separate opinions that both Judge Eboe-Osuji and Judge Fremr found that, on the merits, the requirements for an acquittal were satisfied (namely that the Prosecutor had no case) and that it was the exceptional circumstances of the case, alone, that led them to declare a mistrial[24] instead of an acquittal. In *Ruto* the Judges preferred to declare mistrial instead of an acquittal because external interference may have affected the outcome of the trial.

[22] ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, para. 139.
[23] ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Fremr, para. 147.
[24] ICC-01/09-01/11-2027-Red-Corr, paras. 147-148.

47. That circumstance does not pertain in the instant case: at no time has the Prosecutor claimed that there was the slightest problem during the trial affecting any of her witnesses or in the gathering and presentation of her evidence. Over the two complete years of the trial she was able to present the entirety of her case – a case which she was free to compile as she saw fit. It is therefore impossible to compare the two cases. The facts differ. The factors that led the Judges to declare a mistrial in the *Ruto* case accordingly cannot obtain in this case.

48. The Prosecutor seeks to dismiss *Ruto* as a precedent. To that end she relies on the fact that there was a mistrial rather than an acquittal, suggesting that if the Judges had wished to acquit the Accused, they would have chosen article 74 instead of article 64(2). The Prosecutor is therefore giving the impression that the Judges chose the legal basis depending on the outcome, which defies logic. There is nothing in the reasoning of the Judges in *Ruto* to suggest that they would have issued their decision on a basis other than article 64(2) had they acquitted the Accused. In other words, nothing indicates that they would have considered themselves within the purview of article 74 of the Rome Statute.

49. It is also worth noting that Judge Carbuccia, in her dissenting opinion to the decision in the *Ruto* case, did not at the time question the legal basis that the Majority Judges had chosen in order to provide parameters for the no case to answer procedure (article 64(2)). Nor did she express any reservations concerning the details of how the decision was delivered, which were nevertheless almost identical to those on which the Prosecutor bases her appeal in the case *sub judice*.[25] Judge Carbuccia might therefore have been expected to follow the same line of thought in this case. However, with no explanation, in her dissenting opinion of 15 January 2019, she

[25] ICC-01/09-01/11-2027-AnxI.

took an approach – on which the Prosecutor relies – different from her approach in *Ruto*.[26]

50. In the case at bar, were the Appeals Chamber to concur with the Prosecution it would be a departure from the position taken by the Trial Chamber in *Ruto*. It should further be noted that the fact that different judges pursued the same line of thinking in different cases – the only two no case to answer cases heard by the Court, *Ruto* and *Gbagbo* – shows how robust that reasoning is and the extent to which it is a helpful precedent.

51. It is also worth noting that in *Ruto* the decision on the no case to answer motion took the form of a cover filing stating the Judges' decision accompanied by three annexes comprising the individual opinions of the three Judges, Judge Eboe-Osuji and Judge Fremr forming the majority, Judge Carbuccia taking the minority view.[27] In other words, the Judges in the *Gbagbo* case followed in the footsteps of their predecessors in *Ruto*. The Defence also notes that the Trial Chamber in *Ruto* did not hold a hearing to present the content of its decision. It is therefore plain that on that occasion the Judges took the view that a written decision alone was sufficient to safeguard the rights of the Accused.

1.3. Other precedents

52. The Appeals Chamber of the International Criminal Court has already had an opportunity to rule on the legal basis applicable to a no case to answer procedure. In the *Ntangada* case it held, relying, *inter alia*, on the authority of *Ruto*, that the legal

[26] ICC-02/11-01/15-1234.
[27] ICC-01/09-01/11-2027-Red-Corr, p. 1.

basis for a no case to answer procedure was article 64.[28] It made no reference to article 74.

53. The Prosecutor presents recourse to article 74 as an absolute necessity. However, before the ad hoc tribunals, there is a specific procedure that the judges must follow when rendering a final judgment (a conviction or an acquittal) at the end of a trial (article 23(2) of the ICTY Statute) and a different procedure that the judges must follow when making a decision on a no case to answer motion (rule 98 *bis* of the ICTY Rules of Procedure and Evidence). Accordingly, there has never been any outright objection to applying two different rules depending on whether it is a matter of a final decision or a no case to answer decision.

1.4. The flawed logic followed by the Prosecutor

54. In order not to find herself at odds with the *Ruto* case, the Prosecutor does not dispute that article 64(2) applies to a no case to answer procedure but confines its application to a no case to answer procedure with an outcome other than an acquittal. For the Prosecutor, the legal basis that should apply to a no case to answer procedure leading to an acquittal is necessarily article 74.[29]

55. That argument is difficult to comprehend in that, in respect of legal bases, the Prosecutor is putting the cart before the horse: if the Prosecutor is to be understood correctly, she is of the view that the legal basis applicable to a procedure therefore depends on the outcome of the procedure and the content of the Judges' decision, which is nonsensical.

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[28] ICC-01/04-02/06-2026, para. 44.
[29] ICC-02/11-01/15-1277-Conf, para. 38.

56. By extension, it would be necessary to wait for the end of the no case to answer procedure to know with certainty, depending on the outcome – an acquittal, for example – the legal basis applicable to the procedure as a whole. In reality the Prosecutor's intention is to rule out the application of article 64(2) to the case *sub judice* at all costs – because article 64(2) leaves the judges room for manoeuvre – and to replace it with article 74, which applies more narrowly and, crucially, lays down a detailed procedure for the rendering of a final decision.

57. That the Prosecutor's argument flies in the face of logic is clearly apparent if one considers the practical consequences were it to be accepted.

58. First, having two different legal bases applicable to the same no case to answer procedure depending on the content of the decision issued at the end of the procedure would lead to distinctively different appeal procedures. If the Prosecutor has been understood correctly, an acquittal would trigger an appeal procedure under articles 74 and 81 of the Statute, whereas that would not be so for a mistrial or a decision that the trial should proceed.

59. In other words, the Prosecutor would have an automatic right to lodge an appeal under article 81 where a no case to answer procedure ends with an acquittal but, if her thinking has been correctly understood, she would have to seek leave to appeal under article 82(1)(d) in the case of a mistrial. The Defence, for its part, would have no automatic right of appeal against a decision rejecting a no case to answer motion. There can be no justification for the procedural remedies available to the parties being different depending on the outcome of the no case to answer

procedure, especially in relation to an issue as fundamental as the right to appeal, lest the equilibrium of proceedings be upset and the fairness of trials undermined.

60. The second practical consequence: the Prosecutor contends that, since article 74 applies automatically, the Judges should have ruled on the admissibility of each item of evidence presented before they could enter an acquittal.[30] If the Prosecutor has been understood correctly, in a decision on conclusion of a no case to answer procedure where that decision is not an acquittal, the Judges would not be required to rule on the admissibility of the items of evidence since that decision would not fall under article 74. What would happen, then, in a no case to answer procedure leading to a partial acquittal? Would the Judges then be required to rule on the admissibility of the evidence as a whole or on the admissibility of certain items of evidence? In the latter case, how would they decide from among all the items of evidence (which only acquire meaning because they are congruent with each other) those for which there should be a ruling on admissibility and those where none is needed? The consequences of the illogicality in the Prosecutor's argument are plain to see.

61. In reality, in order to analyse the manner in which the Trial Judges issued its decision, it is necessary to consider the no case to answer procedure as it really is, in accordance with the manner in which it is configured, instead of on the basis of reasoning which works backwards from the content of the decision and which exists solely to suit the Prosecutor's purpose. The nature of the no case to answer procedure is that it determines whether the Prosecutor has, or has not, presented a sufficiently sound case to justify continuing with the trial. A single regime must be

[30] ICC-02/11-01/15-1277-Conf, paras. 67-68.

applied to the evidence and to the procedural remedies available to the Parties, irrespective of the outcome of the procedure.

2. The Judges obeyed the spirit of the Statute and of article 74(5) in particular when they delivered the decision

62. It has just been seen that article 74(5) does not apply unequivocally and literally to a decision issued in a no case to answer procedure. The spirit of article 74(5) was nevertheless obeyed in these proceedings.

2.1. The *raison d'être* of article 74(5): to safeguard the rights of the accused

63. The *raison d'être* of article 74(5) is to enable the accused to base a decision on objective reasons, so that arbitrariness is precluded. A decision to convict must therefore state reasons so that it can be reviewed both by the accused and by society at large. A decision to convict must be the outcome of reasoning structured along the lines of generally accepted legal concepts. By extension, an acquittal decision must likewise be the outcome of reasoning for which detailed support is advanced. This is the *sine qua non* for a decision, be it a conviction or an acquittal, to be accepted all. That acceptance is predicated on the judicial process being completely transparent from the start (the indictment) to finish (the final acquittal or conviction). That transparency is required for the community to take ownership of the process. A decision, whether a conviction or an acquittal, must state reasons and must show that the judges had regard to the parties' submissions and counter-submissions on the evidence adduced during the trial, that they duly heard the arguments of the parties and that they rendered an evenly balanced and well-founded decision. The

fact that the decision is made public makes clear that the accused's arguments were heard and given in-depth impartial consideration.

64. It is noted incidentally that if detailed reasons are not stated, the accused cannot lodge an appeal because it is impossible to pinpoint any factual or legal errors by the judges.

65. Contrary to the Prosecutor's claims in her appeal brief,[31] the *raison d'être* of article 74(5) is therefore to protect the rights of the person prosecuted, in the broader context of the right to a fair trial, rather than to safeguard any purported rights of the Prosecution. In a criminal trial, although the judges must treat the parties fairly and in a balanced manner during the proceedings, this does not place them on the same footing in respect of their rights. Protecting the rights of the individual takes precedence. Why so? Because the individual is always the weaker party in a trial, confronted by the institution, by society. Rights are the individual's only asset. That is why in modern democratic States criminal proceedings afford precedence to the rights of the individual. For the parties to be brought on a par, the individual must therefore be protected by the judges, to the extent of being raised to the same level as the prosecution, which represents Society. Looking beyond criminal proceedings *per se*, the very concept of "fundamental rights" exists to protect individuals in their vertical relationship with the State. The reason an individual has rights is to guard against arbitrariness by the State − which by definition is more powerful − and that means the State in all its forms, including in the form of a prosecutorial organ. That being so, to speak of "fundamental rights" in relation to her own Office, as the Prosecutor does, is conceptually flawed.

[31] ICC-02/11-01/15-1277-Conf, para. 93.

66. Fundamental rights belong to the individual, and not to any form of State entity or the like, such as the Prosecution. The corpus of human rights decisions is clear on that point.[32]

67. The Defence also observes that the Rome Statute reflects that inherent difference between the individual and the prosecuting authority in terms of the grounds of appeal that each can invoke. Article 81(1)(a) of the Statute provides that "[t]he Prosecutor may make an appeal on any of the following grounds: (i) Procedural error, (ii) Error of fact, or (iii) Error of law". Convicted persons can appeal, under the Statute, on those three grounds, but also on another: "Any other ground that affects the fairness or reliability of the proceedings or decision."[33] The position is therefore clear: only an individual can rely on the unfairness of proceedings as a ground of appeal; the Prosecutor cannot. It is also arguable that, by devoting so much space here, in both the first and the second ground of appeal, to alleging an infringement of her rights and unfair treatment by the Judges, under the cloak of purported errors of law or procedure, the Prosecutor has violated the spirit, if not the letter, of article 81(1).

2.2. The Judges obeyed the spirit of article 74(5) (paragraphs 86 to 98 of the Prosecutor's Brief)

68. The spirit of article 74(5) was undeniably obeyed in the case *sub judice*: the Judges acquitted Laurent Gbagbo as soon as they were satisfied that an acquittal was justified in the light of their assessment of the Prosecutor's evidence. The Judges pronounced the acquittal as soon as possible, so that Laurent Gbagbo could be

[32] ECtHR, *Moreira Ferreira v. Portugal*, para. 84. Similarly, see ECtHR, *Lhermitte v. Belgium*, paras. 66-67; ECtHR, *Taxquet v. Belgium*, para. 90; ECtHR, *Legillon v. France*, para. 53.
[33] Article 81(1)(b) of the Rome Statute.

released without delay rather than remaining in detention throughout the time it would take to write the reasons for the decision. The Judges thereby spared Laurent Gbagbo six months' detention – the time it took to write the reasons – which they knew to be unwarranted since they had formed an opinion, on the basis of a meticulous assessment of the evidence carried out before 15 January 2019, that Laurent Gbagbo should be acquitted.

69. As Judge Tarfusser spelled out at the hearing on 15 January 2019:

> The majority is of the view that the need to provide the full reasoning at the same time of the decision is outweighed by the Chamber's obligation to interpret and apply the Rome Statute in a manner consistent with internationally recognised human rights as required by Article 21(3) of the Statute. Indeed, an overly restrictive application of rule 144(2) would require the Chamber to delay the pronouncement of the decision, pending completion of a full and reasoned written statement of its findings on the evidence and conclusions. But given the volume of evidence and the level of detail of the submissions of the parties and participants, the majority, having already arrived at its decision upon the assessment of the evidence, cannot justify maintaining the accused in detention during the period necessary to fully articulate its reasoning in writing.[34]

70. In order to obey the spirit of the Statute and respect the rights of Laurent Gbagbo, the Judges therefore terminated his detention which, had it continued once the Judges knew they intended to acquit him, would have been wrongful.

71. In addition, the Majority fully met the obligation incumbent upon it according to the spirit of the Statute to render a reasoned decision, given that the 950 pages of Judge Henderson's Reasons, which Judge Tarfusser endorsed, explained to the Parties, the participants and the general public why and in what way the Judges found the Prosecutor's case to be so weak that, once it had been concluded, there was no case to answer. The Judges' reasoning is detailed and exhaustive and establishes comprehensively on the basis of law and fact why the Judges dismissed

[34] ICC-02/11-01/15-T-232-ENG, p. 3, line 24 to p. 4, line 9.

the charges against Laurent Gbagbo and acquitted him. Last, the procedure elected by the Judges did not impair the Prosecutor's ability to appeal, since the Majority ordered that the time limit for an appeal would start to run only from notification of the written reasons for the acquittal decision.[35]

72. Under those circumstances, it is baffling that the Prosecutor criticizes the Judges for releasing Laurent Gbagbo before issuing the written reasons for their decision given that the approach followed by the Judges enabled them to obey the spirit of the Statute and respect the rights of Laurent Gbagbo.

73. The Defence notes that the Prosecutor summarily dismisses the matter of Laurent Gbagbo's fundamental rights: "[N]or can interpreting article 74(5) in light of article 21 of the Statute legitimise the Majority's approach or validate Mr Gbagbo's and Mr Blé Goudé's acquittals in this case."[36] Put differently, the Prosecutor wants to prevent the Chamber from proceeding in accordance with what article 21(3) requires: interpreting and applying the Statute consistently with internationally recognized human rights.

74. Seeking to justify her stance, the Prosecutor attempts to suggest that adherence to the letter of article 74 leads to adherence to the spirit of the Statute and to human rights, on the ground that by failing to do so the Judges violated the rights of the Prosecution: "The absence of a reasoned decision also affected the victims' and the Prosecution's right to a fair trial, which does not belong only to the accused."[37]

[35] ICC-02/11-01/15-T-232-FRA, p. 4, lines 9-10.
[36] ICC-02/11-01/15-1270-Corr, para. 5.
[37] ICC-02/11-01/15-1277-Conf, para. 93.

75. She offers unconvincing arguments in support, alleging that the Judges violated principles such as the expeditiousness of proceedings, the publicity of the decision and the requirement to state reasons for a decision. The Prosecutor also submits that it would have been sufficient for the Judges to conditionally release the acquitted persons in order to safeguard their rights in accordance with article 74.

76. The Prosecutor claims that the principle of the expeditiousness of proceedings was violated on account of the time the Judges took to compose their written reasons.

77. First, what does the concept of "expeditiousness of the proceedings" encompass? Its purpose is primarily to ensure that an accused person can have his or her case heard swiftly (to prevent an accused who has not been tried from remaining in prison for the rest of his or her days, in other words, to prevent arbitrariness). This means that the concept cannot be used against the accused in order to diminish his or her rights. What constitutes swift proceedings therefore depends on how the rights of the accused can be exercised. It is through that prism that proceedings should be found to be expeditious or otherwise.

78. Here the most pressing question for the Judges in respect of Laurent Gbagbo's rights was the timing of his release once the acquittal decision had been taken. Expeditiousness was at stake. The fact that the Judges took six months to deliver a detailed and substantiated decision does not go to expeditiousness and does not represent an infringement of Laurent Gbagbo's rights since it was in his interests that the decision should be as detailed and substantiated as possible. On the contrary, had he received a hastily written decision that was therefore incomplete

and unclear, his rights may have been infringed. It has to be noted that the Trial Judges performed its task fully and exhaustively, to the benefit of all the Parties and to the benefit of justice more broadly. The composition of a full and exhaustive decision in a case as complex as this obviously requires time, as long as is necessary. The Prosecutor cannot criticize the Judges for doing their level best. In this regard, the rights of the Accused were not infringed and the corollary principle of the expeditiousness of proceedings was not violated on account of the time taken by the Judges to write their reasons.

79. It must also be said that since the primary objective of the concept of the expeditiousness of proceedings is to protect the rights of the accused, the accused, alone, may claim an infringement of that right, and it is not for the Prosecutor to step in for that Party.

80. Finally and crucially, proceedings cannot be of a predetermined duration, since proceedings evolve over time and the parties and participants must be able to present their views as fully and effectively as possible at each stage – including new stages not foreseen at the outset. In other words, the duration of proceedings depends on their nature, the complexity of the issues raised and the hearings held. It is therefore impossible to say, as the Prosecutor does, that the no case to answer procedure lasted too long or quite simply that the Judges took too long to write their reasons, unless she establishes that to be so, which she has not done.

81. Turning to the length of the procedure, thorough examination of the course of the no case to answer procedure reveals that at no time was there any "undue delay" that marred the procedure itself when considered as a whole.

82. (1) The Judges gave the Defence only seven weeks in which to file a no case to answer motion (decision of 4 June 2018).[38] The Defence filed its no case to answer motion (consisting of 498 pages) on 23 July 2018.[39]

83. (2) On 10 September 2018, the Prosecutor filed a 1,057-page "response" to the motion filed by the Defence, which was in reality a completely new presentation of her case and which differed in several places from what she had set out in her Mid-Trial Brief of 19 March 2018.[40]

84. (3) The Judges also gave the Prosecutor leave to present a summary of her "response" and accordingly of what she regarded as the outline of her case, at a hearing on 1, 2 and 3 October 2018.

85. (4) They gave the Defence leave to reply to the Prosecutor at a hearing on 10, 11 and 12 November 2018. The Defence therefore had only a little over five weeks from the hearing of 3 October 2018 in which to prepare its reply. Furthermore, the Defence only received the Prosecutor's "response" in French on 1 November 2018, that is to say, a week and a half before the November hearing, and even then only in an unofficial, non-final and unrevised version. The Judges seem therefore to have given the Parties a tight timescale.

86. (5) The Judges decided on Laurent Gbagbo's acquittal on 15 January 2019, that is to say, two months after the hearings concluded. Here again, that lapse of time does not seem to be unreasonably long since in that period the Judges had both to

[38] ICC-02/11-01/15-1174.
[39] ICC-02/11-01/15-1199-Corr.
[40] ICC-02/11-01/15-1207-Conf-Anx1.

analyse the Parties' arguments and to conduct an exhaustive review of the Prosecutor's evidence.

87. (6) The Judges issued their detailed reasons on 16 July 2019. Once more, the Prosecutor fails to explain in what way the six-month time period between the decision being made known and the detailed reasons being delivered was unreasonably long, whereas the extent of the evidence, the number of incidents that the Prosecutor presented as charges, the number of witnesses called by the Prosecutor (82) (plus the 15 witnesses whose prior statements were admitted but who did not give evidence in person at a hearing) and the number of items of evidence on the record (over four thousand) quite clearly explain why the composition of the written reasons could not be compressed into a shorter time. As Judge Henderson noted:

> Seeing that the Chamber was not unanimous, I felt it was necessary to explain my decision with some precision. Indeed, it would have been much easier for me to simply say that the evidence is insufficient and give a few illustrative examples. This may be appropriate in other contexts, but I am of the view that in this case it is not. The parties, the victims, the public and other stakeholders have a right not just to know what we think of the evidence – namely that it is insufficient – they also have a right to know *why* we think this.
>
> Given the complexity of the Prosecutor's case and the large volume of evidence, this has inevitably resulted in a long and detailed opinion.[41]

88. By way of comparison – even though these were not decisions delivered in no case to answer procedures – the judgment in the *Bemba* case, consisting of 413 pages, was delivered 15 months after the end of the trial; the judgment in the *Lubanga* case, totalling 593 pages, was delivered 7 months after the end of the trial; and the 539-page judgment in the *Ntaganga* case was delivered 10 months after the end of the trial. The no case to answer decision in *Ruto*, consisting of 254 pages, was

[41] ICC-02/11-01/15-1263-Conf-AnxB, Preliminary Remarks, paras. 3-4.

for its part delivered 5 months after the end of the proceedings, bearing in mind that in *Ruto* the two Accused were not subject to arrest warrants and attended the hearings as free men.

89. The Defence also notes that the Chambers Practice Manual, written by the judges themselves in February 2016, now – since it was revised on 29 November 2019 – includes indicative timeframes which, for acquittal decisions, foresee a period of 10 months between the parties' closing statements and delivery of the decision.[42] Nevertheless, in the instant case, one of the most complex cases that the Court has been called upon to hear, the Majority delivered the written reasons less than eight months after the no case to answer procedure closed. It is immaterial that this is a decision on a no case to answer motion since the Judges had to analyse all the evidence and the various arguments of the Parties in order to reach their decision. Under those circumstances and in view of the complexity of the case, it would seem that the Judges were remarkably expeditious.

90. (7) Above all, as regards expeditiousness, the fact that there was a no case to answer procedure drastically reduced the length of the trial – by several years. The no case to answer decision in fact enabled the Court to save time. That being so, the Defence fails to understand how the Prosecutor can say that the procedure lasted too long, in particular as at the hearing on 6 February 2020 she then stated, unperturbed by the contradiction, that she intended to initiate a new trial.[43]

91. The Prosecutor's claim that the Judges violated the principle of publicity that applies to the delivery of any decision and the principle that any decision must state

[42] *ICC Chambers Practice Manual,* para. 87.
[43] ICC-02/11-01/15-T-237-CONF-FRA ET, p. 42, lines 7-12.

reasons is not worthy of consideration. The Defence will establish below that the Judges in fact complied with the relevant obligations cast upon them by virtue of the spirit of the Statute and the corpus of decisions in human rights cases.

92. Finally the Prosecutor attempts to question the Judges' approach by arguing that "[t]he Chamber could have conditionally released Mr Gbagbo and Mr Blé Goudé as part of its review of its previous detention decision under article 60(3)."[44] She is therefore also criticizing them for pronouncing the acquittal and the release simultaneously, before delivering their detailed decision. Nevertheless, this is in fact the same argument that has already been examined (see above) and the Prosecutor does not answer the real question: should the Judges have kept Laurent Gbagbo under the control of the Court for a period of months (whether in detention or released subject to conditions), even though they knew that they were going to acquit him?

93. First, importantly, the conditional release of an accused cannot under any circumstances be equated to absolute release which is, according to every international standard of human rights, the corollary of an acquittal.

94. Second, the Defence notes that the Prosecutor's approach here has been inconsistent, since for eight years the Prosecutor objected to any release of Laurent Gbagbo, including conditional release. Had she pursued that line in January 2019, in the absence of any acquittal decision, she could have continued to object to any conditional release ordered by the Judges.

[44] ICC-02/11-01/15-1277-Conf, para. 96.

95. It emerges from the foregoing that the Prosecutor has not presented any convincing argument capable of casting doubt on the procedure followed by the majority judges. Only the approach taken by the Judges was capable of respecting the rights of an acquitted person and the right to liberty in particular.

2.3. The circumstances under which the acquittal decision was delivered complied with the spirit of article 74(5)

2.3.1. The Prosecutor blurs the distinction between the oral decision of 15 January 2019 and the written reasons of 16 July 2019 (paragraphs 40 and 41 of the Prosecutor's brief)

96. The Prosecutor does not explain in her appeal brief how she understands the relationship between the Chamber's oral decision of 15 January 2019 and the Chamber's written decision of 16 July 2019. Nowhere does she state how she perceives the status of the oral decision and that of the written decision. That vagueness makes it rather easy for her to criticize the Judges. For example, since their written decision states reasons, she criticizes the Judges for not stating reasons in their oral decision even though, according to article 74(5) itself, the obligation to provide a reasoned statement applies to the written decision.

97. The simple truth is that the written decision was delivered on 16 July 2019. That written decision respects the spirit of article 74(5): it contains the verdict and "a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions", which is set out in Judge Henderson's Reasons (950 pages), where he gives an exhaustive, detailed and closely argued explanation of why the Prosecutor

failed to substantiate her claims. It should be recalled that Judge Tarfusser stated clearly in his individual opinion: "For the purposes of the Majority reasoning, I confirm that I subscribe to the factual and legal findings contained in the 'Reasons of Judge Henderson'."[45]

98. That being so, it is easier to appreciate the Prosecutor's argument that the decision of 15 January 2019 failed to state reasons. Since it is not open to the Prosecutor to argue that the written decision of 16 July 2019 did not comply with the letter of the Statute – as to do so would destroy her thesis – she falls back on the oral decision of 15 January 2019 as grounds for suggesting that the Judges failed to discharge their obligations. This requires her to blur the distinction between those two decisions and to pass the oral decision off as the written decision.

99. That strategem is symptomatic of how the Prosecutor has constructed her appeal brief: she recasts what happened in order to contrive something to criticize. The Prosecutor finds fault with the Judges but at no time did they proceed in the way the she claims.

2.3.2. The oral delivery of the acquittal decision (15 January 2019) complied with the spirit of article 74(5) and the requirements of internationally recognized human rights (paragraphs 42 to 44 of the Prosecutor's brief)

100. The Prosecutor's argument that the "summary" of the decision given at the hearing on 15 January 2019 did not comply with article 74(5) is no more persuasive than her other arguments. The Prosecutor has not provided anything to indicate which are the requirements upon issuing an oral acquittal decision that were not

[45] ICC-02/11-01/15-1263-AnxA, para. 1.

met. With good reason: there are none, either in the instruments of the Court or its decisions.

101. First, the Prosecutor continues to blur the distinction between the oral decision and the written decision, proceeding as if what applies to a written decision under article 74(5) also applies to an oral decision or a summary.[46]

102. Furthermore, the Prosecutor has neither established nor advanced anything in support of her assertion that "[a]lthough the degree of detail in a summary will depend on each case, it must include the key steps of a chamber's reasoning on how and why it reached its conclusions."[47] The Prosecutor refers to no source and makes no reference in a footnote.

103. Similarly, when she claims that "[m]erely stating the ultimate conclusion and verdict, as the Majority did in its 15 January 2019 Oral Acquittal Decision, violated article 74(5)",[48] she does not refer to any relevant material, either in the body of the text or in a footnote, and simply states, in a footnote, that "[t]he Majority acknowledged that it departed from the Court's practice referring to the 'novelty' of its approach".[49] The fact that the Majority stated that it did not proceed in this case exactly as it had done in others does not in the slightest prove that it did not comply with the spirit of article 74(5).

[46] ICC-02/11-01/15-1277-Conf, para. 43.
[47] ICC-02/11-01/15-1277-Conf, para. 43.
[48] ICC-02/11-01/15-1277-Conf, para. 43.
[49] ICC-02/11-01/15-1277-Conf, footnote 102.

104. In both instances it can be seen that the Prosecutor is of her own motion laying down the rules which she complains the Judges failed to follow, once again fabricating something to criticize.

105. Returning to the *raison d'être* of article 74(5), which is primarily to enable the accused to exercise their rights and to ensure that the judicial process is transparent by making decisions public, it is clear that the approach taken by the Majority complies with the spirit of that article.

106. Effect was given to the principle of public hearings throughout the trial and the no case to answer procedure. Accordingly, to an observer, the acquittal decision could be seen as the logical outcome of what had occurred during the trial and during the no case to answer procedure in particular. The Prosecutor can therefore scarcely argue that

> [a]s occurred in this case, failure to give such a summary when the verdict is announced makes it difficult for the parties, the participants and the public to assess whether the previously rendered verdict was indeed based on the reasons that were articulated in writing later[50]

and insinuate once again that the oral decision – which is the one to which she draws attention (see above) – materialized from nowhere.

107. In any event, the Judges' oral decision satisfies the recommendations of human rights bodies. Consonant with the decisions of the ECtHR, to which the Prosecutor makes abundant reference, the Trial Chamber took pains to comply with the spirit of internationally recognized human rights. At the ECtHR the particularities of the requirements for delivering an oral decision are not spelled out.

[50] ICC-02/11-01/15-1277-Conf, para. 31.

For the decision to meet human rights standards it suffices that the judges comply in practice with the requirement of publicity of the decision.

108. The Strasbourg court has held that the provisions of article 6 of the Convention, laying down that "[j]udgment shall be pronounced publicly", should not be subject to a "literal interpretation" and that

> in each case the form of publicity given to the "judgment" under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 para. 1 (art. 6-1).[51]

It has stated that although the wording of the Convention would seem to suggest that reading out in open court is required, other means of rendering a judgment may be compatible with article 6(1).[52] To the Strasbourg court, "[t]he formal aspect of the matter is, however, of secondary importance as compared with the purpose underlying the publicity required by Article 6 § 1".[53]

109. In *Ryakib Biryoukov v. Russia*, the ECtHR recalled the position of the European Commission of Human Rights which had held that it was "standard practice in State parties to the Convention that the reasons for a decision in a criminal case are often signed at a later date and only the sentences are read out during the public hearing".[54] The Commission had found that a "sentence, which was read out at the public hearing, contained the offence with which the applicants were charged, the finding of guilt, a decision on the presence of aggravating circumstances and the penalty imposed on the applicants." It held that "the decision read out in Court,

[51] ECtHR, *Sutter v. Switzerland*, para. 33. See also: ECtHR, *Campbell and Fell v. United Kingdom*, para. 91; ECtHR, *B. and P. v. United Kingdom*, para. 45.
[52] ECtHR, *Welke and Białek v. Poland*, para. 83.
[53] ECtHR, *Pretto and Others v. Italy*, para. 22.
[54] ECtHR, *Ryakib Biryoukov v. Russia*, para. 33.

despite its concise nature, was sufficiently explicit and satisfied the requirements of Article 6 § 1 of the Convention".[55]

110. In the instant case the oral delivery of the acquittal decision, followed by detailed written reasons, quite clearly complies fully with the corpus of decisions on questions of protection of human rights.

2.3.3. In contrast to the Prosecutor's assertions, the Majority Judges did issue "one decision" (paragraphs 45 to 59 of the Prosecutor's brief)

111. The Prosecutor submits that the Chamber did not render "one decision", thereby infringing article 74(5). The Prosecutor offers two different arguments: (1) she claims that the six months that elapsed between the oral pronouncement of the acquittal decision (January 2019) and the written reasons (July 2019) violates the provision of article 74(5) according to which there must only be "one decision"; and (2) the Prosecutor contends that the fact that each of the Majority Judges issued his own opinion means that the acquittal decision cannot be regarded as "one decision". Neither of those arguments is convincing.

112. In respect of the six-month period that elapsed between oral announcement of the acquittal and delivery of the Judges' reasons in writing, the Prosecutor has not tendered anything to support her claim that article 74(5) precludes written reasons being delivered after an oral announcement of the essential content of the acquittal.[56]

113. Once again, to sustain that argument, the Prosecutor is forced to improvise: at times she gives the impression that she regards the July 2019 decision as the one

[55] ECtHR, *Ryakib Biryoukov v. Russia*, para. 33.
[56] ICC-02/11-01/15-1277-Conf, para. 49.

requiring attention and whose manner of delivery should be for discussion; at times she criticizes the January 2019 decision, conferring on it the status of an original decision (see above). Now she takes a third stance in which she places both decisions on the same footing so as to claim that both, considered together, fail to satisfy the obligation under article 74(5) to issue "one decision". Article 74(5) is nevertheless unequivocal: the obligation to issue "one decision" applies only to the written decision, which is therefore the "decision", the decision, for example, as of which all time limits begin to run. Here, the written decision in question is the decision of 16 July 2019. However, that is an inconvenient truth for the Prosecutor, because the decision of 16 July 2019 complies with article 74. In order to support her argument the Prosecutor must therefore, out of expediency, detract from the significance of the written decision (and cast the oral decision as a part of the overall decision) – the only means by which she can give the impression that the process as a whole failed to comply with the requirements of article 74. Her argument therefore harbours an intrinsic inconsistency.

114. Having no genuine criticism to level against the January-July sequence in terms of the "one decision" test, the Prosecutor is obliged to repeat the same allegations that she made against the Judges in relation to the absence of reasons for the decision of 15 January 2019.[57] However, those claims are not only groundless (see above), they are also irrelevant to the question of whether "one decision" was issued.

115. It is apparent here that the only argument left to the Prosecutor in her attempt to show non-compliance with article 74 is the notion – which is in fact no more than an opinion – that six months is too long a period in absolute terms and is in itself unfair, an opinion that has no foundation in law, either in the instruments or in the

[57] ICC-02/11-01/15-1277-Conf, para. 48.

decisions, and fails to take into account either the complexity of the case or the need to respect the rights of Laurent Gbagbo.

116. The Prosecutor claims that the period elapsed between the acquittal and the written reasons was too long, relying on Canadian authorities cited by Judge Carbuccia in her dissenting opinion. Those authorities are irrelevant because the facts they involve are completely different from those in this case.

117. In the *Teskey* case cited by the Prosecutor,[58] the Accused had been convicted in an oral decision and was obliged to appeal that oral decision before a written judgment had been issued. Since that judgment was issued 11 months after the verdict,[59] that is to say, after the person concerned had filed grounds of appeal, the question arose as to whether the written reasons had been composed with the aim of responding *ex post facto* after the event to the grounds of appeal. In *Teskey* the fact that the written judgment came after the appeal may have occasioned prejudice to the convicted person. That case is therefore irrelevant here because the written decision was available to the Prosecutor at the time she lodged her appeal.

118. The Defence also points out that, although the Prosecutor cites verbatim nearly eleven lines of the *Teskey* decision,[60] in which the Canadian judges state that, in certain circumstances, an overly long period of time between an oral decision and the issuance of written reasons may be problematic, she deliberately cut a crucial passage from that excerpt, in which the judges stated that in order for that lapse of

[58] ICC-02/11-01/15-1277-Conf, para. 29.
[59] Judgment of the Supreme Court of Canada, *R. v. Teskey*.
[60] ICC-02/11-01/15-1277-Conf, footnote 71.

time to be considered problematic, the applicant must also show bias on the part of the judges, which the Prosecutor has not established in the present case.[61]

119. In her appeal brief, the Prosecutor has not shown any such bias and confines herself to suppositions about how, in her view, the Majority Judges proceeded and what purportedly, after the event, dictated the content of their observations. The Prosecutor is here imputing motives to the Judges and gratuitously calling their professionalism into question.

120. Similarly, the Prosecutor's reference to the *R. v. Cunningham*[62] decision does not seem to be of particular relevance here, since in that case the Canadian prosecutor had been put in the position of having to appeal against an acquittal where the trial court had not stated any reasons whatsoever, and only delivered its judgment 25 months after the acquittal. In that case the Court of Appeal for Ontario found that the written judgment had been composed with the sole purpose of responding after the fact to the ground of appeal submitted by the Canadian prosecutor alleging that the reasons given orally were insufficient.[63] Here again, the circumstances are plainly not applicable to the case *sub judice*.

121. The Prosecutor's second argument on the delivery of "one decision" concerns the fact that the two majority Judges each issued their own opinion.[64] The Prosecutor's argument on that point is unclear. It is all the less clear because the written statement of reasons of 16 July 2019 is for its part very clear: "The majority's

[61] Judgment of the Supreme Court of Canada, *R. v. Teskey*.
[62] ICC-02/11-01/15-1277-Conf, footnote 71.
[63] Court of Appeal for Ontario, *R. v. Cunningham*, para. 50.
[64] ICC-02/11-01/15-1263-AnxA, paras. 52-59.

analysis of the evidence is contained in Judge Henderson's reasons."[65] Furthermore, Judge Tarfusser states in his separate opinion, in the first paragraph, that "[f]or the purposes of the Majority reasoning, I confirm that I subscribe to the factual and legal findings contained in the 'Reasons of Judge Henderson'".[66] It is therefore the opinion of Judge Henderson that forms the core of the majority opinion, whereas Judge Tarfusser's opinion represents only a non-exhaustive commentary on certain aspects of that joint opinion.

122. In an attempt to deny that fact, the Prosecutor engages in an unconvincing grammatical analysis.[67] Relying on the fact that Judge Henderson used "I" instead of "we", the Prosecutor infers that Judge Henderson was speaking only on his own behalf. Here again she is recasting what happened, given that it is clearly apparent from the decision that Judge Henderson was speaking on his own behalf and on behalf of Judge Tarfusser, who moreover recalled that fact as clearly as can be in his opinion.

123. Worse still, the Prosecutor imputes motives to the Majority Judges in respect of their deliberative process:

> Although Judge Henderson's Reasons were ultimately presented as "the Majority's analysis of the evidence", there is no indication that Judge Tarfusser participated in such analysis, the reasoning process and in reaching the conclusions found therein. Indeed, nothing in Judge Henderson's Reasons — or in Judge Tarfusser's Opinion — allows the reader to conclude that the Majority Judges deliberated to reach any joint findings and conclusions.[68]

Such allegations as to what a particular judge did or did not do are surprising, especially when they are not founded on any concrete evidence.

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[65] ICC-02/11-01/15-1263-AnxA, para. 29.
[66] ICC-02/11-01/15-1263-AnxA, para. 1.
[67] ICC-02/11-01/15-1263-AnxA, para. 53.
[68] ICC-02/11-01/15-1277-Conf, para. 54.

124. Still seeking to distract from the fact that the Majority Judges were in complete agreement on finding the Prosecutor's evidence to be "exceptionally weak"[69] and that they were therefore in agreement on the only possible outcome, an acquittal, the Prosecutor suggests that the two Judges had divergent views on "(1) the 'nature' or legal basis for the decision acquitting Mr Gbagbo and Mr Blé Goudé; and (2) the standard of proof applied in acquitting Mr Gbagbo and Mr Blé Goudé."[70] On both those points the Prosecutor misrepresents the opinions of the two Judges in a bid to have her argument succeed.

125. Contrary to the Prosecutor's assertions, both the Majority Judges were in full agreement that they should not rely on article 74 as the framework applicable to a no case to answer procedure (see above). As regards the standard of proof, which the Prosecutor claims was a fundamental point of divergence between the two Judges, the fact that the two opinions may have been worded differently does not alter the fact that they both agreed on finding that the evidence presented by the Prosecutor was too weak for them to convict Laurent Gbagbo, irrespective of the standard of proof adopted (see above, response to the second ground of appeal).

126. The Defence also notes that the Prosecutor is again attempting to dismiss the only relevant precedent, *Ruto*, a case in which the Judges proceeded exactly as they did in the case *sub judice*. In *Ruto* likewise, the two Majority Judges issued two separate opinions, and Judge Eboe-Osuji stated in his opinion:

> 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

[69] ICC-02/11-01/15-T-234-FRA ET WT, p. 3, line 25.
[70] ICC-02/11-01/15-1277-Conf, para. 55.

> conduct no further evidential review. I fully adopt the evidential review set out in Judge Fremr's reasons.[71]

127. Judge Eboe-Osuji went even further and justified his position in a footnote:

> My highly esteemed colleague, Judge Herrera Carbuccia noted in her first footnote that "the decision of the majority of the Chamber contains insufficient reasoning, since Judge Eboe-Osuji and Judge Fremr have both given separate reasons." With respect, I disagree. The decision of the majority has been more than amply explained in the separate reasons. While it may be the norm in some jurisdictions that judges must speak with one voice in their decisions, no value judgement is either appropriate or necessary to be made in the matter. Indeed, in many parts of the world, it is entirely normal and to be expected that judges who serve on a panel may express themselves separately.[72]

128. There is no reason not to apply that precedent here since, as noted above (paragraph 48), the fact that the Judges in *Ruto* declared a mistrial rather than an acquittal does not alter the fact that the two decisions have the same legal basis.

129. As a final point, the Prosecutor, quite incomprehensibly, relies on the 1994 Draft Statute for an International Criminal Court, containing a provision that rejected any possibility for the Judges to render separate or dissenting opinions, which was obviously rejected by the drafters of the Rome Statute and whose relevance to the present discussion is unclear.[73]

130. There follows a discussion of the supposed disadvantages of what the Prosecutor calls "plurality judgments" ("judgment[s] in which a majority of judges agree on the outcome but not on the reasoning"[74]), which (1) does not apply to the case *sub judice* since, in contrast to the Prosecutor's claims, the Majority Judges did agree on both the outcome of the trial and on the reasoning; and (2) cannot be relied

[71] ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, para. 1.
[72] ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, footnote 213.
[73] ICC-02/11-01/15-1277-Conf, para. 59.
[74] ICC-02/11-01/15-1277-Conf, para. 59.

on to argue any error by the Judges, since the Prosecutor, by framing the debate in purely theoretical and academic terms (as borne out by the references she lists in a footnote), offers no legal basis according to which a "plurality judgment" is an error. The opinions expressed by academic writers as to their preferred method of delivering a judgment cannot constitute an effective legal basis for reversing an acquittal decision.

131. Ultimately, it is nevertheless surprising that the Prosecutor concludes her reasoning by stating that "[a]rticle 74(5) clearly requires the latter [what the Prosecutor is advocating]",[75] when article 74(5) clearly does not require anything of the sort. That is probably why the Prosecutor confines herself, in that section of the brief, to making gratuitous allegations against the Judges and stating her preferences as to how she would have wished the decision to be delivered, without citing a single legal source, a single authority or a single article of the Statute.

2.3.4. According to the Prosecutor, the Judges were not fully informed at the time they made their decision of 15 January 2019 (paragraphs 60 to 85 of the Prosecutor's brief)

132. The Prosecutor continues her line of argument by once again imputing intentions to the Judges. According to the Prosecutor, they delivered their acquittal decision, on 15 January 2019, at a time when they were not "fully informed".[76]

133. First, in contrast to the Prosecutor's submission,[77] the fact that in January 2019 the Judges did not specify the date on which they would deliver their written

[75] ICC-02/11-01/15-1277-Conf, para. 59, emphasis added.
[76] ICC-02/11-01/15-1277-Conf, para. 60 *et seq.*
[77] ICC-02/11-01/15-1277-Conf, para. 64.

decision is not a logical basis on which to claim that in January 2019, at the time they decided to acquit, the Judges had not analysed the Prosecutor's evidence. What the Prosecutor does not say is that analysing evidence is one thing (and the Judges had been carrying out that analysis as the trial progressed) and writing a detailed statement of reasons is another (which takes as long as it takes, depending on the complexity of the case (see above)).

134. The Prosecutor relies on the dissenting opinion of Judge Carbuccia in whose view,

> [i]f a judge has analysed all the facts and the evidence before him or her, the judge must be able to issue a fully reasoned decision or at least provide the parties with a strict time limit to issue its reasons.[78]

135. However, the Defence notes that Judge Carbuccia decided to follow exactly the same procedure as the other two Judges, in that, having announced on 15 January 2019 her intention to file her written reasons "in due course", she did no more that day than give the outcome of her thinking.[79] On 16 July 2019, Judge Carbuccia, in common with the other Judges, delivered the detail of her written reasons, which therefore constituted her dissenting opinion. That notwithstanding, the Prosecutor does not seem to consider that Judge Carbuccia was not "fully informed" in January 2019.

136. Second, the Prosecutor reproaches the Majority of the Trial Chamber for not ruling on the admissibility of all the evidence before declaring the acquittal:

> However, if such evidence was submitted, and a Trial Chamber still considers granting a NCTA motion and acquitting an accused, it must first make detailed findings on the

[78] ICC-02/11-01/15-1277-Conf, para. 64, citing ICC-02/11-01/15-1234, para. 32.
[79] ICC-02/11-01/15-1234, para. 48.

> relevance, probative value and potential prejudice of each item of evidence before reaching its ultimate conclusion.[80]

The Prosecutor infers from this that, in January 2019 "[t]he Majority had not completed its assessment of the evidence or reached all conclusions",[81] which is another way of approaching the same argument.

137. The Prosecutor's argument seems rather curious in the light of the line of argument she was maintaining during the no case to answer procedure. In fact, she systematically argued that in the context of a no case to answer procedure the Judges were not required to concern themselves too minutely with the quality of her evidence but should take it "at its highest".[82] By logical inference, the Prosecutor's argument means that the Judges were therefore not required – at that juncture – to take a decision on the admissibility of the evidence put before them by the Prosecutor. It was because the Majority, following the Prosecutor, took the view that the entire case presented by the Prosecutor had to be taken into consideration in a no case to answer procedure, that it did not rule on the admissibility of each item of evidence.

138. In conclusion, it is difficult to understand what accusation the Prosecutor is levelling against the Judges. The Majority decided to acquit Laurent Gbagbo taking into account the whole of the case against him presented by the Prosecution. They would have had even greater reason to acquit him had they been obliged to declare an entire part of the Prosecutor's evidence inadmissible after carrying out a strict assessment of its relevance and probative value. As Judge Henderson stated in his

[80] ICC-02/11-01/15-1277-Conf, para. 68.
[81] ICC-02/11-01/15-1277-Conf, sect. III.E.2.
[82] ICC-02/11-01/15-1207-Conf-Anx1, para. 34; ICC-02/11-01/15-T-221-CONF-ENG, p. 10, lines 18-24.

written reasons, "had we been able to simply exclude all anonymous hearsay, this draft would have been several hundreds of pages shorter"[83] and "[t]his implies that, had I systematically assessed the credibility and reliability of the Prosecutor's testimonial evidence, there would be even less of a basis to continue the proceedings in this case."[84]

139. In other words, the Prosecutor, which devoted much of the no case to answer procedure to attempting to convince the Judges not to look too closely at the quality of her evidence, is now criticizing them for not doing so.

140. In reality, by not ruling on the relevance and probative value of each item of evidence, the Majority adopted an evidentiary regime that was in fact *favourable* to the Prosecutor, since ultimately the Judges took into account all her evidence, even the weakest of it. Even on that basis, the Judges found that evidence to be insufficient to enable the trial to proceed.

141. Third, still seeking to prove that the Judges were not "fully informed" on 15 January 2019, the Prosecutor claims that Judge Tarfusser decided to acquit Laurent Gbagbo *even before* the no case to answer procedure began.[85]

142. The Prosecutor acts in this respect as if the Judges, when they embarked upon the no case to answer procedure, were unfamiliar with the case, as if two full years of trial had not previously taken place, two years in which the Judges heard 82

[83] ICC-02/11-01/15-1263-Conf-AnxB, para. 30.
[84] ICC-02/11-01/15-1263-Conf-AnxB, para. 41.
[85] ICC-02/11-01/15-1277-Conf, para. 75.

witnesses, ruled on the admission of the prior statements of 15 other witnesses (after a meticulous analysis of their evidence), accepted almost 3,000 items of documentary evidence submitted from the bar table and were present at hearings when the Parties canvassed the submission of over 1,000 items of documentary evidence through witnesses. Put otherwise, the Judges did not first come across the Prosecutor's case on the day the Defence filed its no case to answer motion, 23 July 2019, and nor did they need to wait for the hearings of November 2018 to end in order to be acquainted with the substance of the Prosecutor's case. The Prosecutor's claim that the Judges were not "fully informed" on 15 January 2019 is therefore revealed for what it is – a baseless allegation.

143. Going even further and temporarily setting aside for the sake of argument the issue of the no case to answer procedure, and turning to the trial itself, it should be noted that the Prosecutor was able to present the entirety of her case against the Accused freely before the Chamber for two years. Logically, since the burden of proof rests with the Prosecution, it had to be open to the Judges, in theory, to rule on whether or not the Prosecutor had proven the charges beyond reasonable doubt at the time the Prosecutor closed her case, in spring 2018 – solely on the basis of that case against the Accused. That being so, does it not follow as a matter of course that a judge, who had been present at the presentation of all the Prosecutor's evidence for two years, was able to form a clear picture of whether the Prosecutor's case was sound or weak, irrespective of whether or not the Defence filed a no case to answer motion?

144. To put it plainly, contrary to what the Prosecutor seems to be suggesting, the fact that a judge has a clear idea of the nature of the Prosecutor's case when the

Prosecutor has concluded the presentation of her case cannot be equated with bias. It is a standard part of the accomplishment of the task of a judge.

145. Fourth, again in her attempt to show that the Judges were not "fully informed" in January 2019, the Prosecutor once more claims that the Majority Judges had divergent views on the nature of the decision and the standard of proof,[86] and that those differences became apparent in their opinions of July 2019. As the Defence has previously shown, not only was there in fact no disagreement between the Majority Judges on those two matters, but alleging such differences cannot under any circumstances support the argument that the Majority Judges were not "fully informed" on 15 January 2019 when they acquitted Laurent Gbagbo.

146. Fifth, the Prosecutor claims that "inconsistencies" are apparent in Judge Henderson's reasoning when he analyses her evidence in the written Reasons of July 2019.[87] First of all, that claim, which to a great extent forms the basis of the second ground of appeal, is unfounded, as will be shown in the second part of this response. Primarily, once again, in what respect can a claim that there are inconsistencies in the July 2019 written Reasons in any way show that Judge Henderson was not "fully informed" in January 2019?

[86] ICC-02/11-01/15-1277-Conf, para. 76 *et seq.*
[87] ICC-02/11-01/15-1277-Conf, para. 83.

3. Whatever arguments the Prosecutor has presented, even assuming for the purposes of argument that some of them are well-founded, none of them is sufficient to reverse the acquittal decision (paragraphs 98 to 102 of the Prosecutor's brief)

147. It emerges clearly from the foregoing that the Majority respected the rights of all the Parties in proceeding as it did on 15 January and 16 July 2019. The procedure followed by the Judges complied fully with the spirit of the Statute, internationally recognized human rights, the spirit and the letter of article 74(5) of the Statute, article 64(2) and the precedent afforded by the *Ruto* case.

148. For the sake of completeness, it is necessary to examine the nature of the arguments submitted by the Prosecution. Even if, for the purposes of argument, it was assumed that each of those arguments was valid, the door to reversal of the acquittal would not immediately open. Why? It is because the Prosecutor has not shown that the alleged errors "affected the reliability of the decision" appealed from,[88] which is nevertheless the essential precondition which alone justifies appellate interference.

149. Specifically, upon scrutiny of the Prosecutor's argument that failure to comply with one or more of the requirements under article 74(5) is, alone, sufficient to reverse the decision, it should be noted that the Prosecutor has been unable to give any example whatsoever of an international judgment that has been reversed on the grounds of infringement of the formal requirements relating to the delivery of a judgment.

[88] Article 83(2) of the Rome Statute.

150. The Prosecutor is therefore reduced to relying on: (1) a chapter in a book written in Spanish by a staff member of her Office,[89] which is completely irrelevant to the present discussion since the chapter appears to relate to the duty on the parties and participants in the trial to comply with the rules on the gathering of evidence and to the penalty incurred in the event of failure to comply with those rules; and (2) a number of domestic examples, listed in summary in a footnote, relating to highly exceptional cases where the fundamental rights of the person prosecuted were infringed (where a United States judge delegated his duties to his law secretary during the jury deliberations,[90] for example) and which are not in the least applicable to the present case.[91]

151. Furthermore, the Prosecutor's reference to the appeal judgment of 8 March 2018 in *Bemba et al.*[92] is also irrelevant since, in the excerpt to which the Prosecutor refers, the Appeals Chamber explains that a failure to provide reasons for a decision could amount to a procedural error because it would mean that the accused could not "usefully exercise available rights of appeal".[93] However, as the Defence has already explained (see above), there can be no possible doubt: the 950 pages of reasons signed by Judge Henderson, but delivered on behalf of both Majority Judges, constitute a sufficient statement of reasons to comply with the spirit and the letter of the Statute, and that statement of reasons enabled the Prosecutor to exercise her right to appeal.

[89] ICC-02/11-01/15-1277-Conf, footnote 216.
[90] Court of Appeals of the State of New York, *People v. Ahmed*, cited in ICC-02/11-01/15-1277-Conf, footnote 216.
[91] ICC-02/11-01/15-1277-Conf, footnote 216.
[92] ICC-02/11-01/15-1277-Conf, para. 99, footnote 213.
[93] ICC-01/05-01/13-2275-Red, para. 102.

152. The Defence also observes that the Prosecutor has not raised any alleged failure to state reasons in the impugned decision as a ground of appeal as such. In all logic she therefore cannot rely on a failure to state reasons, which she nevertheless does in practice by relying on the *Bemba* judgment to seek reversal of the impugned decision.

III. Response to the second ground of appeal: contrary to the Prosecutor's claim, the Majority Judges did examine the Prosecutor's evidence in the light of an appropriate standard

153. Under the head of her second ground of appeal the Prosecutor lumps a series of disparate points in order to show, purportedly, that the Majority "erred in law and/or procedure by acquitting Mr Gbagbo and Mr Blé Goudé without properly articulating and consistently applying a clearly defined standard of proof and/or approach to assessing the sufficiency of evidence".[94]

154. On analysis, it seems that the Prosecutor's argument can be summarized as follows: she claims that the alleged lack of definition, clarity and consensus between the Majority Judges as regards the standard of proof and the procedure applicable in a no case to answer procedure constitute both an error in law[95] and a procedural error.[96]

155. The Prosecutor's claims are unclear: the arguments seem to overlap and her criticisms of the Judges are particularly ill-defined. In her second ground of appeal the Prosecutor appears in fact to be jumbling a number of very different questions which ultimately have little in common: (1) at what stage of the no case to answer

[94] ICC-02/11-01/15-1277-Conf, sect. IV.
[95] ICC-02/11-01/15-1277-Conf, para. 123.
[96] ICC-02/11-01/15-1277-Conf, paras. 122, 124, 125 and 131.

procedure must the Judges define the applicable standard of proof and at what stage must the Judges inform the Parties of that standard; (2) whether the Judges defined the chosen standard of proof appropriately in their reasons; (3) whether the Majority Judges agreed on how to define the standard of proof; and (4) whether the standard of proof was applied properly.

156. Once those questions have been posed and the discussion clarified, it will be become manifest that in her Brief the Prosecutor has shown neither an error in law nor a procedural error.

1. <u>At what stage of the no case to answer procedure must the Judges define the applicable standard of proof and at what juncture must the Judges inform the Parties of that standard (paragraphs 122 to 125, 127 and 131-161 of the Prosecutor's Brief)</u>

157. On that question, the Prosecutor seems to suggest in her Brief that the Chamber erred in law by not informing the Parties of the applicable standard of proof while the no case to answer procedure was taking place.[97]

158. The Prosecutor claims that the purported uncertainty as to the standard of proof at the no case to answer stage prevented her from presenting her evidence and arguments fully and satisfactorily. The Prosecutor's argument aims to give the impression that she was presenting her evidence to the Judges for the first time in the no case to answer procedure. That argument is tantamount to casting a veil over the two years of trial that preceded the no case to answer procedure. During those two full years, the Prosecutor was able, in support of her claims, to tender all the

[97] ICC-02/11-01/15-1277-Conf, paras. 131-136.

evidence she saw fit to tender and to call all the witnesses she considered necessary to call. During that trial phase there was not the slightest ambiguity as to the legal framework applicable: the Prosecutor presented a case which, in her view, was capable of substantiating the charges beyond reasonable doubt, in accordance with the obligation cast upon her by article 66 of the Rome Statute.

159. The Prosecutor's assertion that the Judges should have informed the Parties of what standard was applicable *while* the no case to answer procedure was taking place, that is to say, before any decision, is therefore incomprehensible. Their doing so would not in any way have changed how the Prosecutor presented her evidence during the trial, since during that period it was subject to a well-established standard, that of beyond reasonable doubt. She therefore cannot argue that she suffered any prejudice, much less any unfairness.[98]

160. Having in that way returned the discussion to its proper context, that of the trial, the Defence notes that the arguments put forward are baseless and that the examples that the Prosecutor gives are irrelevant.

161. For instance, the Prosecutor relies on a decision in the *Lubanga* case in which the Appeals Chamber held that the Trial Chamber had failed to explain sufficiently to the Parties and participants the standard it would apply to assessing the evidence presented at the reparations stage.[99] In that decision in *Lubanga* the Appeals Chamber identified a specific prejudice caused to the Parties and participants by the previous uncertainty as to the standard of proof that would apply. The Parties and

[98] ICC-02/11-01/15-1277-Conf, para. 155.
[99] ICC-01/04-01/06-3466-Red, paras. 165-169.

participants had not been in a position to present their arguments on a fully informed basis and had not known which items of evidence they should submit in support of their arguments.[100]

162. The situation here is very different given that (1) at the time the Prosecutor presented her evidence during the trial, she was well aware that it was to be assessed according to the beyond reasonable doubt standard and (2) in contrast to the Prosecutor's contention, the Judges did not express any "varying views" about the standard applicable during the no case to answer procedure.

163. Furthermore, in contrast to the Prosecutor's assertion that "[o]nly a brief discussion was had at the hearing, well after the Parties had filed their written submissions",[101] the Parties were able to set out their positions on the standard of proof fully and freely throughout the no case to answer procedure.

164. Accordingly, the Defence for Laurent Gbagbo, from as early as April 2018, in a document in which it stated its intention to file a no case to answer motion, stressed that such a motion was required on account of the weakness of the Prosecutor's evidence, as illustrated by the extensive use of (often anonymous) hearsay and indirect, circumstantial and uncorroborated evidence.[102] From the outset, therefore, Laurent Gbagbo's Defence placed the poor quality of the Prosecutor's evidence at the heart of the no case to answer procedure. In its no case to answer submissions filed on 23 July 2018, the Defence specified how, in its view, the Chamber should proceed in order to assess the Prosecutor's evidence. The

[100] ICC-01/04-01/06-3466-Red, paras. 165-169.
[101] ICC-02/11-01/15-1277-Conf, para. 150.
[102] ICC-02/11-01/15-1157-Conf.

Defence devoted lengthy expositions to the factors that it believed the Chamber should examine in order to gauge the evidence of the evidence, such as reliability, authenticity, the probative value of the documentary evidence presented by the Prosecutor and the credibility of the Prosecution witnesses. On 10 September 2018, in her response to the Defence motion, the Prosecutor set out in detail how she believed her evidence should be assessed in a no case to answer procedure,[103] and she clarified her position subsequently at the hearings of 1, 2 and 3 October 2018. On 13 November 2018, the Defence, for its part spelled out before the Judges its view of what the applicable standard of proof should be in a no case to answer procedure.[104]

165. The matter of how the Prosecutor's evidence should be analysed and assessed at the no case to answer stage was therefore canvassed in full and openly by the Parties, and disposed of by the Majority in the acquittal decision. In other words, the procedure followed was a completely normal, standard procedure.

166. Besides the fact that it makes no sense for the Prosecutor to require the Chamber to give an opinion, *before any decision*, on a question under discussion between the Parties, the Prosecutor has not explained what, specifically, she would have done differently if the Chamber had given one.

167. In this regard, the Defence notes that, despite arguing during the no case to answer procedure for a standard of proof which does not give consideration to the authenticity, reliability or probative value of her evidence,[105] at the same time the Prosecutor set out in detail over more than a 1,000 pages why, as she saw it, her evidence was credible, reliable, authentic and so on. As

[103] ICC-02/11-01/15-1207-Conf-Anx1, paras. 34-44.
[104] ICC-02/11-01/15-T-225-CONF-FRA CT, p. 29 *et seq.*
[105] ICC-02/11-01/15-1207-Conf-Anx1, para. 34.

Judge Tarfusser emphasized in his separate opinion, the Prosecutor went so far as to invite the Judges to take at face value the witnesses who favoured her case and conversely to doubt the credibility of those of her witnesses whose evidence undermined her accusations.[106] In other words, in practice the Prosecutor presented her entire case, during the no case to answer procedure, in as much detail as possible, and thus applied the standard which the Judges went on to adopt formally. She therefore suffered no unfairness or prejudice.

168. In that respect the procedure followed here bears no relation to that followed in the *Ayyash et al.* case before the Special Tribunal for Lebanon (STL), on which the Prosecutor relies heavily in her appeal brief. The Prosecution refers to the decision delivered by the Appeals Chamber pursuant to a request filed by the Defence for Mr Baddredine. The Defence complained of a lack of clarity as regards the standard of proof applied by the Judges to determine that one of the co-Accused was dead.[107]

169. The first difference compared with these proceedings is that, before *Ayyash et al.*, the STL had no standard for determining whether an accused had died. It was therefore natural that the Trial Chamber was required to inform the Parties, at the start of the procedure, of the standard of proof it would apply so that the Parties could present their arguments accordingly. Here, in contrast: (1) the Parties were aware that the standard applicable throughout the trial, by virtue of article 66, was that of beyond reasonable doubt; and (2) in respect specifically of the no case to answer procedure, there was a precedent in the *Ruto* case, in which both the Majority Judges had explicitly applied a standard for assessing the strength of the Prosecutor's evidence which looked at various factors such as the authenticity of

[106] ICC-02/11-01/15-1263-AnxA, para. 71.
[107] ICC-02/11-01/15-1277-Conf, para. 143, referring to STL, *Ayyash et Al*, Decision of 11 July 2016, para. 38.

the evidence and the credibility of witnesses. Ultimately it was the *Ruto* precedent that the Majority Judges in the instant case followed. It is pointed out that here the Prosecutor is not questioning the standard of proof adopted by the Judges (see above). It also should be noted that during discussion of how the standard of proof should be assessed (in the no case to answer procedure), the Parties' positions were clear-cut, with the Prosecutor at pains to rule out the *Ruto* precedent while the Defence argued for its adoption. However, the fact that the Prosecutor was seeking the exclusion of *Ruto* did not mean there was uncertainty as to the existence of a standard, since the *Ruto* precedent predated the debate.

170. The second difference compared with these proceedings is that in *Ayyash et al.* it is apparent from the proceedings that the Trial Chamber ruled on the death of the Accused in its oral decision of 1 June 2016 without applying a predefined standard, given that subsequently, after delivering its oral decision, it asked the Parties for their opinions, and then referred explicitly to those opinions in its written decision of 7 June 2016, at which time it stated the standard it had chosen to apply.[108] In these proceedings the Majority Judges stated very clearly on 15 January 2019 that they "ha[d] thoroughly analysed the evidence and taken into account, into consideration all legal and factual arguments submitted both orally and in writing by the parties and participants".[109] They therefore evidently had at their disposal, before their decision, a standard that took the arguments of the Parties into account. The fact that the Majority may not have stated explicitly at the time of its oral decision of 15 January 2019 what standard it had applied when analysing the evidence does not at all mean that the Judges had not at that time already decided on the applicable

[108] STL, *Ayyash et Al,* Decision of 11 July 2016, para. 40.
[109] ICC-02/11-01/15-T-232-ENG ET WT, p. 2, line 25 to p. 3, lines 1-2.

standard of proof or that they had not already applied it to the Prosecutor's evidence.

171. The Prosecutor's assertion that "[b]efore granting the NCTA motions and orally acquitting Mr Gbagbo and Mr Blé Goudé on 15 January 2019, the Majority had not set out the evidentiary standards it would be guided by, or its approach",[110] is therefore groundless.

172. Similarly baseless is the Prosecutor's assertion that "[i]t is unknown what legal and evidentiary framework guided the Majority when it assessed the evidence underlying this complex case."[111] In his reasons, on behalf of the Majority, Judge Henderson clearly defined the evidentiary standard adopted. Accordingly, in contrast to what the Prosecutor claims, it is well known "what legal and evidentiary framework guided the Majority when it assessed the evidence underlying this complex case". In order to bolster her argument, the Prosecutor conflates two junctures in the proceedings, the point when the Judges decide on the applicable standard and the point when the Judges formally inform the Parties of their decision. The question that needs answering is whether the Judges had set a standard of proof before their decision of 15 January 2019; otherwise stated, whether that decision of 15 January 2019 was taken on the basis of a particular standard. Whether or not the Judges informed the Parties of that standard on 15 January 2019 is immaterial. What is known, because the Judges so stated in July 2019, is that they applied their chosen standard throughout their task. The Prosecutor has not submitted anything capable of proving the contrary.

[110] ICC-02/11-01/15-1277-Conf, para. 142.
[111] ICC-02/11-01/15-1277-Conf, para. 142.

173. To summarize: (1) before the no case to answer procedure the Prosecutor was able to present her case freely on the basis of a clear, acknowledged standard, the beyond reasonable doubt standard; (2) during the no case to answer procedure the the standard of proof to be applied to the Prosecutor's evidence was openly and exhaustively canvassed; (3) in their decision the Judges formally decided on the applicable standard; this was a logical sequence of events, the normal course of proceedings; (4) specifically, during the no case to answer procedure, the Prosecutor was able to argue her case freely, as she saw fit, in her 542-page "trial brief", in her response consisting of 1,057 pages, and in court, over the course of three days, on 1, 2 and 3 October 2018; there was therefore no prejudice; (5) the Majority Judges adopted the evidentiary standard established by the Judges in the applicable precedent, the *Ruto* case; (6) there is a contradiction between the Prosecutor's criticism that the Judges failed to adopt an appropriate standard and the fact that the Prosecutor states that she "does not allege that Judge Henderson erred in law when he defined the NCTA standard"[112] and that she states how that standard was applied.[113] Ultimately, it is not very clear where the Prosecutor's grievance lies.

2. Whether in their Reasons the Judges properly defined the standard of proof relied upon (paragraphs 142 to 161 of the Prosecutor's Brief)

174. The Prosecutor devotes considerable discussion to the theoretical question of how clearly a standard of proof has to be defined.[114] The problem is that at no point in her appeal brief does the Prosecutor show in what respect that theoretical discussion applies to the case at hand.

[112] ICC-02/11-01/15-1277-Conf, para. 126.
[113] ICC-02/11-01/15-1277-Conf, para. 129.
[114] ICC-02/11-01/15-1277-Conf, paras. 143-145.

175. Once again the Prosecutor is conflating two junctures in the proceedings: first, the discussion on the standard of proof that took place during the no case to answer procedure before the decision (a routine process); thereafter, what is specified in the final decision – the definition of the evidentiary standard. The fact that there was an oral discussion does not mean that there was a lack of clarity, but merely that the oral discussion preceded the decision.

176. Of note is that the Prosecutor does not criticize the Majority Judges for defining the standard of proof in the way they did in their written reasons: "[T]he Prosecution does not allege that Judge Henderson erred in law when he defined the NCTA standard."[115] What is more, she asserts that her appeal does not relate to the definition of the standard of proof: "[T]he legal correctness of the NCTA standard is immaterial to this appeal."[116]

177. Under those circumstances it is difficult to understand why the Prosecutor states later in her brief that "the Majority dismissed the Prosecution's case on the basis of its unclear approach to assessing the evidence",[117] whereas previously she had expressly stated that she did not wish to enter into debate about the evidentiary standard that the Majority adopted in July 2019. The most obvious reading of the Prosecutor's argument is that she is criticizing the Judges for not applying any standard at all before 15 January 2019, that is to say, for the fact that, as she sees it, the decision of 15 January 2019 was not based on the use of a standard. Were that so, it would have to be remarked that the Prosecutor has not submitted any material to support that thesis. The only other reading of the Prosecutor's brief is that she is disputing not the standard of proof adopted by the Judges, but only what she sees as

[115] ICC-02/11-01/15-1277-Conf, para. 126.
[116] ICC-02/11-01/15-1277-Conf, para. 126.
[117] ICC-02/11-01/15-1277-Conf, para. 141.

the flawed application of that standard. Why then, is what she puts forward illustrated with authorities on the degree to which the standard of proof should be defined, which are not applicable to the instant case?

178. There is one specific example of the Prosecutor expressing disagreement on the definition of the standard, one single example. It relates to corroboration. According to the Prosecutor:

> [T]he Majority's opaque evidentiary approach overall led Judge Henderson to adopt an inflexible and legally unsupported approach to corroboration that ignored the realities of international trials. By adopting and applying this standard, he (and the Majority) erred in law. The Majority applied its approach to corroboration inconsistently in its analysis. In the circumstances, since the Parties were given no notice of such an overly strict approach (which likely affected how the Majority decided if evidence was sufficient or not), this was also unfair.[118]

179. This calls for a number of remarks.

180. First, the Prosecutor states that the standard adopted by the Majority in respect of corroboration "ignored the realities of international trials."[119] The meaning of that phrase is unclear and there is nothing in what the Prosecutor says to clarify it. Perhaps she is suggesting that, because in the context of international trials investigations are supposedly more difficult to undertake and evidence more difficult to gather, more lenient standards of proof should be adopted.

181. To start with, the very basis of that position is debatable. The obligation cast upon the Prosecutor to prove on the basis of solid evidence the allegations underlying the charges beyond reasonable doubt is a consequence of the

[118] ICC-02/11-01/15-1277-Conf, para. 155.
[119] ICC-02/11-01/15-1277-Conf, para. 155.

requirement to abide by the principle of the presumption of innocence. To enter a conviction without the charges having been proven beyond reasonable doubt would be antithetical to the principle of the presumption of innocence which would be thus rendered nugatory. In other words, however difficult it may be to conduct investigations and construct a case, there can be no departure, on any account whatsoever, from respect for the fundamental rights of the accused, in particular in relation to international criminal procedure, which must be exemplary.

182. Next, that position is debatable in the instant case. As the Defence has had frequent opportunity to point out, in particular at the hearings in November 2018,[120] during the trial the Prosecutor did not refer to any difficulty in conducting her investigations. She had the constant close cooperation of the new Côte d'Ivoire government which came out the post-electoral crisis and she had been in contact with Alassane Ouattara and his advisers since at least the end of 2010. For example, thanks to her long-standing close contacts, the Prosecutor was able to meet with witnesses – P-0009, P-0010, P-0011, P-0046 and P-0047 – in the weeks immediately following the crisis.[121] The Prosecutor was given unrestricted access to the archives of various State authorities (the police, the gendarmerie and so on).[122] In general terms, there is nothing to indicate that the Prosecutor encountered the slightest difficulty in meeting with potential witnesses or collecting evidence. That being so, it is curious that the Prosecutor should seek to justify the weakness of her evidence on the basis of the purported "realities of international trials" which, if the Defence has understood correctly, would allow the Prosecution to be given excessive powers and to use low standards in order to obtain a conviction.

[120] ICC-02/11-01/15-T-224-CONF-FRA CT, p. 27 *et seq.*
[121] ICC-02/11-01/15-T-224-CONF-FRA CT, p. 29, line 2 to p. 30, line 15.
[122] ICC-02/11-01/15-1029-Conf, paras. 67-96.

183. The question of the "realities of international trials" can be approached from a different angle. What the Prosecutor is insinuating is that if she had been able to investigate in other circumstances she would, she submits, have been able to compile better evidence. That reasoning is obviously flawed since it is based on the assumption that any purported "better evidence" existed. The reality is much simpler: since the Prosecutor was able to investigate freely for nearly five years before the trial started (and continued to investigate after it had started), and found nothing, the only rational conclusion is that such evidence simply does not exist.

184. Second, it is astonishing that the Prosecutor states that the approach to corroboration that Judge Henderson adopted on behalf of the Majority was an unexpected after-the-event revelation to her.[123] The fact is that, throughout the trial, the Defence warned against the mistaken approach that the Prosecutor had taken to corroboration, which distorted the very concept of corroboration,[124] and called that position to mind during the no case to answer procedure.[125] Corroboration was therefore at the very least an open question both during the trial and during the no case to answer procedure and the Prosecutor cannot now claim that she was unaware of the discussion that took place on that point. Furthermore, several times during the trial Judge Henderson himself expressed very clear views on the matter[126] in line with what he set out on behalf of the Majority in his written reasons. It is surprising that the Prosecutor claims to have learned the Judges' conception of corroboration only on 16 July 2019.

[123] ICC-02/11-01/15-1277-Conf, para. 133.
[124] ICC-02/11-01/15-495-Conf, paras. 38-41, 46. See also ICC-02/11-01/15-884-Conf, paras. 96-100.
[125] ICC-02/11-01/15-T-225-CONF-FRA CT, p. 50, lines 1-3.
[126] ICC-02/11-01/15-950-Conf-Anx, para. 7; ICC-02/11-01/15-466-Conf-Anx, paras. 6-7.

185. That remark also illustrates the superficial nature of the Prosecutor's line of argument in her second ground of appeal. The question of corroboration has been on the table since the trial started in 2016. It is therefore not the result of any alleged lack of clarity on the part of the Judges in the conduct of the no case to answer procedure. To link the two is gratuitous and contrived. They are very different things and on any logical basis are completely unrelated.

186. Third, by considering the question of corroboration in isolation and addressing it from a theoretical perspective, the Prosecutor is trying to gloss over the fact that the Judges made a holistic assessment of the quality of her evidence and found, overall, that it was insufficient to substantiate the charges. The Majority Judges, in exercise of their power as ultimate arbiters of fact, took pains to analyse the soundness of the Prosecutor's evidence on the basis of a set of criteria, of which corroboration was only one. There are other criteria such as the extensive use of (often anonymous) hearsay and the failure to establish the authenticity of many items of evidence. In other words, contrary to what the Prosecutor seems to be suggesting, the Majority did not automatically refuse to consider items of evidence or testimonies simply because they were not corroborated. It took the (very frequent) absence of corroboration into consideration as a relevant factor in assessing the credibility of a witness or the probative value of an item of evidence. The Judges' examination of the Prosecutor's evidence was therefore a comprehensive, meticulous and in-depth examination in which the analysis of corroboration was merely one factor among others.

187. It was therefore perfectly reasonable, for example, for the Majority Judges not to give any credence to the notion that Laurent Gbagbo may have given orders directly to Colonel Dadi, knowing as they did that the Judges had established that: (1) the allegation in question came from a subordinate of Dadi, P-0239, who

allegedly heard Dadi report it to third parties but had not himself heard any orders being issued, and it was therefore hearsay; (2) the Majority found that, for various reasons, P-0239's testimony was not reliable; and (3) there was nothing on the record to corroborate the content of that allegation. This example shows therefore that the Prosecutor's evidence posed a number of problems and that it was those problems combined that led the Judges to reject the Prosecutor's allegation.

188. Fourth, as regards what the concept of corroboration encompasses and the standard to be applied, the Prosecutor blurs the distinction between two scenarios: the first concerns whether the same fact is corroborated by two different sources; the second, whether several facts can corroborate each other and, on the basis of that corroboration, establish the contextual element of the crimes.

189. The first point, which goes to the heart of what corroboration means in the primary sense of the word, quite simply boils down to examining whether one and the same fact is corroborated by two different sources.

190. It is quite clear that two testimonies, or two items of evidence in general, which are unrelated to the *fact* that the Prosecutor is trying to prove, logically cannot, by definition, be corroborative of each other as to the truth of the fact at issue. It is most curious that the Prosecutor claims otherwise, as she does when she states for example that the Majority "incorrectly and unfairly limited its assessment of corroboration to only those acts/crimes that occurred in the exactly identical locations and times as each other".[127] How can evidence that one "act" occurred serve as evidence of another act that occurred in a different place at a different time?

[127] ICC-02/11-01/15-1277-Conf, para. 159.

191. The Defence notes that the Prosecutor takes care not to point out that where the Majority Judges did seek corroboration of one fact by another it was because the Prosecutor was claiming that such corroboration existed (the word "corroboration" and its derived forms appear more than three hundred times in the Prosecutor's response to the Defence no case to answer motion).[128] How therefore can the Judges be criticized for verifying for themselves whether what the Prosecutor was claiming in terms of corroboration was true?

192. The Defence notes moreover that the Prosecutor frequently criticizes the Majority for focusing on "minutiae" and thereby finding testimonies to be mutually incompatible, in other words, uncorroborated.[129] However, the Judges clearly had a duty to analyse the testimonies in detail and to consider all the factors they considered relevant to assessing each testimony. The Judges, who heard all the testimonies, observed the demeanour and reactions of the witnesses under examination and cross-examination and analysed the Prosecutor's evidence in detail and in its entirety, used all those factors to create a filter through which they passed the Prosecutor's allegations. It was in the light of all those factors that they were able to find the lack of corroboration or the contradictions between testimonies to be significant or even decisive in determining that a fact was not proven. By speaking of "minutiae" the Prosecutor is trying to minimize the task accomplished by the Judges, to reduce it to a superficial approach, and to deny that the Judges did in fact undertake an in-depth analysis.

[128] ICC-02/11-01/15-1207-Conf-Anx1.
[129] ICC-02/11-01/15-1277-Conf, paras. 195 and 205.

193. That is all the more so insofar as the Prosecutor has a very idiosyncratic idea of "minutiae".

194. For example, in her response to the Defence no case to answer motion, the Prosecutor presented testimonies and items of documentary evidence to the Chamber stating that they were corroborative of one another, in an attempt to prove that there was 120 mm mortar fire from Camp Commando on 17 March 2011.[130]

195. The Majority Judges took each of those items one by one, analysed them in meticulous detail and identified all the contradictions and uncertainties emerging from the analysis of that evidence, which included: (1) the fact that, on the basis of that evidence, it was impossible to establish with any degree of certainty whatsoever that 120 mm mortars were present at Camp Commando on 17 March 2011;[131] (2) the fact that P-0239, the only witness called by the Prosecutor as an eyewitness to the firing, could not in fact remember the date of the firing he purportedly witnessed;[132] (3) the fact that P-0239's account and the Prosecutor's claims were markedly different since according to P-0239 two shots were fired in short succession in the same direction, whereas according to the Prosecutor six were fired in different directions;[133] (4) the fact that P-0226, who stated that he had heard firing from Camp Commando, put it at the beginning of March instead of 17 March; P-0226 was the only witness to give a precise date, which means that either his testimony related to a different incident from that described by P-0239 and therefore did not corroborate it, or both testimonies related to the same incident which did not occur

[130] ICC-02/11-01/15-1207-Conf-Anx1, para. 812 *et seq.*
[131] ICC-02/11-01/15-1263-Conf-AnxB, para. 1811.
[132] ICC-02/11-01/15-1263-Conf-AnxB, para. 1812.
[133] ICC-02/11-01/15-1263-Conf-AnxB, para. 1814.

on 17 March, contrary to what the Prosecutor was claiming;[134] (5) the fact that the United Nations reports from the time of the alleged incident referred to firing from 81 mm mortars (in contrast to 120 mm mortars as the Prosecutor claimed) and gave no material information about the source of the firing.[135] It was therefore reasonable for the Majority to conclude that the evidence presented by the Prosecutor, taken as a whole, was not such as to substantiate the allegation as submitted by the Prosecutor.

196. Nevertheless, in her appeal brief, the Prosecutor finds fault with the Majority for concentrating excessively on the contradictions and, unlike Judge Carbuccia, for not accepting the premise that "several of the testimonies are true, and prove the same or similar facts or a sequence of linked facts."[136] Yet how could testimonies prove the Prosecutor's allegation (six shots coming from Camp Commando on 17 March 2011, fired from a 120 mm mortar) when none of them gives a date or when they each give a date different from that claimed by the Prosecutor, when none gives any assurance that there was a 120 mm mortar at Camp Commando, when none of them confirms that the incident took the course the Prosecutor claims it did, and when they contradict each other? The Prosecutor gives no explanation in her appeal brief. The Prosecutor's argument that the approach to corroboration taken by the Majority Judges was too rigid rests in reality on her distortion of the Judges' efforts, given that they undertook a sophisticated and exhaustive analysis of the Prosecutor's evidence.

[134] ICC-02/11-01/15-1263-Conf-AnxB, para. 1817.
[135] ICC-02/11-01/15-1263-Conf-AnxB, para. 1819.
[136] ICC-02/11-01/15-1277-Conf, para. 197.

197. Last, the Defence notes that the Prosecutor persists in referring, as she did in the no case to answer procedure,[137] to a definition of corroboration that she draws from ICTR authority, according to which,

> [t]wo testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts.[138]

The Prosecutor has only one aim in using that definition: to try to persuade the Chamber that two weak items of evidence can, in some unknown way, miraculously reinforce each other and as a result of that strange alchemy turn into robust evidence. The Defence notes that Judge van den Wyngaert and Judge Morrisson roundly criticized that approach in their separate opinion to the appeal judgment in *Bemba*: "We also reject the Trial Chamber's apparent conclusion that weak testimonial evidence can somehow be corroborated by weak documentary evidence, especially if one or both are based on (anonymous) hearsay."[139]

198. The other question, which is very different from the first, is whether acts which are discrete but which form part of a single sequence, are, because they thus evince a "pattern"[140] [141] or a "course of conduct",[142] corroborative of one another and therefore substantiate the contextual element of crimes against humanity. Several remarks are to be made in that respect.

199. To begin it is necessary to state the obvious: to say that two different incidents establish the existence of a pattern or a course of conduct presupposes that the

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[137] ICC-02/11-01/15-1207-Conf-Anx1, para. 198.
[138] ICC-02/11-01/15-1277-Conf, para. 157.
[139] ICC-01/05-01/08-3636-Anx2, para. 64.
[140] ICC-02/11-01/15-1263-Conf-AnxB, para. 1386.
[141] ICC-02/11-01/15-1207-Conf-Anx1, para. 197.
[142] ICC-02/11-01/15-1263-Conf-AnxB, para. 1371; ICC-02/11-01/15-1207-Conf-Anx1, para. 122.

Prosecutor has previously established that each of the two incidents she wishes to link in that way actually occurred. In fact she never does so. It will be recalled that the truth of the incidents that the Prosecutor claims constitute the contextual element is based solely on anonymous hearsay, unverified reports that contradict each other and contradict what her witnesses say, and incidents whose occurrence has never been corroborated. That was shown to be so by the Defence, incident by incident, in its no case to answer motion[143] and in detail by the Majority in the July 2019 Reasons.[144]

200. Next, if two incidents are to be considered to form part of a pattern or a course of conduct, it must also be proven that those incidents are linked in terms of the identity and motives of the perpetrators, the status of the alleged victims, the circumstances and so forth. By finding fault with the Majority Judges for adopting an overly strict approach to corroboration, the Prosecutor is seeking to obscure the fact that at no time, either during the trial or in her "trial brief", or in her response to the no case to answer motion filed by the Defence, or at the hearings in October 2018, did she establish that the incidents she was proposing as constitutive of the contextual element of crimes against humanity did in fact occur, or even establish any link between those separate incidents, as Judge Henderson explained, on behalf of the Majority, in the reasons.[145]

[143] ICC-02/11-01/15-1199-Conf-Anx3-Corr, paras. 629-767.
[144] ICC-02/11-01/15-1263-Conf-AnxB, paras. 1418-1613, 1773-1787, 1802-1839 and 1848-1862.
[145] ICC-02/11-01/15-1263-Conf-AnxB, para. 1888.

3. Whether the Majority Judges were in agreement on the definition of the standard of proof (paragraphs 132 to 141 of the Prosecutor's Brief)

201. The Prosecutor relies on what she perceives to be an inconsistency between Judge Tarfusser's approach to the standard of proof and that of Judge Henderson, in order to argue that there was no consensus between the two judges on that point.[146]

202. Once again, the Prosecutor is trying to distract from the fact that Judge Tarfusser concurred completely with Judge Henderson's legal and factual conclusions,[147] which Judge Henderson reached, it will be recalled (see above), on the basis of a standard of proof that has not been disputed by the Prosecutor. The Prosecutor's entire point is therefore based on the artificial distinction she contrives for the purposes of her line of argument, between the consensus that existed between the two Judges on the reasons and the lack of consensus she alleges existed on the standard of proof, whereas the fact that Judge Tarfusser endorsed all the factual and legal conclusions drawn by Judge Henderson necessarily means that he endorsed the standard of proof used to reach them.

203. One needs only read Judge Tarfusser's opinion to realize that he fully endorsed the reasoning set out by Judge Henderson. For example, Judge Tarfusser referred to the Reasons more than a hundred times in his own opinion, a good illustration of the fact that this was a complete and detailed endorsement, rather than, as the Prosecutor suggests, an endorsement in appearance only.

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[146] ICC-02/11-01/15-1277-Conf, para. 255.
[147] ICC-02/11-01/15-1263-AnxA, para. 1.

204. Specifically, in respect of the applicable standard of proof, although Presiding Judge Tarfusser did indeed refer to the beyond reasonable doubt standard[148] as being applicable in theory to a no case to answer procedure, he clarified that in the instant case Judge Henderson and he were entirely in agreement on how to approach 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.[149]

205. Judge Tarfusser then stated very clearly that, in this case, the matter of the standard of proof is of little practical consequence since the Prosecutor's evidence is so weak that it does not satisfy any standard of proof, however low:

> Furthermore, the very features of the present case and of the submitted evidence – as exhaustively addressed in the Reasons and highlighted here in those parts which I found particularly significant – do not require engaging in further discussions as to either the theoretical foundation or the practical application of the notion. […] **Simply put, there is no evidence in respect of which the Majority's determination as to the need for a defence case would have changed depending on the standard applied**.[150]

206. Judge Tarfusser therefore indicated clearly that, on the basis of the "standard applied", that is to say, the standard defined in Judge Henderson's written reasons, there was in his view nothing to support the Prosecutor's allegations. The Majority Judges were therefore in complete agreement given that, in this case, they followed the same approach, applied the same standard and reached the same conclusions. Accordingly, there is no need to address Judge Tarfusser's theoretical comment about the beyond reasonable doubt standard, because Judge Tarfusser explained that, in his view – and in that of Judge Henderson – the Prosecutor failed to reach the

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[148] ICC-02/11-01/15-1263-AnxA, para. 2.
[149] ICC-02/11-01/15-1263-AnxA, para. 67.
[150] ICC-02/11-01/15-1263-AnxA, para. 68, emphasis added.

lowest standard, the standard adopted by the Majority. If she has not satisfied the lowest standard, by definition it she has not satisfied the highest, that is to say, the beyond reasonable doubt standard.

4. Whether the standard of proof was correctly applied (paragraphs 162 to 253 of the Prosecutor's Brief)

207. In the last part of her second ground of appeal the Prosecutor seeks to illustrate, by means of factual examples, the errors of law and procedure she alleged in the first part of her second ground of appeal. She contends that those examples of errors in the assessment of the evidence arose from "the Majority's absence of clarity and failure to establish consensus on their approach".[151]

208. The Prosecutor argues that because the standard to be applied had not been identified and because the Judges were not in agreement on that standard during the no case to answer procedure, they decided to acquit him in January 2019 against a backdrop of lack of clarity and in consequence erred when assessing her evidence in the July 2019 written reasons.

209. First, at no time has the Prosecutor shown that the purportedly dubious application of the standard of proof was the result of the purported vagueness surrounding that standard during the no case to answer procedure. Indeed, how can she show that to be so since, by her own admission, the Prosecutor is not challenging the standard as adopted by Judge Henderson in his Reasons?[152] Even conceding, for the sake of argument, that there was uncertainty as to the standard of proof during

[151] ICC-02/11-01/15-1277-Conf, paras. 123, 160.
[152] ICC-02/11-01/15-1277-Conf, para. 126.

the no case to answer procedure, that circumstance is irrelevant to how the standard ultimately adopted was applied in the acquittal decision itself.

210. Second, in any event, as explained (see above), the Prosecutor has not established either an "absence of clarity" as to the standard of proof applied, nor any "lack of consensus" between the Majority Judges. It is probably because she has failed to do so that she has been forced to try a different approach: taking a fact and attempting to convince the Appeals Chamber that the Trial Judges did not give that fact the weight it deserved. Put otherwise, in all her examples the Prosecutor posits the truth of an allegation; to so proceed is entirely antithetical to a legal approach predicated on a showing and on the passing of evidence through the filter of a standard. Here, the Prosecutor presents the alleged incidents that form her narrative as having occurred come what may. She therefore takes no steps to make any showing whatsover and instead proceeds on the basis of mere statements.

211. What remains, then, of the Prosecutor's second ground of appeal, since she has not in fact shown either an error of law or a procedural error? All that remain are nothing more than differences of opinion on how Judge Henderson (on behalf of the Majority) applied the standard of proof, and even then only in isolated instances.

212. Those few differences of opinion cannot justify appellate interference in the case, with all the more reason since the Prosecutor herself has acknowledged that those differences cannot shake the decision of the Trial Chamber, stating as she does that the Appeals Chamber is not asked

> to apply the factual standard of review overall and declare, on that basis, that the Majority's overall conclusions on the five charged incidents (and the chapeau elements

> for crimes against humanity) were unreasonable, such that it led to a miscarriage of justice warranting reversal of the acquittals.[153]

213. In other words, it is clearly apparent from the appeal brief that (1) the Prosecutor is not criticizing the Majority for the standard it adopted; (2) she is not criticizing it for the overall conclusions it reached. Put plainly, the Prosecutor is quite simply not disputing the substance of the acquittal decision.

214. The Defence also notes that the Prosecutor, concluding her ground of appeal, expresses the view that she is not required to establish that the alleged errors could have influenced the impugned decision:

> [A]n 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.[154]

215. That statement is particularly surprising because it is expected of a party on appeal that it will have to establish that the errors it alleges against the judges had an impact and that had it not been for those alleged errors, the outcome of the proceedings would have been different. Here the appellant, the Prosecutor, declines either to put any argument whatsoever as it declines to establish anything whatsoever.

216. In all criminal cases, irrespective of the complexity of the case or the length of the decision, the appellant must show that one or more errors, including errors of fact, had an impact on the impugned decision. What is to be made of the

[153] ICC-02/11-01/15-1277-Conf, para. 129.
[154] ICC-02/11-01/15-1277-Conf, para. 260.

Prosecutor's belief that she is not bound by that obligation to make a showing, that her evidence has intrinsic value which nothing can call into question?

217. The Prosecutor's thinking has to be inverted in order to fathom what she is saying: for the Prosecutor, an acquittal rooted in a detailed and densely reasoned decision, which paid close attention to all aspects of the case and assessed all the evidence according to a standard which the she does not in fact question – a decision that followed two complete years of trial during which the Prosecutor's evidence was presented and heard and then a no case to answer procedure in which all the Parties and participants freely and fully made representations – can be challenged on the basis of what are no more than unproven statements and a handful of differences of opinion plucked randomly from the thousand pages of the reasons.

218. What therefore is to be gained from those "examples", if they cannot, as the Prosecutor herself concedes, serve to support a showing supposedly intended to cast doubt on the acquittal? The Appeals Chamber should therefore reject these pointless examples.

219. In truth, those "examples" have a different purpose – to lure the Appeals Bench into the realm of fact, as if the Prosecutor's allegations still had any solidity at all even though the triers of fact, the Trial Bench, found – after examining and assessing it over several years – that the Prosecutor's evidence was "exceptionally weak",[155] that it was not solid. The Prosecutor seems to want to gloss over the fact that her evidence did not withstand the ultimate test, that of the trial and of being challenged and canvassed by the Parties. The Prosecutor wishes to deflect attention

[155] ICC-02/11-01/15-T-234-FRA ET WT, p. 3, line 25.

from the fact that one Prosecution witness after another cast doubt on her narrative, and to not draw the slightest conclusion in consequence, as Judge Tarfusser noted in his opinion:

> If one were to single out one shortcoming above all, however, one would have to select the Prosecutor's choice, to this day a reason for the utmost concern, not to adjust and progressively amend her narrative, taking stock of things said or revealed in the courtroom: instead, this narrative has remained the same as in the early days of the pre-trial stage, and to this very day.[156]

The Appeals Chamber cannot follow the Prosecutor down this path, which consists of refuting both the two years of trial and the full and exhaustive analysis of the Prosecutor's evidence accomplished by the Majority Judges and set forth clearly in their written reasons.

220. The plain truth is that the Prosecutor is quite simply unable to challenge the acquittal on the merits. This observation is key to understanding the true meaning of the section of the ground of appeal based on factual examples. Where is the benefit in presenting "examples" of alleged factual errors by the Judges if ultimately the Prosecutor is not challenging the acquittal? Is the Prosecutor's aim to give the impression to the outside world that she is still defending her case (even at the cost of blatant distortion of the Judges' reasoning (see above))?

221. Because she is incapable of challenging the acquittal, the Prosecutor is incapable of demonstrating the slightest prejudice caused by the alleged errors, and confines herself to making general statements. For example, she states:

> In particular, the Prosecution as the party bringing the case suffered prejudice. The Prosecution has a role that goes beyond its role as a party in judicial proceedings. It represents the interests of the international community in seeking to address impunity for the most serious international crimes. In these circumstances, abruptly halting the

[156] ICC-02/11-01/15-1263-AnxA, para. 104.

> Prosecution's case against Mr Gbagbo and Blé Goudé — in circumstances that were neither clear nor correct — was unfair to the Prosecution. This in turn frustrates the greater expectations that vest in the Office's mandate and is unfair to other stakeholders such as the victims in this case, the citizens of Côte d'Ivoire and the broader international community.[157]

A number of remarks are to be made in that regard.

222. First, the Prosecutor is confusing two things here: (1) her role as a party in proceedings in which she is supposed to represent the international community; (2) a role, which she arrogates to herself − spokesperson of what she regards as the general good. In the name of that general good, she casts herself as the arbiter of what should be done, exalting herself *de facto* above the Judges. As such, she considers herself not bound by the rules governing proceedings. In her view, the Majority Judges caused her prejudice simply by examining the soundness of her evidence, that is to say, her narrative. She therefore seems to be finding fault with them for having done their job.

223. In the same vein, the Prosecutor shifts the debate from the judicial to the moral dimension of the fight against impunity, casting herself as the sole champion of that cause. However, fighting impunity is the mission of the International Criminal Court as a whole, and the Prosecutor is only one cog in the mechanism that is the ICC, in common with the Judges, the Legal Representatives of Victims and the Defence, who all participate in the judicial endeavour embodied in the existence of a process founded on respect for the accused.

224. Last, when the Prosecutor claims that the Chamber "abruptly" halted the trial, she is once again giving a skewed picture of the procedure that was followed and is

[157] ICC-02/11-01/15-1277-Conf, para. 262.

"overlooking" the fact of a trial that lasted two complete years and during which she was able to present her case exhaustively. She is also "overlooking" the fact that there was a no case to answer procedure in which the Parties were able to air all matters and which led to a 964-page decision in which the judges meticulously and minutely analysed her evidence before delivering the acquittal. There was therefore nothing abrupt about that process.

IV. Response to the Prosecutor's second ground of appeal: the factual examples that the Prosecutor presents in her second ground of appeal in an attempt to show that the Judges applied the standard of proof incorrectly are unpersuasive

225. In the last part[158] of her second ground of appeal, the Prosecutor attempts to illustrate the consequences, in terms of the facts, of the errors of law and procedure she alleges the Judges made in assessing the evidence. Otherwise stated, the aberrant way in which the Judges supposedly handled a particular incident purportedly reveals the errors made earlier on.

226. The following is apparent from the six examples on which the Prosecutor relies.

227. First, she invariably presents a truncated and distorted picture of the Majority Judges' efforts. For example, the Prosecutor argues many times that the Majority did not substantiate its conclusions on a point under discussion whereas, on each occasion, the Majority did set out in detail how it understood and analysed the Prosecutor's evidence, item by item and as a whole, and that it was only on

[158] ICC-02/11-01/15-1277-Conf: "IV.B.4. The Majority's errors are manifest in the following examples".

completion of that analysis that it found the evidence to be insufficient to reach the standard of proof.

228. It is worth noting that whereas she (wrongly) reproaches the Majority for not looking at her evidence as a whole, the Prosecutor, for her part, fragments the Majority's analysis, extracting a particular consideration that the Majority may have stated in relation to a specific item of evidence but not at any time taking the trouble to examine that consideration in the light of the holistic analysis carried out by the Judges.

229. Similarly, the Defence notes that the Prosecutor's arguments are often vague and superficial. For example, she states several times that the Majority ignored "other evidence" or "other witness testimony" on the record, but does not give specifics.[159] She is therefore asking the Appeal Judges to revisit the work of the Trial Judges, but does not provide them with any relevant information. She is also asking the Appeal Judges to take on trust that the "evidence" in question exists, whereas in reality it does not.

230. Second, the Defence points out that, in her discussion of the six examples, the Prosecutor refers only to the English version of the transcripts of what was said by the witnesses, whereas the vast majority of them spoke in French. Furthermore, the Prosecutor does not refer to a single item of documentary evidence in French, whereas the bulk of the evidence is in French. The Prosecutor seems to have built up a picture of the record that she submitted to the Appeal Judges solely on the basis of what was available to her in English. That is to say, she is offering them only an incomplete and not the full version of the record.

[159] ICC-02/11-01/15-1277-Conf, paras. 203, 212.

231. Third, it should be noted that, the Prosecutor, realizing the weakness of her evidence, changes to a more or less appreciable extent how she presents the evidence for each of the incidents to which she refers in her brief (see below). It is noted that the Prosecutor has resorted to that stratagem throughout the proceedings.[160] That stratagem seems to signal the Prosecutor's wish here to "salvage" her case at any cost by offering the appeal judges new explanations to overcome the contradictions inherent in her evidence highlighted by the trial judges.

232. Fourth, instead of analysing each of the stated incidents vis-à-vis the standard of proof adopted by the Judges and drawing from that analysis a critical view of how the Judges assessed a particular item of evidence, the Prosecutor merely rejects each of the analyses by the Judges, arguing that, for each incident, her evidence should be found, as a whole, to be corroborated, clear, consistent and cogent and therefore to have weight in itself.

233. In doing so, as the Judges noted,[161] the Prosecutor is following the same approach that she followed throughout the trial, consisting of putting foward the case for consideration as a whole so that its particulars do not come under scrutiny.

234. The Defence notes that the Majority even anticipated the arguments that the Prosecutor would deploy on appeal:

> [B]y failing to articulate a clear evidentiary argument, it will always be possible for the Prosecutor to argue that whatever problems the Chamber identifies with a particular aspect of the evidence, that this particular aspect is not decisive to the outcome of the case.[162]

[160] See, for example, ICC-02/11-01/15-1199-Conf-Anx3-Corr, para. 229.
[161] ICC-02/11-01/15-1263-Conf-AnxB, paras. 87-88.
[162] ICC-02/11-01/15-1263-Conf-AnxB, para. 88.

This is precisely what the Prosecutor does in the six examples she gives in her brief. She criticizes specific aspects of the Judges' analysis, and consistently refers to her case considered as a whole. The Majority also foresaw that

> [i]t is not inconceivable that the Prosecutor will try to argue that the Chamber has failed to take into consideration certain evidence in reaching its conclusion. However, the Prosecutor should not be allowed to hide behind large volumes of submitted evidence and an indeterminate "system of evidence" to avoid scrutiny of her case.[163]

235. In short, the Prosecutor's line of argument in relation to each factual example boils down to a recapitulation of what, in her view, her own evidence represents − evidence which she regards as valid, with no need to enter into in any depth or detail what the Judges said about it. Hence, the Prosecutor suggests that the Majority acted unreasonably merely for not agreeing with her. That approach is unacceptable.

236. On analysis, it seems therefore that the Prosecutor routinely proceeds from the premise that the facts are true to infer that her evidence is sound. Because to her mind the facts are true, the inconsistencies and contradictions in her evidence are insignificant and must be ignored. That stance amounts to denying the benefit of oral argument. The Prosecutor is in a way attempting to gloss over the court's role which is to assess her evidence; it is the trial phase itself that she is attempting to gloss over. The Prosecutor seems to want to go straight from her pre-trial brief to a conviction, with no trial in between.

237. The Majority noted that tendency of the Prosecutor throughout the case to operate on the premise that everything she states is true without ever heeding reality:

[163] ICC-02/11-01/15-1263-Conf-AnxB, para. 90.

> In this case, the Prosecutor seems to have started from the premise that her case theory is correct and that this theory provides the necessary coherence to link the disparate evidentiary elements she relies upon. However, this is putting the cart in front of the horse. In order to prove her case, the Prosecutor must first *demonstrate* the aforesaid connections and coherence. This has not been done. Although the Prosecutor has made considerable efforts in advancing a wide range of factual claims, she has neglected to provide a clear and cogent explanation of how they all relate. [164]

1. First factual example: according to the Prosecutor, the Judges erred in assessing the evidence relating to her allegations concerning firing from a convoy which allegedly targeted civilians in Abobo on 3 March 2011 (paragraphs 166 to 182 of the Prosecutor's brief)

238. The Prosecutor claimed in relation to that incident that members of the security forces fired on a women's gathering on 3 March 2011. In its no case to answer motion, the Defence noted the weakness of the Prosecutor's narrative and of the evidence she submitted in its support.[165]

239. The Judges analysed all the evidence relating to the incident and concluded:

> From the above, no reasonable trial chamber could conclude that the convoy opened fire with the aim of killing or injuring unarmed female pro-Ouattara demonstrators. This conclusion is reinforced by the fact that there is no evidence of prior instructions to use violence against civilians, [REDACTED], and that the convoy did not know of the women's march and were taken by surprise when they encountered the demonstrators.
>
> In sum, although serious question marks may be placed by the use of a heavy machine gun in an environment with a very high concentration of civilians, it is not possible to determine on the basis of the available evidence that the soldiers in the BTR 80 or in any of the other vehicles in the convoy caused the deaths and injuries of the 13 victims of the women's march of 3 March 2011, much less that they did so because they intentionally targeted them because of political, racial, national, ethnic, religious, or other grounds. There is simply too much that remains unclear about this incident to allow a reasonable trial chamber to come to any firm conclusions.[166]

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[164] ICC-02/11-01/15-1263-Conf-AnxB, para. 79.
[165] ICC-02/11-01/15-1199-Conf-Anx3-Corr, paras. 245-412.
[166] ICC-02/11-01/15-1263-Conf-AnxB, paras. 1786-1787.

240. The Prosecutor chooses to ignore that exhaustive analysis of her evidence as a whole and to focus on one point taken in isolation from the rest of the analysis. By doing so, the Prosecutor misrepresents the debate that took place concerning that incident, both during the trial and during the no case to answer procedure.

241. According to the Prosecutor, "[t]he Majority's failure to attribute the deaths and injuries of the 13 victims to the shots fired from the FDS convoy is a stark example of its opaque, inconsistent and unreasonable assessment of evidence at the NCTA stage."[167]

242. Here as elsewhere, the Prosecutor's line of argument is intended to obscure both the weakness of her evidence and the detailed, exhaustive analysis of that evidence undertaken by the Majority Judges in their reasons.

243. It will be recalled that Judge Henderson in the first paragraphs of his reasons the methodology he would follow in evaluating the evidence, stating that a holistic approach was not incompatible with the need also for rigorous analysis of each item of evidence.[168]

244. Following that methodology, that is to say, analysing all the information relating to the alleged incident of 3 March 2011, such as the video submitted by the Prosecutor and the associated forensic examination report, the various witness testimonies (which were analysed in turn and then compared), he found that

> it is not possible to determine on the basis of the available evidence that the soldiers in the BTR 80 or in any of the other vehicles in the convoy caused the deaths and injuries of the 13 victims of the women's march of 3 March 2011, much less that they did so because

[167] ICC-02/11-01/15-1277-Conf, para. 167.
[168] ICC-02/11-01/15-1263-Conf-AnxB, para. 31, emphasis added.

> they intentionally targeted them because of political, racial, national, ethnic, religious, or other grounds.[169]

245. Therefore, the reason the Majority did not agree with the Prosecutor was not because she acted wrongly by analysing some items of evidence or all the items of evidence concerning the firing in relation to each other, but on the contrary because there is nothing in the Prosecutor's evidence to sustain her allegation and narrative.

246. To recall the Prosecutor's line of argument: the Prosecutor contends that the Majority "failed to appreciate that the evidence was consistent and corroborated",[170] and that "in part due to its inflexible understanding of 'corroboration' and 'consistency' of evidence, **the Majority rejected a wealth of consistent evidence** (eye-witness, video, expert, autopsy reports) […]".[171]

247. Nevertheless, on each of those points, the Judges did offer a detailed and exhaustive analysis of the evidence before concluding that it did not substantiate the Prosecutor's allegations.

1.1. <u>The purported "eye witnesses"</u>

248. At the start of his analysis of the possible source of the firing, Judge Henderson stated that "there is no direct evidence as to who fired the shots that hit the victims".[172] He therefore explained at the outset that although he was not disputing any of the direct evidence (including the statements of the purported

[169] ICC-02/11-01/15-1263-Conf-AnxB, para. 1787.
[170] ICC-02/11-01/15-1277-Conf, p. 108, sect. IV.B.4.i.b.
[171] ICC-02/11-01/15-1277-Conf, para. 177, emphasis added.
[172] ICC-02/11-01/15-1263-Conf-AnxB, para. 1775.

"eyewitnesses"), the fact was that after his analysis he found that no alleged "eyewitness" had provided any useful information.

249. In his section entitled "Why did the convoy open fire?",[173] Judge Henderson analysed, witness by witness, what the witnesses said about who may have been the source of the firing. Under those circumstances, the Prosecutor's criticism of Judge Henderson for not carrying out that analysis is beyond comprehension.

250. The Majority rejected the testimony of P-0580 because he did not see any firing and did not provide any specific relevant information about the alleged incident.[174] The Defence had moreover noted that "[TRANSLATION] 10 of the 13 crime-based witnesses called by the Prosecutor **were not present at the time of the incident**."[175]

251. In a paragraph devoted entirely to P-0184, Judge Henderson set out why he found that witness not to be a reliable witness to the incident on 3 March 2011. Judge Henderson rejected her testimony after noting that the witness stated that she did not know where the firing was coming from, that she had her back to the convoy, that she fell twice and lost consciousness for a few seconds or minutes, that she saw a white flag on one of the passing vehicles (whereas no flag could be seen on the vehicles filmed in the video presented by the Prosecutor), and that the convoy opened fire just after the vehicles had passed by her, which, according to Judge Henderson, "is also not in line with what can be seen on the video."[176]

[173] ICC-02/11-01/15-1263-Conf-AnxB, paras. 1778-1785.
[174] ICC-02/11-01/15-1263-Conf-AnxB, para. 1782.
[175] ICC-02/11-01/15-1199-Conf-Anx3-Corr, para. 256, emphasis added.
[176] ICC-02/11-01/15-1263-Conf-AnxB, para. 1781.

252. Judge Henderson found P-0114's testimony to be not "very instructive"[177] because the witness was vague about how many vehicles he saw and furthermore "stated that he had forgotten a lot about the events of 3 March 2011."[178]

253. In relation to P-0582, Judge Henderson noted that, "after having fled from the Banco roundabout, she heard a loud noise of weaponry, which made the ground shake",[179] meaning that she was not present at the *locus in quo* at the time of the alleged firing.

254. Judge Henderson noted that P-0190 declared that

> when she was at the march, something fell down *before* she observed gunshots being fired. […] None of the parties have raised this issue so the Chamber is left to speculate about what actually happened. In any event, if it was to be believed that there was an explosion before the gunfire started this would, if anything, make the course of events even more confusing, and hence cast further doubt on the Prosecutor's version of events.[180]

255. Accordingly, when the Prosecutor finds fault with the Majority for rejecting "eye witnesses", she is under a misapprehension because in his reasons Judge Henderson did not automatically exclude any witness but rather, after an analysis, found that those witnesses – which the Prosecutor presented as eyewitnesses – were not informative witnesses.

256. Incidentally, the line of argument pursued by the Prosecutor in her appeal brief shows that she has a rather idiosyncratic, elastic notion of what constitutes an "eyewitness" or "direct" witness to an incident given that, both here and throughout

[177] ICC-02/11-01/15-1263-Conf-AnxB, para. 1783.
[178] ICC-02/11-01/15-1263-Conf-AnxB, para. 1783.
[179] ICC-02/11-01/15-1263-Conf-AnxB, footnote 3982.
[180] ICC-02/11-01/15-1263-Conf-AnxB, footnote 3982.

the trial, any person who refers to an event, whether or not as a direct witness, can, in her view, be regarded as an "eyewitness" to that event.

1.2. The video presented by the Prosecutor in support of her allegations

257. Judge Henderson stated that the video in question "shows only a very limited aspect of the entire incident and even so, the footage is of poor quality".[181] He also highlighted the fact that, although the first three shots heard when listening to the video could "'likely' be attributed to one of the two machine guns that are mounted on the turret of the BTR 80 that is visible in the video",[182] that was not true of the other shots heard subsequently.[183] Accordingly, "unless it is established that the 13 victims were killed or injured by the first burst of three shots, it is not possible to know who is responsible for their deaths and injuries".[184] Since the Judges found that the Prosecutor had not established that "the 13 victims were killed or injured by the first burst of three shots", they were not unreasonable in concluding that the video did not support the Prosecutor's allegations.

258. In her attempt to circumvent the Judges' analysis and show that they did not correctly analyse the video and the associated expert report, the Prosecutor is reduced to misinterpreting the content of both the video and of the expert report.

259. For example, whereas in relation to the first volley fired (time code 03:39 to 03:46) the Prosecutor concedes that "[t]he Majority rightly found that this could likely be attributed to the heavy calibre weapons mounted on the turret of the

[181] ICC-02/11-01/15-1263-Conf-AnxB, para. 1780.
[182] ICC-02/11-01/15-1263-Conf-AnxB, para. 1775.
[183] ICC-02/11-01/15-1263-Conf-AnxB, para. 1775, footnote 3965 (CIV-OTP-0089-1030, p. 1059).
[184] ICC-02/11-01/15-1263-Conf-AnxB, para. 1776.

BTR-80 armoured vehicle in the FDS convoy", she goes on to say: "Subsequent gun fire of 17 shots can be heard at various intervals until minute 05:15",[185] intimating that those shots could also be attributed to the BTR-80 in the FDS convoy.

260. What the Prosecutor omits to state is that there was an interval of 40 seconds between the first volley and the "shots" that followed. Judge Henderson nevertheless correctly drew attention to that fact, which is crucial since in that interval the convoy disappeared; Judge Henderson pointed out that "the convoy seems to have already passed the location of where the demonstrators were gathered and is crossing a largely deserted intersection",[186] a finding in keeping with the expert report.[187] To put it another way, the shots heard on the second occasion could not have come from the convoy. The Prosecutor is careful not to state that she has failed to produce any information giving the slightest indication of the source of those shots in an area controlled by the armed rebellion.

261. A further example: the Prosecutor, commenting on the same video, asserts that

> the footage, as confirmed in the expert examination of the video, **shows the bodies of women lying on the ground with the convoy passing right next to them at minute 04:07**, i.e. *28 seconds* after the first shot is heard.[188]

That statement is quite simply untrue since, contrary to the Prosecutor's assertion, neither the video nor any material on the record, including the expert report to which the Prosecutor nevertheless refers in a footnote,[189] shows the convoy passing "right next to" the bodies of the women.

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[185] ICC-02/11-01/15-1277-Conf, para. 172.
[186] ICC-02/11-01/15-1263-Conf-AnxB, para. 1785.
[187] CIV-OTP-0089-1030, pp. 1076, 1079.
[188] ICC-02/11-01/15-1277-Conf, para. 172, emphasis added.
[189] ICC-02/11-01/15-1277-Conf, footnote 362.

262. What the Prosecutor asserts in her appeal brief is all the more surprising given that, at the hearing on 13 November 2018, the Defence for Laurent Gbagbo showed, with supporting images from the video, that there were no bodies lying on the ground at the time the convoy passed and that bodies only appeared in the images after the convoy had ceased to be visible.[190] That observation alone, illustrated by the images submitted by the Prosecutor herself, establishes that the alleged victims could not have been killed by the convoy. Instead of analysing the weakness of her evidence of that incident and drawing the appropriate conclusions, the Prosecutor has chosen instead to present only one aspect of the matter, seeking to level accusations at the Judges and thereby distract from the "[TRANSLATION] extreme weakness" of her case.

1.3. The purported ballistic and forensic evidence

263. The Prosecutor has submitted nothing to support her claim that the Judges misused the ballistic and forensic evidence she presented. Nowhere does she explain how the Majority erred in its approach.

264. Nevertheless, Judge Henderson found that the autopsy reports on the three alleged victims[191] could not be used to link the weapons in the BTR-80 with the fatal injuries to the three autopsied victims.[192]

1.4. The Prosecutor's arguments on the Judges' misuse of [REDACTED]'s testimony are baseless

[190] ICC-02/11-01/15-T-225-CONF-FRA CT, p. 9, line 3 to p. 12, line 9.
[191] ICC-02/11-01/15-1277-Conf, para. 181.
[192] ICC-02/11-01/15-1263-Conf-AnxB, para. 1776.

265. The Prosecutor submits that "the Majority preferred [REDACTED]'s version of events to the eyewitness accounts of the three other witnesses, the video evidence, the autopsy reports and the expert ballistics evidence"[193] and that "the Majority erroneously relied on the evidence of [REDACTED] to discard the probative value of all other evidence",[194] possibly in order to distract from the fact that the Majority rejected the Prosecution's allegations about the incident of 3 March 2011 only after a rigourous and exhaustive analysis of all its evidence, irrespective of the testimony of [REDACTED].

266. The Prosecutor also believes that the Judges should not have taken [REDACTED]'s testimony into consideration because it was "partial testimony".[195] First, it is recalled that this was her own witness. Of further note is that the Prosecutor's stance here is symptomatic of her overall approach to her own witnesses: they have to be taken on trust when, in her view, their accounts concur with her accusations, and what they say must be rejected when it does not agree with the Prosecutor's allegations. That unrigorous approach, which is based on the Prosecutor's preconceived opinion of the course the post-electoral crisis took, instead of heeding the witnesses, must quite clearly be rejected by the Appeals Chamber just as it was rejected by the majority at first instance.

267. As Judge Henderson noted in his written reasons:

[REDACTED].[196]

1.5. The "common-sensical indicators"

[193] ICC-02/11-01/15-1277-Conf, para. 178.
[194] ICC-02/11-01/15-1277-Conf, para. 179.
[195] ICC-02/11-01/15-1277-Conf, para. 177.
[196] ICC-02/11-01/15-1263-Conf-AnxB, para. 1779.

268. In order to flesh out her criticisms of the Judges, the Prosecutor moves into more abstruse territory: "[A]lthough the Majority was pre-occupied in its assessment by its need to link the 'shots' and the 'bodies', it disregarded *other* common-sensical indicators of the larger context showing that the FDS convoy was responsible."[197] A number of remarks are to be made here.

269. First, in the absence of any objective evidence establishing that a shot was in fact fired from the convoy at the group that can be seen in the video images, the Prosecutor is reduced to asking the appeal judges to disregard that lack of evidence and use non-objective evidence instead, purely in the interests of "rescuing" her narrative.

270. Second, the Defence draws attention to the Prosecutor's tone: "[A]lthough the Majority was pre-occupied in its assessment by its need to link the 'shots' and the 'bodies' […]".[198] The Prosecutor seems here to be reproaching the Judges for accomplishing their task, which she portrays as something that "preoccupies" them. She criticizes them for analysing the evidence in order to verify whether her claims that shots coming from the convoy that can be seen in the video could have caused the deaths of a number of people. The Judges' first task was therefore to examine whether the Prosecutor had established a link between the "shots" and the "bodies". Absent such link, the allegation obviously fell away.

271. Third, the Prosecutor does not explain where the notion of "common-sensical indicator" comes from and which, in her view, should have led the Majority Judges to accept her narrative, however weak her evidence might be. To illustrate what she believes those "common-sensical indicators" to be, the Prosecutor merely lists

[197] ICC-02/11-01/15-1277-Conf, para. 173.
[198] ICC-02/11-01/15-1277-Conf, para. 173.

various factors that she declares are true, that she declares have only a single meaning and that she declares – without a shred of evidence or any reference or footnote – make manifest a state of affairs that does not emerge from the video or from the testimony. That approach is not rigorous.

272. Fourth, not only is that approach not rigorous, it is in this instance factually incorrect. The Prosecutor asserts that the "common-sensical indicators" that she lists show that "the crowd was fearful of, and reacting to, the actions of the FDS convoy."[199] It suffices to watch the video to observe that when the convoy passes along the road there is no footage of any victim, no fearful movement among the onlookers and no panicked movement. It is only later, when the convoy is out of shot, that (1) volleys of gunfire are heard and (2) people can be seen running towards bodies lying on the road. It will be noted that in the place where those bodies are there was nothing on the road when the convoy passed, as borne out by the video footage. Had the Prosecutor applied her "common-sensical indicators" in good faith to her own evidence, she would have had to make the following observations which ensue from that evidence itself: (1) the volleys of gunfire that can be heard could not have come from the convoy; (2) it is likely that if there were victims as alleged, they were hit by those shots that occurred after the convoy had passed, since the bodies appear on the tarmac only once the convoy had passed; and therefore (3) if there were victims as alleged, it is not logically possible that they were victims of the convoy. It is plain here that what the Prosecutor calls "common-sensical indicators" serve only to gloss over the extreme weakness of her evidence, and the facts of what occurred.

[199] ICC-02/11-01/15-1277-Conf, para. 173.

2. Second factual example: according to the Prosecutor, the Judges erred in assessing the evidence relating to her allegations about mortar fire that allegedly took place on 17 March 2011 (paragraphs 183 to 198 of the Prosecutor's Brief)

273. In the Reasons, the Majority devoted dozens of pages to analysing the Prosecutor's evidence relating to the alleged incident of 17 March 2011, and then concluded that that it could not, on that evidence, be established that (1) there were mortars at Camp Commando on 17 March 2011;[200] (2) mortar fire came from Camp Commando that day;[201] (3) even had there been mortar fire that day, there was nothing to suggest that the Prosecutor's narrative was correct, and specifically that six shots were fired that day;[202] (4) even had there been mortar fire that day, there was nothing to suggest that it was aimed at the civilian population;[203] and (5) even had there been mortar fire that day, there was nothing to suggest that the firing was carried out at the say-so of anyone at all, let alone at the say-so of President Gbagbo.[204]

274. It is apparent that at each step in its reasoning, the Majority has, in a sense, afforded the Prosecutor the benefit of the doubt since, even absent any cogent evidence concerning crucial points such as the date of the firing or whether there were even mortars present at Camp Commando, the Judges considered every eventuality and discussed all the Prosecutor's allegations exhaustively and in detail. For example, the Majority considered the possibility that explosions could have taken place in Abobo that day, but had to remark:

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[200] ICC-02/11-01/15-1263-Conf-AnxB, para. 1811.
[201] ICC-02/11-01/15-1263-Conf-AnxB, para. 1820.
[202] ICC-02/11-01/15-1263-Conf-AnxB, para. 1814.
[203] ICC-02/11-01/15-1263-Conf-AnxB, para. 1831.
[204] ICC-02/11-01/15-1263-Conf-AnxB, paras. 1838-1839.

> It is, however, difficult to fully understand what exactly happened with regard to the location, timing and number of explosions that took place on that date. Many of the witnesses have no clear recollection or knowledge as to where or when the explosions that they are speaking of took place, or how many of them there were.[205]

275. In response to the Judges' exhaustive analysis of her evidence, the Prosecutor opts to discuss only one element of her narrative of that incident – the claim that mortar shells were fired from Camp Commando on 17 March 2011.[206]

276. In that respect, the Prosecutor alleges in essence two errors by the Judges: (1) they failed to draw the correct conclusions from the testimonies taken as a whole and (2) they failed to give sufficient credit to the expert report presented by the Prosecutor. On both points the Prosecutor's line of argument is unconvincing.

2.1. The Majority undertook a detailed examination of all the testimonies presented by the Prosecutor and thus concluded that it was not proven that there were mortars at Camp Commando on 17 March 2011

277. The Majority found that the testimonies did not corroborate each other. The Prosecutor criticizes the Judges for applying the concept of corroboration to the content of each testimony and thereby concluding that there was no corroboration. According to the Prosecutor, there was corroboration because the testimonies referred to "similar facts".[207] Her understanding of corroboration is therefore that there is corroboration wherever two witnesses refer to facts which are roughly

[205] ICC-02/11-01/15-1263-Conf-AnxB, para. 1803.
[206] ICC-02/11-01/15-1277-Conf, para. 185.
[207] ICC-02/11-01/15-1277-Conf, paras. 194, 197.

similar.[208]

278. The Judges' analysis is however more sophisticated than that. For example, Judge Henderson acknowledges that several testimonies may be "true"[209] even though they contradict each other. However, Judge Henderson explains that "the main factor from the above analysis is that none of the evidence regarding the presence of 120 mm mortars at Camp Commando specifically and unequivocally concerns the date of the incident in question, that is 17 March 2011".[210] In contrast to the Prosecutor's assertion, Judge Henderson therefore did not find the testimonies of P-0226, P-0239 and P-0164 to be "untrue" or "inaccurate" on account of the contradictions they contained;[211] he rejected them purely and simply to the extent that they did not support the Prosecutor's allegation relating to 17 March 2011.

279. A further example relates to whether or not 120 mm mortars arrived at Camp Commando. According to the Prosecutor, the testimonies of P-0226 and P-0239 are "the most striking example of the Majority's unreasonable approach to *prima facie* compatible witness accounts".[212] Both those testimonies address *inter alia* the arrival of 120 mm mortars at Camp Commando. To the Prosecutor they are therefore "compatible" testimonies since, even though they diverge, they do so only in respect of "the specifics of the incidents in which they witnessed the mortars at Camp Commando".[213]

[208] ICC-02/11-01/15-1277-Conf, para. 194.
[209] ICC-02/11-01/15-1263-Conf-AnxB, para. 1811.
[210] ICC-02/11-01/15-1263-Conf-AnxB, para. 1811.
[211] ICC-02/11-01/15-1277-Conf, para. 197.
[212] ICC-02/11-01/15-1277-Conf, para. 196.
[213] ICC-02/11-01/15-1277-Conf, para. 195.

280. However, Judge Henderson analysed those testimonies and established that they diverged in respect of: (1) who put the mortars into battery; (2) where the mortars were put into battery; and (3) the exact date of the events described.[214] It is difficult to agree with the Prosecutor when she claims that these are only "specifics".

281. The Defence notes the contradiction between the magnitude of the discrepancies between testimonies and the fact that the Prosecutor presents those testimonies as compatible. It also notes that this notion of compatibility conflicts with what the Prosecutor states subsequently when she concedes that "they likely referred to different events."[215] The Prosecutor's only real argument in fact consists of asserting that those testimonies are "correct", whatever contradictions they may harbour.

282. It is worth noting that once again the Prosecutor avoids any discussion of the truth of the events in favour of a statement of an assumption: her testimonies are "correct". The simple fact is that two testimonies cannot corroborate each other if they refer to *different events*. The Defence notes that the Prosecutor has backed down here; this is the first time in the whole course of the trial that the Prosecutor concedes that her two witnesses were not speaking of the same event. Indeed, in her response to the Defence no case to answer motion, the Prosecutor was clearly giving the impression that those testimonies related to the same event.[216]

283. Contrary to what the Prosecutor claims, Judge Henderson accepted that those various testimonies could be true albeit relating to different events on different dates. Judge Henderson signalled that if those testimonies were true, then "it would

[214] ICC-02/11-01/15-1263-Conf-AnxB, para. 1808.
[215] ICC-02/11-01/15-1277-Conf, para. 195.
[216] ICC-02/11-01/15-1207-Conf-Anx1, para. 812.

seem that mortars were brought back and forth to and from Camp Commando quite frequently, or at least that they were put in and out of battery by different persons on several occasions",[217] which proves nothing as regards the presence of mortars at Camp Commando on 17 March 2011.

284. The Prosecutor nevertheless seeks, in her appeal brief, to give the impression that the dates pose no problem. They pose no problem, in her view, because Witness P-0226 and Witness P-0329 both testified to the fact that there were mortars at Camp Commando at around the beginning of March 2011.[218] However, the transcript excerpts that the Prosecutor references do not support that contention, since P-0226 refers to the "[TRANSLATION] period of the electoral crisis"[219] and P-0239 does not refer to any date or period.[220]

285. Here follows a further example relating to the date and the alleged firing on 17 March 2011.

286. As regards the date of the firing, Judge Henderson analysed the testimonies of P-0226 and P-0239 and had regard to the Prosecutor's argument that those two testimonies might concur: "At first glance, it may seem therefore that P-0226's hearsay account about who fired the 120mm shells coheres with P-0239's version of events."[221] Judge Henderson found: "However, P-0226 stated that the mortars were fired one or two days after the women's march at around 17h00, which would be on

[217] ICC-02/11-01/15-1263-Conf-AnxB, para. 1811.
[218] ICC-02/11-01/15-1277-Conf, para. 195.
[219] ICC-02/11-01/15-T-166-CONF-FRA CT, p. 61, lines 18-26.
[220] ICC-02/11-01/15-T-167-FRA CT WT, p. 52, line 15 to p. 56, line 7; p. 62, lines 13-21.
[221] ICC-02/11-01/15-1263-Conf-AnxB, para. 1817.

4 or 5 March 2011, rather than on 17 March, as alleged by the Prosecutor".[222] He ultimately concluded:

> As P-0239 had no recollection of the precise date of the incident he allegedly witnessed, it remains possible that he and P-0226 testified about the same incident. In that case, however, they would both be referring to a different event from the one charged.[223]

The Prosecutor carefully avoids recalling the whole of the exercise undertaken by the Majority.

287. As regards the sequence of of the alleged firing, the only witness that the Prosecutor presented as a direct witness was P-0239. After examining his testimony, Judge Henderson found that his version (two shots in quick succession in the same direction) conflicted with the Prosecutor's thesis[224] that there were six shots. Judge Henderson noted:

> It is, of course, possible that Witness P-0239 witnessed only part of the shelling and that other shells were fired from a different location and/or at different times or that the remainder of the explosions were caused by other devices. However, this scenario deviates considerably from the Prosecutor's allegations and raises more questions than it answers.[225]

288. Instead of explaining in what respect the Majority's analysis of P-0239's testimony was purportedly incorrect, the Prosecutor dwells on the fact that the Majority acknowledged "that it is possible that P-0239 witnessed only part of the shelling" to find fault with it for not agreeing with her approach.[226] The Prosecutor's argument calls for two remarks. First, if P-0239 witnessed only part of the firing, that means that the Prosecutor in fact has no direct witness to the event, thereby reinforcing the Judges' finding that the Prosecutor has not proven her allegations.

[222] ICC-02/11-01/15-1263-Conf-AnxB, para. 1817.
[223] ICC-02/11-01/15-1263-Conf-AnxB, para. 1817.
[224] ICC-02/11-01/15-1263-Conf-AnxB, para. 1814.
[225] ICC-02/11-01/15-1263-Conf-AnxB, para. 1814.
[226] ICC-02/11-01/15-1277-Conf, para. 187.

Second, the Defence notes that at no time during the entire trial, including in her response to the Defence no case to answer motion,[227] did the Prosecutor argue that P-0239 may have witnessed only part of the incident. Here, as she did throughout the trial, the Prosecutor changes her narrative whenever she encounters a difficulty.

2.2. The Majority did properly analyse Expert P-0411's report

289. In order to understand how the Judges approached Expert P-0411's report, it must be borne in mind that the confirmation hearing was adjourned on 3 June 2013 because the Judges found that the Prosecutor had not adduced any solid ballistic evidence, in particular in respect of the alleged events of 17 March 2011.[228] The Prosecutor then appointed an expert as a matter of urgency. That expert therefore visited the *locus in quo* more than two years after the alleged shelling. Accordingly, the expert was unable: (1) to date the impacts he was able to see in certain places; (2) to ascertain whether those impacts were caused on the same date; (3) to ascertain what weapon, at each site, could have caused the impacts; or (4) to determine where the shelling may have come from. Under those circumstances, even taking the content of the report "at its highest", the report could not be very helpful to the Judges and did not enable them to understand what had happened on 17 March 2011. Of note is that the Defence had shown in what respects P-0411's report was "[TRANSLATION] incomplete and biased",[229] given that the witness admitted under cross-examination that in the report he had used only the evidence found on the

[227] ICC-02/11-01/15-1207-Conf-Anx1, para. 812.
[228] ICC-02/11-01/11-432, para. 44(6).
[229] ICC-02/11-01/15-1199-Conf-Anx3-Corr, paras. 484-520.

ground that could support the Prosecutor's thesis,[230] and that "[TRANSLATION] P-0411's expert report served merely to 'rubber stamp' the Prosecutor's theory".[231]

290. Judge Henderson was therefore correct when he said of that report:

> Although the expert was of the view that the damage was likely caused by heavy-cased 120 mm mortar rounds, he admitted that it was also possible that other types of ordnance or an improvised explosive device might have done so. The expert's evidence thus shows that the available physical evidence is consistent with the Prosecutor's thesis that the injuries and damage were caused by Russian 120 mm mortar shells, but it does not prove it.[232]

291. Judge Tarfusser, for his part, noted that the expert had to undertake his task "more than two years after the alleged events, in an area which had never benefited from cordoning off or any other form of measure aimed at preserving the intactness of the site for forensic purposes."[233] Judge Tarfusser noted that the report's findings appeared under the blanket caveat that "when viewed in isolation, each of the visited subject areas remains inconclusive of the root cause of the event":

> It should have been obvious that, in light of the circumstances, and irrespective of whether the material made available by the Prosecutor might or might not have influenced this conclusion, such report would indeed remain "inconclusive" both as to the identification of the author(s) of the shot and as the underlying motives.[234]

292. To put it differently, the Judges merely stated what was obvious: the expert report, although it did not directly contradict the Prosecutor's thesis that 120 mm mortars had been used, did not prove that thesis, and in any event did not pinpoint either the physical perpetrators of the alleged firing (and therefore where the firing came from) or why it took place.

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[230] ICC-02/11-01/15-T-169-CONF-FRA ET, p. 54, lines 20-26.
[231] ICC-02/11-01/15-1199-Conf-Anx3-Corr, paras. 519-520.
[232] ICC-02/11-01/15-1263-Conf-AnxB, para. 1806.
[233] ICC-02/11-01/15-1263-AnxA, para. 29.
[234] ICC-02/11-01/15-1263-AnxA, para. 29.

293. Under those circumstances, the Prosecutor's criticisms of the Judges are difficult to understand.

294. First, the Prosecutor contends that Judge Carbuccia "correctly approached P-0411's evidence in the context of the other evidence on the record", including by "not dismissing the evidence simply because, on its own, it is insufficient to make certain factual findings."[235] That wording is in effect insinuating that the Majority Judges, conversely, did not consider P-0411 *in the context of the other evidence on the record* and dismissed P-0411's evidence in this case because it was, *on its own*, *insufficient*.

295. Judge Henderson in fact did exactly the opposite of what the Prosecutor insinuates he did: "However, the expert's evidence must not be seen in isolation. Indeed, the conclusions may complement and/or converge with other information that is on the record."[236] Judge Henderson compared the expert's testimony with other testimonies in order to look at the truth of the Prosecutor's allegation.[237] On completion of his analysis Judge Henderson found that "on the basis of the abovementioned evidence, no reasonable trial chamber could affirm that 120mm mortars were present in Camp Commando on 17 March 2011."[238]

296. Similarly, the Prosecutor argues that there is no requirement "that expert evidence support with *complete certainty* the Prosecutor's allegations."[239] At no time however did Judge Henderson claim that the report had to "support with *complete*

[235] ICC-02/11-01/15-1277-Conf, para. 192.
[236] ICC-02/11-01/15-1263-Conf-AnxB, para. 1807.
[237] ICC-02/11-01/15-1263-Conf-AnxB, para. 1807.
[238] ICC-02/11-01/15-1263-Conf-AnxB, para. 1811.
[239] ICC-02/11-01/15-1277-Conf, para. 190.

certainty the Prosecutor's allegations" in order to be used. He merely highlighted what was self-evident: the fact that an expert report does not contradict the Prosecutor's thesis does not mean that it proves it. That is why Judge Henderson compared the expert's testimony with the other testimony available to him.

297. Second, the Prosecutor claims that "the two Judges of the Majority took different — and inconsistent — approaches to the expert testimony about the 17 March 2011 incident."[240] However, in the Reasons, P-0411's report is analysed with a view to understanding *what weapon may have been used in the alleged shelling*,[241] whereas in Judge Tarfusser's opinion it is used to determine the *authors* of the shots and their *motives*.[242] The Judges' approaches are therefore complementary rather than incompatible.

298. Third, the Prosecutor contends that "Judge Tarfusser unreasonably diminished the importance of the expert evidence."[243] Here, once again, the Prosecutor relies only on one part of the findings in P-0411's report and of Judge Tarfusser's conclusions in order to frame that criticism.

299. In the first place, although the report finds, as the Prosecutor notes, a "high probability" that the events occurred in that way,[244] the expert voiced reservations which therefore affected his finding, and the two Majority Judges drew attention to that fact.[245] Merely because the report found that the events may have occurred as the Prosecutor asserts does not mean that that finding necessarily outweighs the reservations expressed by P-0411, in particular given the fact, noted by

[240] ICC-02/11-01/15-1277-Conf, para. 188.
[241] ICC-02/11-01/15-1263-Conf-AnxB, para. 1806.
[242] ICC-02/11-01/15-1263-AnxA, para. 29.
[243] ICC-02/11-01/15-1277-Conf, para. 191.
[244] ICC-02/11-01/15-1277-Conf, para. 191.
[245] ICC-02/11-01/15-1263-Conf-AnxB, para.1806; ICC-02/11-01/15-1263-AnxA, para. 29.

Judge Tarfusser, that the expert investigation did not take place under scientific conditions.

300. Next, the Prosecutor submits that "Judge Tarfusser's approach was less than clear", because Judge Tarfusser "appears to acknowledge the specialised expertise" on the one hand, but dismisses "the evidence for being 'intrinsically inconclusive', despite its utility in assisting the chamber to understand".[246]

301. In the first place, the Prosecutor furnishes no reference to explain at what point Judge Tarfusser supposedly acknowledged the expert's specialized expertise. Judge Tarfusser simply mentioned what the witness said about himself in his curriculum vitae,[247] but did not infer anything specific from it as regards the expertise he could attribute to the expert. Judge Tarfusser suggested that the expert may have been influenced in his conclusions by "the material made available [to him] by the Prosecutor".[248]

302. Furthermore, the acknowledgement by a court that an expert witness has expertise does not in any event prevent it from dismissing the report submitted by that witness where, for a variety of reasons, it proves inconclusive for the purposes of finding an alleged event to have occurred.

3. Third factual example: according to the Prosecutor, the Judges erred in assessing the evidence in relation to her allegations about the military operations carried out in Abobo (paragraphs 199 to 213 of the Prosecutor's Brief)

[246] ICC-02/11-01/15-1277-Conf, para. 191.
[247] ICC-02/11-01/15-1263-AnxA, para. 29.
[248] ICC-02/11-01/15-1263-AnxA, para. 29.

303. Two general remarks are needed before assessing the Prosecutor's line of argument. First, in her appeal brief, as during the trial and the no case to answer procedure, the Prosecutor continues to claim that the military operations that took place in Abobo in late February 2011 with the aim of repelling rebel attacks are in some way linked to the purported incident on 17 March 2011. The Prosecution is in that way trying to implicate Laurent Gbagbo as President and therefore head of the army. That is why the Prosecutor argues that in respect of the role of Laurent Gbagbo the items of evidence relating to February and March should be taken "together"[249] for the entire period. According to the Prosecutor, therefore, the evidence relating to the events that occurred in late February 2011 should be used to understand what may have happened on 17 March 2011 since those events took place "only a few weeks apart".[250]

304. Judge Henderson did indeed analyse the events of late February 2011. It will be recalled that at that time the army and the police as well as the civilian population, especially in the Abobo district, were the target of constant attacks carried out by heavily armed rebel groups. That explains why, in February 2011, army commanders sought to retake a number of positions lost by the government forces. Faced with superior forces, those attempts failed. In March, the only position still controlled by the FDS in Abobo was Camp Commando, which was completely besieged by the rebel forces. Judge Henderson stated:

> The Prosecutor has presented a narrative about how the situation in Abobo evolved from the beginning of January 2011 until the end of February 2011. This narrative does not offer a full and balanced picture of the available evidence, which is itself far from complete. In particular, although the Prosecutor sporadically acknowledges the fact that

[249] ICC-02/11-01/15-1277-Conf, para. 202.
[250] ICC-02/11-01/15-1277-Conf, para. 200; a similar expression is used in para. 201: "incident that occurred only a few weeks later."

> the FDS suffered heavy losses and gradually lost control over Abobo, this is all but ignored in the way her narrative is constructed and presented. However, if there is one thing that emerges from the evidence, then it is that the FDS was permanently on the back foot in Abobo. The dynamic was one of reaction rather than action, trying to regain lost ground whilst preventing the loss of even more. Of equal importance is the fact that the FDS was engaged in asymmetrical warfare against elusive enemies who did not identify themselves and who appear to have blended in with the civilian population of Abobo.
>
> At the same time, the FDS was faced with the military presence and threat of the FAFN both inside and outside Abidjan. Again, the Prosecutor does not deny these realities but seems to have attached no significance to them. Yet, it is certain that the fact that there were heavily armed troops in the centre of Abidjan and many more in the north of the country, ready to launch an offensive (possibly with the support of French troops), would have been in the forefront of the minds of senior FDS officers.[251]

305. As regards Laurent Gbagbo's alleged role in the military operations in late February 2011, after reviewing all the evidence, Judge Henderson found: "According to both Generals Mangou and Guiai Bi Poin, Mr Gbagbo did not give his commanders any specific instruction concerning the military strategy for the FDS to employ in the second military offensive."[252] He added: "There is no evidence indicating that Mr Gbagbo was directly involved in the shelling of Abobo in late February."[253]

306. Quite plainly, the Majority found no link between the military operations conducted against the rebels in late February 2011 and the alleged shelling in March 2011. Alleging such a link is nevertheless crucial to the Prosecutor, since she cannot otherwise implicate Laurent Gbagbo. However, the only argument she has in order to link those incidents and accordingly to lend credence to her narrative about them is her claim that any evidence concerning one of those incidents automatically applies to the other because they took place "only a few weeks apart".[254]

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[251] ICC-02/11-01/15-1263-Conf-AnxB, paras. 1376-1377.
[252] ICC-02/11-01/15-1263-Conf-AnxB, para. 1337.
[253] ICC-02/11-01/15-1263-Conf-AnxB, para. 1355.
[254] ICC-02/11-01/15-1277-Conf, para. 200.

307. Second, the Prosecutor has nowhere tendered evidence of any order given by Laurent Gbagbo at either time, whether in late February 2011 or on 17 March 2011. Faced with that reality, the Prosecutor constantly changes her position and her narrative. Accordingly, in her response to the Defence no case to answer motion, she stated:

> The Prosecution submits that the early March order to fire 120mm mortars into Abobo, as well as the subsequent order on 17 March 2011, **must have come directly from Mr Gbagbo himself**. Although there is no direct evidence of these orders, there is no other reasonable conclusion to draw from the circumstances.[255]

Now, in her appeal brief, the Prosecutor changes tack and, contending that "specific authorisation was, in any event, not required"[256] for the use of 120 mm mortars in late February 2011, infers, for the first time, that the same must have held true for Camp Commando on 17 March 2011.[257] She changes her narrative by basing her allegation concerning 17 March 2011 on evidence concerning military operations in February 2011.

3.1. The Prosecutor misrepresents the analysis carried out by the Majority Judges

308. Given the complete absence of evidence of the role she alleges Laurent Gbagbo played in the purported incident of 17 March 2011, the Prosecutor resorts to taking issue with the way in which the Majority analysed the circumstantial evidence presented to it.

[255] ICC-02/11-01/15-1207-Conf-Anx1, para. 809, emphasis added.
[256] ICC-02/11-01/15-1277-Conf, para. 208.
[257] ICC-02/11-01/15-1277-Conf, para. 208.

309. For example, in respect of the testimony of P-0330, a junior officer who allegedly heard the word "presidency" uttered in a conversation taking place at a distance from him between Captain Zadi and Colonel Doumbia "on or around 28 February 2011"[258] (and therefore not 17 March 2011) and which concerned the installation of mortars at Camp Commando, the Prosecutor claims that "[i]n excluding this probative evidence **arbitrarily**, the Majority **contradicted its own stated approach** to hearsay."[259]

310. First, the Defence notes the contradictions in the Prosecutor's line of argument, since she states that the Majority Judges dismissed P-0330's testimony "**arbitrarily**", but then states that his testimony was dismissed "**primarily** because it constitutes hearsay."[260] Those two statements are necessarily incompatible since if the court gave a reason, the approach was not arbitrary.

311. Second, the Prosecutor is misrepresenting the analysis performed by the Majority. Judge Henderson did not act arbitrarily given that he stated that P-0330 was an unpersuasive witness "for two reasons":[261] because the witness's evidence relied on hearsay and because, in any event, the Prosecutor had failed to establish that the word "presidency" referred to the President himself:[262] "Thus, even if the order in question had been made, *who* at the presidency made such an order has not been established."[263] The Prosecutor circumvents that major obstacle to her argument by stating: "Obviously, the term 'Presidency' could include the 'President' himself. These minutiae should not have prevented the Majority from properly considering

[258] ICC-02/11-01/15-1277-Conf, para. 204, emphasis added.
[259] ICC-02/11-01/15-1277-Conf, para. 204, emphasis added.
[260] ICC-02/11-01/15-1277-Conf, para. 204, emphasis added.
[261] ICC-02/11-01/15-1263-Conf-AnxB, para. 414.
[262] ICC-02/11-01/15-1263-Conf-AnxB, paras. 414-415.
[263] ICC-02/11-01/15-1263-Conf-AnxB, para. 415.

this evidence at this stage."[264] What is obvious is that the Prosecutor's inability to substantiate her allegation (that Laurent Gbagbo gave any order whatsoever) is not a "minutia". Nor was the Defence informed during the trial that according to the Prosecutor the standard against which her evidence was to be tested was the "it is obvious" standard. That approach, quite obviously, must be ruled out, since it would relieve the Prosecutor of the requirement to prove anything, on the pretext that her allegations are "obviously" true.

312. Third, in a footnote, the Prosecutor quotes a passage from paragraph 43 of Judge Henderson's Reasons – "I accept that, in appropriate cases, hearsay evidence may have considerable probative value"[265] – as a basis for arguing that Judge Henderson's stated approach to hearsay was at odds with how he handled P-0330's testimony.

313. The Prosecutor completely ignores the rest of Judge Henderson's reasoning in paragraph 43, in which he went on to say:

> **However for this to be the case, at the very least it requires the Chamber to be provided with adequate information regarding the reliability and credibility of the original source. Unfortunately, such information is frequently lacking in relation to the Prosecutor's evidence**. In fact, a considerable proportion of the evidence submitted by the Prosecutor is anonymous hearsay. No probative value can be ascribed to such evidence, in my view. This is because no responsible adjudicator can base factual findings on evidence without having good reasons to accept that the source of the information is sufficiently trustworthy. In the case of anonymous hearsay, this is simply impossible because the source of the information is unknown and can therefore, by definition, not be evaluated.[266]

314. A further striking example of how the Prosecutor disregards Judge Henderson's analyses comes when she claims that "P-0239 confirmed that he

[264] ICC-02/11-01/15-1277-Conf, para. 205.
[265] ICC-02/11-01/15-1277-Conf, footnote 424.
[266] ICC-02/11-01/15-1263-Conf-AnxB, para. 43, emphasis added.

had been told by Colonel Dadi, his commanding officer at BASA, that he was receiving orders directly from Mr Gbagbo",[267] as if the Judges had disregarded P-0239, whereas they did in fact review his statements. In relation to P-0239 Judge Henderson stated that "it should be noted that the probative value of P-0239's testimony is low" and

> [e]ven though it cannot be concluded with certainty that Colonel Dadi was exaggerating when he (supposedly) said that he was receiving direct orders from Mr Gbagbo, the fact that such a possibility cannot be ruled out, coupled with the distinct lack of evidence corroborating the Colonel's claims, would make it difficult for a reasonable trial chamber to attach great importance to this evidence.[268]

315. In addition, P-0239's statements are in any event completely irrelevant to the discussion of the incident of 17 March 2011, since it has not even been established that Colonel Dadi played any part whatsoever that day, contrary to the Prosecutor's unsubstantiated assertions in her response to the Defence no case to answer motion.[269]

316. A further illustration of the Prosecutor ignoring the analysis undertaken by the Majority is her claim that "the Majority's finding in relation to the 17 March 2011 incident was overshadowed by its overemphasis on the credibility of the evidence of witness P-0164."[270] The Majority did in fact analyse various testimonies and items of evidence to arrive at its findings on the alleged incident of 17 March 2011, independently of anything P-0164 may have said. Thereafter, as Judge Henderson emphasized:

[267] ICC-02/11-01/15-1277-Conf, para. 207.
[268] ICC-02/11-01/15-1263-Conf-AnxB, para. 411.
[269] ICC-02/11-01/15-1207-Conf-Anx1, para. 809.
[270] ICC-02/11-01/15-1277-Conf, para. 212.

> However, given that the Prosecutor has raised the issue of witness credibility, it is permissible to point out, at this stage, that P-0164's own veracity is in doubt. […] First, P-0164 admitted to insubordination, sabotage, espionage, and to having been in contact with officers at the Golf Hotel during the crisis when he was deployed by the FDS. These are all elements that indicate strong potential bias against the accused. Second, he made the incredulous claim that Colonel Dadi sent him on an unspecified mission to Port Bouët II all by himself in civilian clothing, where he ended up helping Ouattara supporters with setting up roadblocks against FDS units. Even more lacking in credulity is P-0164's claim that, after Colonel Dadi had tried to have him killed and after Colonel Dadi probably used a chemical substance to drug his family, he voluntarily returned to the BASA camp in Akouédo in order not to lose his salary and with the intention "to give [Dadi] the kind of correction or beat him up so badly that he would never forget it". There are several other areas of concern about P-0164's veracity. However, this is not the occasion to make a fully-fledged credibility assessment. It suffices to say that it is exceedingly hard to imagine any trial chamber attaching significant probative value to the testimony of this witness. [271]

3.2. The Prosecutor resorts to the stratagem of hinting to readers of her Appeal Brief that she has a large amount of evidence to support her arguments, but never references that evidence, thereby attempting to give the impression that she has robust evidence and that the Judges failed to analyse all that evidence appropriately

317. For example, in paragraph 200 of her appeal brief, the Prosecutor states:

> **The testimony of numerous FDS witnesses at trial** gave a reasonable chamber sufficient basis to find that (i) Mr Gbagbo knew of the use of 120mm mortars in Abobo in February and March 2011; and (ii) Mr Gbagbo authorised the use of the mortars in Abobo on those occasions.[272]

Nowhere does the Prosecutor specify what that "testimony of numerous FDS witnesses" consists of or where it might be found.

[271] ICC-02/11-01/15-1263-Conf-AnxB, paras. 1836-1837.
[272] ICC-02/11-01/15-1277-Conf, para. 200, emphasis added.

318. In paragraph 202 she proffers: "In general, the evidence showed that",[273] and then makes five allegations which, she claims, can be inferred from that evidence. However, at no time does the Prosecutor refer to specific items of evidence, either in the body of the text or in the footnotes.

319. In paragraph 203 of her appeal brief, the Prosecutor declares that "**there was evidence** that the use of 120mm mortars had to be authorised by written order from the President because of the destruction they cause."[274] The Prosecutor founds her allegation solely on the testimony of P-0239 and submits that "the Majority failed to assess this evidence *together* with **other witness testimony**".[275] Twice in that paragraph, then, the Prosecution intimates that other items of evidence could support its allegation but fails ever to provide any references whatsoever.

320. Incidentally, as regards P-0239's testimony and more generally whether authorization was required to deploy 120 mm mortars, the Majority found that

> it is difficult to see how any armed force would be able to engage in sustained and complex military operations if every time there was a need to use heavy artillery there would be a need to first get prior approval from the head of state or government. There is little point in speculating about what the witnesses may have actually been told. It suffices to note that the Chamber has not been presented with evidence of an actual rule or procedure in the FDS that required the President to personally approve every single instance of the use of 120mm mortars.[276]

321. Then, in paragraph 204, the Prosecutor declares that "there was **specific evidence**, consistent with the **evidence** of the general practice, that the Presidency issued orders to use the 120mm mortars in late February 2011."[277] However, the Prosecutor bases her allegation solely on P-0330's testimony (which the Majority

[273] ICC-02/11-01/15-1277-Conf, para. 202.
[274] ICC-02/11-01/15-1277-Conf, para. 203, emphasis added.
[275] ICC-02/11-01/15-1277-Conf, para. 203, emphasis added.
[276] ICC-02/11-01/15-1263-Conf-AnxB, para. 1834.
[277] ICC-02/11-01/15-1277-Conf, para. 204, emphasis added.

rejected). She says nothing about that other "specific evidence" and provides no references. Furthermore, when the Prosecutor refers to "the evidence of the general practice", she is in fact referring only to P-0239, whose testimony, as has been seen, had been rejected.

322. Another example is to be found in paragraph 212 of her appeal brief, where the Prosecutor states: "Yet, even if the Majority's concerns on these aspects are considered, **there was already sufficient other evidence on the record**,"[278] but gives no reference for that purported "sufficient other evidence".

323. In paragraph 210 of her appeal brief, the Prosecutor states that "the Majority's failure to reach conclusions naturally available on the record is also apparent when **testimony** on the scope of Mr Gbagbo's *own* knowledge of military affairs is considered."[279] That surprising claim is based exclusively on the testimony of P-0010 and there is no mention – either in the paragraph itself or in a footnote – to any other testimony.

4. <u>Fourth factual example: according to the Prosecutor, the Judges erred in assessing the evidence in relation to her allegations about the course of events on the *Boulevard Principal* in Yopougon on 25 February 2011 (paragraphs 214 to 233 of the Prosecutor's Brief)</u>

324. In the Reasons, the Majority reviewed the evidence of the crimes that the Prosecutor alleges were committed in Yopougon between 25 and 28 February 2011,

[278] ICC-02/11-01/15-1277-Conf, para. 212, emphasis added.
[279] ICC-02/11-01/15-1277-Conf, para. 210, emphasis added.

as part of its holistic analysis of the Prosecutor's claims in respect of the presence of the contextual element of crimes against humanity.[280]

325. On conclusion of a full and thorough 66-page analysis of the Prosecutor's allegations in respect of the incidents in Yopougon in February 2011,[281] the Majority found that there was no evidence

> that the events of 25-28 February 2011 started by the pro-Gbagbo side simply targeting the pro-Ouattara side by virtue of their ethinc, national, or religious status or presumed political affiliation. Accordingly, no reasonable trial chamber could conclude from the evidence analysed in this section that the killing and injuring of civilians in Yopougon on 25-28 February 2011 happened pursuant to the alleged policy to keep Mr Gbagbo in power at all costs.[282]

The Judges made clear that that "conclusion is confirmed by the (limited and lacunary) evidence of what actually transpired on the ground."[283]

326. In her appeal brief, in order to take objection to the method used by the Judges, the Prosecutor contests only one minute aspect of the matter, namely how the Judges treated the evidence pertaining to the start, the duration and the sequence of the clashes in Yopougon on 25 February 2011 (Section VI.M.2. of the Reasons). It comprises her fourth example.

327. The Majority undertook a rigorous, thorough analysis of the Prosecutor's evidence on that point, which the Prosecutor is now trying to gloss over, claiming that since the testimonies were "generally" consistent[284] there was no cause to discuss them in detail.

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[280] ICC-02/11-01/15-1263-Conf-AnxB, sect. VI. "Existence of a pattern of crimes committed against civilians by persons acting on behalf of or loyal to the accused".
[281] ICC-02/11-01/15-1263-Conf-AnxB, sect. VI.M.6. "Conclusion".
[282] ICC-02/11-01/15-1263-Conf-AnxB, para. 1770.
[283] ICC-02/11-01/15-1263-Conf-AnxB, para. 1771.
[284] ICC-02/11-01/15-1277-Conf, para. 224.

4.1. The Majority's systematic and rigorous analysis of the evidence

328. First of all the Majority highlighted the divergences and contradictions between the testimonies. It did so systematically and rigorously, comparing the accounts of five different witnesses called by the Prosecutor on very specific points, and noted: "Apparent conflicts in potentially incriminatory evidence against the accused merit careful attention."[285] However, it went further. In paragraphs 1667 to 1674 of the Reasons, it then examined "whether there is sufficient evidence that the Police attacked pro-Ouattara supporters *if all contradictions in the evidence were to be ignored by the Chamber*."[286] It is therefore clear, in contrast to what the Prosecutor suggests, that the Majority did not disregard any "crucial evidence"[287] but, on the contrary, gave the Prosecutor the benefit of the doubt at every stage of its reasoning, taking the Prosecutor's evidence "at its highest" in order to ascertain whether her allegations were true.

329. The Majority sought to establish what happened on the *Boulevard Principal* in Yopougon on 25 February 2011[288] by answering two questions: first, how long the events lasted and, second, what exactly happened.[289]

330. In respect of the duration of the events and their starting time, the Majority, on the basis of the testimonies of five witnesses (P-0109, P-0442, P-0436, P-0433 and P-0441), concluded that a finding as to the starting time and duration of the events could not be made with certainty.[290] The Majority found that the testimonies of P-0109 and P-0436 contradicted each other as regards the time at which the firing

[285] ICC-02/11-01/15-1263-Conf-AnxB, para. 1656.
[286] ICC-02/11-01/15-1263-Conf-AnxB, para. 1639, emphasis added.
[287] ICC-02/11-01/15-1277-Conf, para. 214.
[288] ICC-02/11-01/15-1263-Conf-AnxB, para. 1635.
[289] ICC-02/11-01/15-1263-Conf-AnxB, paras. 1639, 1658.
[290] ICC-02/11-01/15-1263-Conf-AnxB, para. 1639.

purportedly took place, and those of P-0433 and P-0441 were not consistent as to the time at which stones were allegedly thrown.

331. As regards the firing with live ammunition, the Majority noted that Witness P-0109 stated that at around midday militia members had begun firing at the crowd with live ammunition, whereas according to P-0436 lethal weapons were used during the clashes on the *Boulevard Principal* only from 16.00.[291] As regards the stonethrowing, the Majority had regard to the testimony of P-0433 according to which the youth from Yao Sehi and Doukouré had thrown stones at each other until around 10.00, when the police intervened. According to the Judges that testimony contradicted that of P-0441, who testified that the stonethrowing began around midday.[292]

332. The Majority only later analysed what may have happened on the ground on 25 February, on the basis of the testimony of three of the five witnesses, Witnesses P-0109, P-0442 and P-0436 (because those witnesses were allegedly present on that day).[293] It is noted that the Judges engaged in that exercise notwithstanding the fact that a finding could not be made as to the duration and starting time of the incidents with certainty, thereby giving the Prosecutor the benefit of the doubt.

333. As regards the course the events took on the ground, the Majority found in the Reasons that the testimonies "differ[ed] significantly"[294] and were "incompatible in relation to a number of significant aspects of the narratives they provide."[295] It held that the contradiction between P-0109 on the one hand and P-0436 and P-0442

[291] ICC-02/11-01/15-1263-Conf-AnxB, para. 1637.
[292] ICC-02/11-01/15-1263-Conf-AnxB, para. 1638.
[293] ICC-02/11-01/15-1263-Conf-AnxB, para. 1639.
[294] ICC-02/11-01/15-1263-Conf-AnxB, para. 1654.
[295] ICC-02/11-01/15-1263-Conf-AnxB, para. 1666.

on the other made it impossible to know what the local police did on 25 February 2011.[296]

334. The Majority found *inter alia* that it could be inferred from the testimony of the three witnesses that they were in the same area on 25 February 2011 and that, "[t]hat being the case", it was unlikely that if the police had acted as described by P-0442 or P-0436, P-0109 would not have noticed their presence. The Majority also noted that "the presence of hooded militia throwing grenades and shooting live ammunition at the population is unlikely to have gone unnoticed by P-0442 and P-0436, who would have been amongst the group of potential victims." It accordingly drew the conclusion that the events recounted by P-0436 and P-0109 could not have happened at the same time.[297]

335. In respect of the contradictions between P-0442 and P-0436, the Majority noted that "each mentioned facts that the other did not mention", and referred to three facts in particular. The Majority found the discrepancy in relation to the first two facts to be "surprising", given the significance of the events.[298] In respect of a third fact – that BAE elements allegedly set fire to the Lem Mosque – the Majority found it implausible that P-0436 would not have noticed it. Once again, the Majority did not merely note the inconsistencies, it carried out an extremely thorough analysis of the evidence, from which it concluded: "What is more troubling is that P-0436 and P-0442 gave substantially different accounts of how the clashes of 25 February 2011 unfolded."[299]

[296] ICC-02/11-01/15-1263-Conf-AnxB, paras. 1654-1655, 1667.
[297] ICC-02/11-01/15-1263-Conf-AnxB, paras. 1661-1662.
[298] ICC-02/11-01/15-1263-Conf-AnxB, para. 1663.
[299] ICC-02/11-01/15-1263-Conf-AnxB, para. 1664.

4.2. The Prosecutor is apparently seeking to distract from the weakness of her case

336. Faced with the Majority's meticulous analysis of her evidence, the Prosecutor tries to evade the difficulty by claiming that the Majority's approach to assessing the evidence was "uncertain and incorrect."[300] According to the Prosecutor, the Majority erred in several ways: (i) by failing to "appreciate that if multiple testimonies on a single event are available, it is not necessary to ascertain which one is 'true' in its 'entirety' to rely on any or all of them" and (ii) by failing to determine that the testimonies corroborated each other, incorrectly disregarding the "wealth of consistent evidence".[301]

337. First, as a general observation, the Prosecutor's line of argument is illogical. She argues that because some of the testimonies that she presents purportedly have points in common, the contradictions should be ignored. However, it is precisely the task of the Judges to examine which aspects of an account are plausible and which are not. The accusation which the Prosecutor is really levelling against the Majority is that it did not disregard the contradictions in her evidence. For the Prosecutor, so long as the evidence is not entirely contradictory, it is valid. That is hardly an acceptable standard.

338. Second, still seeking to draw a veil over the contradictions between her witnesses, the Prosecutor claims that the Majority "conducted an unreasonably atomistic assessment of the evidence, claiming that testimony 'contradicted' each other, when the witnesses only differed in minor details based on what each witness

[300] ICC-02/11-01/15-1277-Conf, para. 215.
[301] ICC-02/11-01/15-1277-Conf, para. 215.

personally saw and experienced."[302] She suggests that the discrepancies are explained by the fact that "each of the witness's testimony reflected *that* witness's individual experience."[303]

If the Prosecutor has been understood correctly, the fact that the witnesses to the same event each give a completely different account of the details of the event should not lead to the contradictory elements being disregarded, because it would be normal it is normal for each witness to perceive things in his or her own way. The Prosecutor is confusing two aspects here: (1) the standpoint of each person and the perspective from which he or she may recount an event witnessed at first hand; and (2) the event itself, which is treated as having happened only if witnesses give the same account of it. In other words, witnesses' accounts may differ depending on their point of view and yet that does nothing to change the fact that if the accounts are contradictory it is impossible to determine the course which the events took. That is nevertheless what the Prosecutor is arguing when she claims that contradictions in how those witnesses portray the sequence of events should not cast doubt on her narrative. What she is insinuating is straightforward: the testimonies, even where they are contradictory, are there to serve her narrative, which is therefore the only truth.

339. Third, by asserting that the contradictions between her witnesses are but "minor details", the Prosecutor seeks to divert attention from the fact that the Majority did in fact examine the Prosecutor's own allegations about the starting time of the incidents, the sequence of events and the role of the police on the day in question – key elements of her narrative throughout the trial but now, in her appeal brief, "minor details".

[302] ICC-02/11-01/15-1277-Conf, para. 223.
[303] ICC-02/11-01/15-1277-Conf, para. 216.

340. For example, the Prosecutor claims that the Majority unreasonably described the accounts of two witnesses, Witnesses P-0436 and P-0442, as being "substantially different".[304] Here the Prosecutor is trying to gloss over the fact that the contradictions between the two witnesses' accounts concern key elements of her own narrative,[305] such as the mosque fire and the location of the police, and that those key factors were examined in depth during the trial, and naturally therefore in the Reasons. The Prosecutor's claim that the Majority's "focus on exactly where the police were *vis-à-vis* the two groups […] should not have come at the cost of finding that the witnesses themselves could not be relied upon"[306] is tantamount to asking the Chamber not to seek to ascertain the truth of what the Prosecutor has been claiming throughout her case.

341. Fourth, once again in her attempt to gloss over the contradictions between her witnesses, the Prosecutor resorts to asserting: "Establishing 'approximate' timings is generally sufficient and considered to be accurate enough estimations in international criminal practice."[307] Unsurprisingly, she offers no reference to support that vague and astonishing statement.

4.3. The Prosecutor misrepresents the task accomplished by the Majority Judges

342. The Prosecutor's appeal brief is replete with examples of misrepresentation of the Judges' task.

[304] ICC-02/11-01/15-1277-Conf, para. 232.
[305] See, for example, ICC-02/11-01/15-1207-Conf-Anx1, para. 637(ii).
[306] ICC-02/11-01/15-1277-Conf, para. 232.
[307] ICC-02/11-01/15-1277-Conf, para. 224.

343. First, the Prosecutor attempts to persuade the reader that the Majority sought to apply a very high standard of proof to all the evidence relating to the events of 25 February 2011 whereas in reality the Majority took a step-by-step approach, examining in succession all the items that the Prosecutor presented as supporting her allegations, and at no time rejected them out of hand on account of manifest contradictions. Stated otherwise, the Judges routinely gave the Prosecutor the benefit of the doubt; for example, they examined how the course of events notwithstanding uncertainty as to when they started and how long they lasted.[308] Judge Henderson went so far as to state: "For the purpose of this analysis, the noted discrepancies in chronology will be disregarded and the focus will be only on whether or not the witnesses were referring to the same events in their testimonies."[309] In that way, by reviewing all the Prosecutor's arguments without dwelling on the contradictions relating to a particular point, the Majority applied a low standard of proof favourable to the Prosecutor.

344. Second, the criticism which the Prosecutor levels at the Judges − failure to find the testimonies of P-0109, P-0436 and P-0442 to be "generally" consistent notwithstanding their contradictions − is untenable. In fact the Judges examined those testimonies as a whole and in detail and found that, taken together, they did not establish the truth of the Prosecutor's allegations:

> Therefore, while the accounts of P-0436, P-0442 and P-0109 are plausible when seen in isolation, they are incompatible in relation to a number of significant aspects of the narratives they provide. Since their respective accounts cannot all be entirely true at the same time, this raises serious questions about their truthfulness altogether. Considering that only one of the three testimonies can be truthful in its entirety and there is no possibility to determine which one this is, it would be difficult for a reasonable trial chamber to reach any conclusion based on this evidence.[310]

[308] ICC-02/11-01/15-1263-Conf-AnxB, para. 1635.
[309] ICC-02/11-01/15-1263-Conf-AnxB, para. 1658.
[310] ICC-02/11-01/15-1263-Conf-AnxB, para. 1666.

345. Third, the Defence notes that on many occasions the Prosecutor misrepresents the meticulous analysis undertaken by the Majority.

346. For example, the Prosecutor seems to take issue with the Majority for not having had regard to the fact that P-0109 said of the clashes that "at around 17.00 it started again", purely because that information was given in a footnote.[311] The fact that the Majority took the trouble to cite P-0109's testimony on that point already shows that it did take it into consideration in its analysis. Furthermore, contrary to the Prosecutor's assertion, what the witness states here is of absolutely no consequence since it does not eliminate the contradictions between his testimony and that of P-0436, in particular as regards the start of the clashes. In addition, in the view of the Majority, P-019 "**thought** that around 17.00 [the firing] started again",[312] which is a reasonable inference since it emerges from his testimony that P-0109 neither saw anybody firing nor even heard shots, but only heard someone shouting "[TRANSLATION] they're coming",[313] a point which the Prosecutor takes care not to mention.

347. A further example: in its analysis, the Majority did respond to the argument that the Prosecutor sets out in her response to the Defence no case to answer motion, according to which the contradiction between P-0109's testimony and those of P-0436 and P-0442, in respect of the presence of police on the day in question, is explained by the fact that P-0109 might have confused police officers and militia member on account of their clothes.[314] The Majority responded by recalling that the accounts of P-0109, on the one hand, and of P-0436 and P-0442, on the other, are very different, and that it was not a matter of confusion:

[311] ICC-02/11-01/15-1263-Conf-AnxB, para. 1637, footnote 3704.
[312] ICC-02/11-01/15-1263-Conf-AnxB, para. 1637, footnote 3704, emphasis added.
[313] ICC-02/11-01/15-T-155-CONF-FRA CT, p. 15, lines 19-25.
[314] ICC-02/11-01/15-1207-Conf-Anx1, para. 641.

> The claim that the contradiction was caused by P-0109's confusion of Police officers with militia members is unpersuasive in light of the dissimilar ways in which the witnesses described the individuals who they said opened fire and threw grenades at the inhabitants of Doukouré.[315]

Changing tack, the Prosecutor is now arguing that this contradiction should be ignored because P-0109 was not present during some of the alleged clashes.[316]

348. In yet another example, the Prosecutor misrepresents the Judges' position, suggesting that, after reviewing the contradictions in the testimonies, they rejected the very notion that there were clashes on the day in question. The Prosecutor asserts that "viewed holistically, as set out above, the evidence establishes that clashes commenced in the morning, and thereafter escalated at some point during the day"[317] and draws the conclusion that any more thorough analysis would have been redundant because that remark alone suffices to establish her case. The Prosecutor is, however, mistaken: it has never been contested that incidents occurred. The Majority itself in fact found: "It appears from the evidence that the confrontation which started with two groups of youths throwing stones at each other escalated to the point of lethal force being used against civilians."[318] The questions to be answered are: who did what during those incidents, why and with what consequences. The Prosecutor is unpersuasive on all those points because her witnesses' accounts are contradictory, and that is why the Judges found that the Prosecutor had no case.

349. A final example: according to the Prosecutor it was "unreasonable"[319] of the Majority to use the muezzin's call to prayer as a point of reference in time when trying to understand the accounts of the various witnesses.[320] On the contrary, that it

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[315] ICC-02/11-01/15-1263-Conf-AnxB, paras. 1654-1655.
[316] ICC-02/11-01/15-1277-Conf, para. 229.
[317] ICC-02/11-01/15-1277-Conf, para. 226.
[318] ICC-02/11-01/15-1263-Conf-AnxB, para. 1636.
[319] ICC-02/11-01/15-1277-Conf, para. 227.
[320] ICC-02/11-01/15-1263-Conf-AnxB, footnote 3711.

did so demonstrates that the Majority took all the relevant factors into consideration in looking at the plausibility of each account and comparing the accounts with each other. It is worth noting that after undertaking that analysis, the Majority found that the point of reference in time allowed the discrepancies between the testimonies to be better understood.[321]

5. Fifth factual example: according to the Prosecutor, the Judges erred in assessing the evidence in relation to her allegations concerning the rapes allegedly committed during the RTI march (16 to 19 December 2010) and in Yopougon (12 April 2011) (paragraphs 234 to 347 of the Prosecutor's Brief)

350. The Prosecutor claims that the Majority's approach to assessing the evidence relating to the allegations of rape was "flawed". The Judges purportedly assessed the allegations of rape differently from "other crimes"[322] by subjecting them to "an additional unreasonable and unjustified scrutiny".[323] The Prosecutor infers from this that "the Majority set too high a threshold to considering these allegations as part of such context—as evidence of the policy to commit the attack or the common plan to do so."[324]

351. Crucially, the allegations of rape are an important element in the Prosecutor's allegations concerning the presence of the contextual elements of crimes against humanity and the existence of a common plan.[325]

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[321] ICC-02/11-01/15-1263-Conf-AnxB, footnote 3711.
[322] ICC-02/11-01/15-1277-Conf, para. 235.
[323] ICC-02/11-01/15-1277-Conf, sect. IV.B.4.v.a.
[324] ICC-02/11-01/15-1277-Conf, para. 236.
[325] ICC-02/11-01/15-1207-Conf-Anx1, sect. III. See also ICC-02/11-01/15-T-221-CONF-FRA CT, p. 65, lines 14-18.

352. That is why the Majority states:

> For the purpose of this exercise, *it will be assumed that the alleged facts about victimisation are established*. This does not imply that the evidence for each alleged victim is sufficient to meet the relevant threshold. Accordingly, the fact that this decision does not question the accuracy of these allegations should not be interpreted as affirmation that they have been proved.[326]

In other words, the Judges would not examine the truth of the allegations of rape incident by incident but would treat them on a par with all the allegations of crimes, in order to determine whether or not those allegations, taken together, established the existence of a common plan.

353. In order to examine the Prosecutor's argument, it is therefore necessary to consider the context of her overall allegation, that there was a common plan and a widespread and systematic attack directed against the civilian population.[327] The Prosecutor also claims that the common plan mutated to include a State or organizational policy of attacking civilians.[328] The rapes allegedly occurred against that background. That is why the Judges examined the question of the rapes in that broader context as delineated by the Prosecutor herself.

354. Let us turn therefore to the general approach that the Majority Judges adopted when analysing the Prosecutor's allegation that there was a common plan/policy and the conclusions they drew on completion of their review.

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[326] ICC-02/11-01/15-1263-Conf-AnxB, para. 1392, emphasis added.
[327] ICC-02/11-01/15-1207-Conf-Anx1, sect. III. See also ICC-02/11-01/15-T-221-CONF-FRA CT, p. 65, lines 14-18.
[328] ICC-02/11-01/15-1207-Conf-Anx1, sect. V. See also ICC-02/11-01/15-T-221-CONF-FRA CT, p. 66, lines 13-16.

5.1. The Judges rigorously and thoroughly analysed the Prosecutor's allegations relating to the crimes forming part of the alleged common plan/policy

5.1.1. The Majority's conclusions on the Prosecutor's case as a whole

355. At the outset, in a preliminary section of the Reasons entitled "The Prosecutor's case", the Majority highlighted the "[p]roblems with the Prosecutor's narrative"[329] and the problems caused by the Prosecutor's evidentiary approach.[330] The Majority emphasized in particular that the Prosecutor failed to discharge the burden of proof by not giving the Chamber all the information it needed to put the incriminating evidence into its true context. According to the Majority, the Prosecutor

> has claimed the existence of a number of patterns and relied upon these as circumstantial proof of some key elements in this case, such as the alleged common plan/policy and attack against a civilian population. Whereas patterns can provide very potent proof, this is only the case when they are genuine.[331]

356. The Majority also drew attention to another "serious shortcoming in the Prosecutor's evidentiary approach", namely her "cat and mouse game with the content […] of the alleged Common Plan/policy."[332] Specifically, the Majority underscored that the Prosecutor had not presented any evidence proving the criminal aspect of that policy. It pointed out that the Prosecutor had merely argued that the criminality of the common plan/policy could be inferred from the totality of the evidence on record. According to the Majority: "The difficulty with the

[329] ICC-02/11-01/15-1263-Conf-AnxB, sect. III.A.2.
[330] ICC-02/11-01/15-1263-Conf-AnxB, sect. III.B.
[331] ICC-02/11-01/15-1263-Conf-AnxB, para. 80.
[332] ICC-02/11-01/15-1263-Conf-AnxB, para. 85.

Prosecutor's approach is that none of the individual factual elements she relies upon clearly point to the existence of a plan or policy to attack civilians."[333]

357. The Majority notes:

> However, as she acknowledged, the Prosecutor did not present any direct evidence of the existence of the alleged Common Plan/Policy. In the place of direct evidence, the Prosecutor presented the Chamber with a plethora of circumstantial evidence and asked us to draw one giant inference from it.[334]

358. Nevertheless, notwithstanding the weakness of the Prosecutor's evidence, the Majority analysed all the evidence presented by her concerning the existence of a common plan/policy and the alleged attack against the civilian population, including the evidence relating to the rape allegations. However, the Majority dismissed the Prosecutor's allegations, whether they concerned the alleged common plan or the claims of an attack against the civilian population.

5.1.2. The Majority's findings on the alleged common plan

359. In relation to the RTI march, the Majority devoted 40 pages of its Reasons to examining the evidence that the Prosecutor claimed to be cogent as to a link between instructions issued by the authorities and the crimes allegedly committed on 16 December 2010.[335]

360. The Majority found on conclusion of that analysis that

[333] ICC-02/11-01/15-1263-Conf-AnxB, para. 86.
[334] ICC-02/11-01/15-1263-Conf-AnxB, para. 1899.
[335] ICC-02/11-01/15-1263-Conf-AnxB, paras. 1122-1218.

> it is noted that in relation to a number of the crimes that were committed there is no obvious connection with the operation to repress the RTI march. This applies, for example, to the instances of rape by FDS members and youths. The Chamber is aware that the Prosecutor cautioned that crimes of sexual violence should not be regarded as opportunistic acts and that rape was a characteristic of the attack by pro-Gbagbo forces against civilians perceived to support Ouattara. However, the evidence she submitted is incapable of supporting this proposition and indeed the Prosecutor makes no serious effort to develop a cogent evidentiary argument in this regard.[336]

361. The Majority therefore took the view that

> the available evidence does not allow a reasonable trial chamber to conclude that the measures that were put in place to enforce the prohibition of the RTI march were deliberately or obliquely intended to cause violent crimes to be committed against civilian supporters of Mr Ouattara.[337]

362. The Majority states as follows in relation to the alleged incidents on 12 April 2011: "Beyond stating that the perpetrators belonged to the 'pro-Gbagbo forces', the Prosecutor is not able to identify which group(s) committed the alleged crimes that were committed in Yopougon on 12 April 2011."[338] It therefore found it difficult to attribute crimes to "pro-Gbagbo" groups and therefore to conclude there was any common plan whatsoever.

363. The Majority notes:

> Even if the Prosecutor's version of the common plan is accepted, it is still hard to see how committing random violence against innocent civilians would in any way contribute to keeping Mr Gbagbo in power. Given that Mr Gbagbo was already in detention on 12 April 2011, what would have been needed for him to resume his reign was to be liberated and reinstated in power. There is absolutely nothing to indicate that the alleged killings and rapes that occurred in Yopougon on that day could have made even the slightest contribution to that aim.[339]

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[336] ICC-02/11-01/15-1263-Conf-AnxB, para. 1917.
[337] ICC-02/11-01/15-1263-Conf-AnxB, para. 1218.
[338] ICC-02/11-01/15-1263-Conf-AnxB, para. 1940.
[339] ICC-02/11-01/15-1263-Conf-AnxB, para. 1917.

364. The Majority further stated that "even if the Prosecutor's allegations, which are in considerable part based on anonymous hearsay, are accepted at face value, there would still only be a relatively small proportion of the alleged incidents that involved rape or other forms of sexual violence" and that "like many of the other crimes alleged in this case, it is not immediately obvious how committing rape and sexual violence could in any way contribute to the goal of keeping Mr Gbagbo in power".[340]

365. The Majority therefore examined the allegations of rape in detail and also returned them to the broader context of the alleged common plan. Whatever viewpoint the Judges took, however, the outcome of their analysis remains unchanged: there is nothing concrete capable of supporting the Prosecutor's allegations.

5.1.3. The Majority's conclusions on the existence of the contextual element of crimes against humanity

366. The Majority also examined the Prosecutor's evidence in support of the allegation that the crimes – in particular the rapes – committed on 16 December 2010, and on 12 April 2011 in Yopougon, constituted an attack against the civilian population and a policy to commit those crimes.[341]

367. The Majority stated that, in order to assess those allegations by the Prosecutor, "the Chamber also analysed for each alleged crime whether there was any evidence about the motive or reasons of the alleged perpetrator for committing

[340] ICC-02/11-01/15-1263-Conf-AnxB, para. 1918.
[341] ICC-02/11-01/15-1263-Conf-AnxB, sect. VI.

the crime", since that motive was "relevant to determine whether or not the alleged physical perpetrator acted pursuant to or in furtherance of the alleged policy."[342]

368. The Majority explained:

> The mere fact that an FDS member or a pro-Gbagbo militia member killed or raped a pro-Ouattara civilian does not *ipse facto* mean that the former was acting pursuant to a putative organisational policy. It is quite possible that the relevant individuals had different reasons for committing the crime. Regular criminality, personal reasons, self-defence, etc., are among many possible motives for why a person might engage in certain conduct regardless or even despite the existence of a policy. In some cases the violence may not have had a particular motive at all, as in the case where a police officer uses excessive force in the execution of his or her duties.[343]

369. Accordingly, for the Majority,

> the fact that the evidence may indicate that a particular physical perpetrator may have had personal reasons for engaging in certain criminal conduct does not preclude the possibility that he or she was at the same time aware of the policy and that his or her actions were furthering it. However, this cannot be simply assumed to be the case, especially in a case like this, where there is no independent direct evidence showing the existence of the policy.[344]

370. The Judges also found that the Prosecutor's approach of amalgamating various groups under the ill-defined and vague "pro-Gbagbo" label was unacceptable and that the Prosecutor had to prove a link between the perpetrator of the alleged crime and the authorities:

[342] ICC-02/11-01/15-1263-Conf-AnxB, para. 1389.
[343] ICC-02/11-01/15-1263-Conf-AnxB, para. 1389.
[344] ICC-02/11-01/15-1263-Conf-AnxB, para. 1390.

> Where an individual committed a crime and the only link to the accused is the Prosecutor's allegation that that individual was "pro-Gbagbo", the proposition that an individual is "pro" Mr Gbagbo must be treated as any other assertion to be proven based on the evidence on the record. Very often the claimed affiliation is a matter of inference. The concern with such inferences is the circularity of reasoning. Without additional information, the Chamber is unable to ascertain whether individual(s) were "pro-Gbagbo" because they committed the crime charged or whether they committed the crime charged because they were "pro-Gbagbo". […]
>
> In order to arrive at a conclusion that an individual committed a crime pursuant to the Common Plan in this case, it is insufficient to only allege that said individual was "pro-" Mr Gbagbo and *hence* formed part of the "pro-Gbagbo youth" and/or "pro-Gbagbo forces". Affiliation to Mr Gbagbo is not criminal per se. Neither is loyalty. Additional facts and/or inferences would be needed to arrive at such a conclusion.[345]

371. The Majority added that "in many cases, the identity of the direct perpetrators is not apparent from the evidence cited in support of the allegation."[346] Stated otherwise, the Prosecutor did not provide any indication as to the identity of the direct perpetrators of the crimes she alleges were committed and did not even succeed in showing that those anonymous perpetrators were in any way linked to the authorities. How then could her line be accepted? That is nevertheless the accusation which she levelling at the Judges, that they did not concur with her even though she had given them no relevant material to allow them to determine that a policy existed.

372. Starting from that observation that it is important to consider the motive of the perpetrators, the Majority set out how it would analyse the evidence, which would be examined

[345] ICC-02/11-01/15-1263-Conf-AnxB, paras. 1398-1399.
[346] ICC-02/11-01/15-1263-Conf-AnxB, para. 1393.

> with the purpose of ascertaining: i. whether the victim was a civilian who belonged to one of the groups that were generally considered – according to the Prosecutor – as favouring Mr Ouattara; ii. whether the alleged crime was committed by a person who belonged to the FDS or any of the irregular pro-Gbagbo forces; iii. *what the reasons or motive of the alleged perpetrator may have been for committing the crime*.[347]

373. The Majority went on to say that "[f]or the purpose of this exercise, *it will be assumed that the alleged facts about victimisation are established*."[348] It is worth noting here that the Judges were indulgent to the Prosecutor, since that "assumption" by definition favours the Prosecutor. That is to say, the Judges used a low standard of proof.

374. The Majority followed that approach when examining the evidence relating to the incidents that allegedly occurred in Yopougon on 16 December 2010 and 12 April 2011, in the broader context of its analysis of the five charged incidents and the 20 other incidents that the Prosecutor presented as demonstrating the contextual element of crimes against humanity.[349] The Majority found in particular:

375. (a) In relation to the rape that allegedly took place during the march on 16 December 2010, the Majority noted "the questionable quality of much of the evidence relied upon by the Prosecutor in relation to the events of 16-19 December 2010".[350] The Majority underlined that

[347] ICC-02/11-01/15-1263-Conf-AnxB, para. 1391, emphasis added.
[348] ICC-02/11-01/15-1263-Conf-AnxB, para. 1392, emphasis added.
[349] ICC-02/11-01/15-1263-Conf-AnxB, para. 1388.
[350] ICC-02/11-01/15-1263-Conf-AnxB, para. 1608.

> it is relevant to point out that the available evidence is incapable of supporting a finding of the existence of a pattern of the use of firearms/grenades against political demonstrators. First, in relation to the identified witnesses, it is not possible, on the basis of the available evidence, to determine who caused their death/injuries in 63 out of 76 instances. Second, even if all the identified victims could be attributed to the FDS or pro-Gbagbo irregular forces, this would still be only anecdotal evidence when seen in light of the scale of the RTI march and the hundreds of confrontations between marchers and law enforcement elements there must have been. There is thus no scope for any argument that the intent to attack the civilian demonstrators can be inferred from what happened on the ground.[351]

376. (b) In relation to the crimes allegedly committed in Yopougon on 12 April 2011, the Majority found that no evidence had been furnished proving that the crimes were committed in pursuit of a policy: "Indeed, it is conceivable that some of the crimes committed in Yopougon on 12 April 2011 were opportunistic in nature, in the sense that the perpetrators took advantage of the general state of lawlessness and defenselessness of the victims."[352]

377. The Majority clarified:

> There is no indication that perpetrators were acting pursuant to or in furtherance of any sort of policy. Indeed, it is telling that out of all crimes in the Prosecutor's narrative, those pertaining to the 12 April 2011 incident were the least likely to contribute to achieving the purpose of the alleged policy to keep Mr Gbagbo in power at all costs. At that point in time, Mr Gbagbo had already been arrested and the struggle for power was effectively over. To the extent that the available information allows any conclusions in this regard, it appears that the crimes committed in Yopougon on 12 April 2011 were mainly driven by vengeance.[353]

378. (c) In more general terms, the Majority found that the evidence presented did not establish that "persons of certain ethnic, national, or religious backgrounds would be automatically killed, raped, or injured upon being identified as such."[354]

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[351] ICC-02/11-01/15-1263-Conf-AnxB, para. 1613.
[352] ICC-02/11-01/15-1263-Conf-AnxB, para. 1859.
[353] ICC-02/11-01/15-1263-Conf-AnxB, para. 1861.
[354] ICC-02/11-01/15-1263-Conf-AnxB, para. 1880.

379. In respect of the crimes committed in Yopougon on 12 April, the Majority concluded that, on the basis of the evidence, "given the timing and nature of these events, it is not possible to argue that the crimes committed on 12 April 2011 constitute a pattern from which anything significant in relation to the Common Plan or policy could be inferred."[355]

5.2. The Prosecutor misrepresents the Majority Judges' analysis regarding the matter of the rapes

380. The Prosecutor contends that the Majority treated the allegations of rape differently from "other crimes"[356] by subjecting them to "an additional unreasonable and unjustified scrutiny".[357] According to the Prosecutor, the Majority "set too high a threshold to considering these allegations as part of such context — as evidence of the policy to commit the attack or the common plan to do so."[358]

381. First, that claim does not stand up to scrutiny. It has been seen that the Majority found that overall the Prosecutor had failed to establish either a common plan or a policy to attack the civilian population. Accordingly, none of the crimes that the Prosecutor alleges – including the rapes – could be found to have been committed in pursuit of such a common plan or policy. For example, as noted above, the Majority concluded from its analysis of the crimes allegedly committed in Yopougon on 12 April 2011 that "it appears that the crimes committed in Yopougon on 12 April 2011 were mainly driven by vengeance."[359] The Prosecutor's claim that

[355] ICC-02/11-01/15-1263-Conf-AnxB, para. 1884.
[356] ICC-02/11-01/15-1277-Conf, para. 235.
[357] ICC-02/11-01/15-1277-Conf, heading of sect. IV.B.4.v.a.
[358] ICC-02/11-01/15-1277-Conf, para. 236.
[359] ICC-02/11-01/15-1263-Conf-AnxB, para. 1861.

the Majority applied "too high a threshold" to the allegations of rape is therefore quite simply baseless.

382. Second, it is incorrect to say that the Majority subjected the rape allegations "to an additional unreasonable and unjustified scrutiny". Indeed, the Chamber did not examine whether the rape allegations were true, because it took the approach, for the purposes of its analysis of whether there was a common plan or policy, that "it will be assumed that the alleged facts about victimisation are established."[360] That being so, it is beyond comprehension that the Prosecutor should claim that the Majority subjected "evidence of sexual crimes to a higher level of scrutiny" whereas, for the purposes of its reasoning, the Majority worked on the assumption that the rape allegations were true and therefore did not subject "evidence of sexual crimes" to any examination.

383. It is therefore clear that the Prosecutor's claim that the Majority erred in law by setting too high a standard for sexual violence is groundless.

384. Third, the Prosecutor criticizes the Majority for dismissing her evidence relating to the instructions purportedly given by Simone Gbagbo to rape women taking part in the RTI march. The Prosecutor finds fault with the Majority for trying to ascertain whether there was a "separate" policy to rape female pro-Ouattara demonstrators, instead of concerning itself with whether there was a more general policy.[361] It has in fact been shown that the Majority Judges took pains to examine in the minutest detail whether there had been a general policy, on the basis of its

[360] ICC-02/11-01/15-1263-Conf-AnxB, para. 1392.
[361] ICC-02/11-01/15-1277-Conf, para. 237.

analysis of all the evidence presented by the Prosecutor in support of all her allegations.

385. Fourth, still with reference to the allegation concerning Simone Gbagbo, the Prosecutor tries to take issue with the reasoning of the Majority when it found that

> it is necessary to discuss the allegation that Simone Gbagbo issued instructions to rape women taking part in the RTI march. The only evidence for this proposition is the prior recorded testimony of [REDACTED], who claims to have been told this twice by two separate policemen in approximately the same terms. As this constitutes anonymous hearsay and as there is no corroboration, no reasonable trial chamber could conclude solely on the basis of this evidence that there was an instruction, agreement and/or policy to rape female pro-Ouattara demonstrators.[362]

386. The Prosecutor submits first of all that because the statements were made by "two separate policemen", "the identity of the source was thus not completely unknown, such that it could be said to be 'anonymous'".[363] That argument is somewhat curious; it amounts to saying that two "anonymouses" make a "non-anonymous". It is quite clear that since there is no information about the policemen who allegedly made those remarks, in particular their identities, the source must be regarded as anonymous. It should be recalled in that respect that in the introductory section on the methodology they adopted to assess the evidence presented to them, the Majority Judges took the trouble of explaining that

[362] ICC-02/11-01/15-1263-Conf-AnxB, para. 1883.
[363] ICC-02/11-01/15-1277-Conf, para. 246.

> [i]t is important to emphasise that simply knowing the identity of the source is not sufficient. Just as in the case of in-court testimony, in order to determine what weight should be given, it is necessary to have reliable information about how the source of the information came to know it, if there are any concerns about his or her memory and whether or not there may be reasons to think that the source may have deliberately given information which he or she did not believe to be correct.[364]

Applying that methodology, even assuming for the purposes of argument that [REDACTED] is telling the truth, the fact that [REDACTED] mentioned "two separate policemen" as the source of [REDACTED] information says nothing about the actual source of that information or the credibility of each policeman.

387. The Prosecutor then claims that since the witness relates what was said by two different people, there are therefore, first, two different items of evidence and, second, items of evidence that corroborate each other and are therefore robust. That argument likewise is curious. There is in fact only one piece of information, not two, since it comes from a single testimony, that of [REDACTED]. When she criticizes the Judges for rejecting that corroboration, the Prosecutor is distorting the purport of the Judges' reasoning insofar as they were talking about the lack of any corroboration because what [REDACTED] said was not corroborated by any other evidence on the record.

388. It is noted here that the Prosecutor is once again taking a new line of argument on appeal, since neither during the trial, nor in her "trial brief" nor during the no case to answer procedure did she maintain that [REDACTED]'s testimony was corroborated.[365]

[364] ICC-02/11-01/15-1263-Conf-AnxB, para. 44.
[365] ICC-02/11-01/15-1207-Conf-Anx, paras. 506, 510; ICC-02/11-01/15-1136-Conf-Anx1-Corr3, para. 367.

389. Fifth, the Prosecutor posits a purported inconsistency between various findings that the Majority made about the rapes committed both on 16 December 2010 and on 12 April 2011 and the fact that it did not infer from them that there was a common plan or policy. Nothing is proven by that proposition but rather it is the expression by the Prosecutor of what is nothing more than her disagreement with the Judges. Once again, the Prosecutor is trying to deflect attention from the fact that the Chamber reached a general conclusion that the purported common plan or policy did not exist, after examining all the incidents, including the rapes, alleged by the Prosecutor.

6. Sixth factual example: according to the Prosecutor, the Judges included factors in their reasoning that were not on the record and which caused them to err in assessing the evidence presented by the Prosecutor

390. In the heading of the exposition of her sixth example, the Prosecutor declares that "[t]he Majority erred in assessing the evidence on the overall pattern of crimes against an unnecessary and unsupported empirical benchmark".[366] In the first paragraph she goes on to say that

> [a]lthough some relevant context is necessary to establish a pattern of criminality, the Majority adopted an overly rigid approach (requiring empirical precision) to determine the overall pattern of criminality, relevant to ascertaining the existence of a policy to commit an attack directed against the civilian population.[367]

391. Thereafter, however, in her discussion, the Prosecutor addresses a different point: the Majority, she claims, erred by using in its reasoning factors other than those on the record,[368] such as the figures for the population of Abidjan, the number

[366] ICC-02/11-01/15-1277-Conf, heading of sect. IV.B.4.vi.
[367] ICC-02/11-01/15-1277-Conf, para. 248.
[368] ICC-02/11-01/15-1277-Conf, para. 250.

of Muslims in Abidjan and the number of "so-called 'pro-Gbagbo forces'"[369] present in Abidjan at that time.[370] In other words, she has abandoned by the wayside any slight inclination to prove the criticism which, in her heading, she said she was setting out to level at the Judges.

[369] ICC-02/11-01/15-1277-Conf, para. 251.
[370] ICC-02/11-01/15-1277-Conf, para. 251.

392. The Prosecutor refers to the following passage of the reasons:

> Based on these considerations, it is absolutely clear that, even if all of the Prosecutor's allegations concerning the charged and uncharged incidents were accepted at face value, still no reasonable trial chamber could find that there existed a veritable pattern of criminal conduct that could support an inference that a policy to commit such crimes must have been in place. Indeed, according to the Prosecutor, the relevant period lasted 137 days and the relevant location was Abidjan. According to the Prosecutor, Abobo alone held 1.5 million inhabitants[371] and the entire city's population probably totalled more than 4 million. The Prosecutor did not provide any information as to how many of these belonged to the relevant categories according to her case theory, but it is probably safe to assume that there were at least 1 million Muslims, northerners and foreigners combined. On the side of the alleged perpetrators, it is also not entirely clear how many members of the different regular and irregular forces were in Abidjan at the time, nor what their respective weaponry was. Nevertheless, it is beyond doubt that there were several thousand armed individuals in Abidjan during the relevant period. According to the Prosecutor, all these individuals belonged to organisations that were controlled by the accused. These thousands of so-called "pro-Gbgabo forces" had ample opportunity to commit violent crimes against the relevant civilian population(s) of Abidjan. Yet, even if the Prosecutor's alleged total number of victims (528) was fully accepted and were all counted as single incidents, this would still only represent 0.052% of the relevant potential victim population.
>
> Although telling, this number is not necessarily determinative. What matters is how often the "pro-Gbagbo" forces complied with the alleged policy when they had the chance to do so. Given the scarcity of the evidence in this regard, it is impossible to make any empirical findings on this point. Nevertheless, assuming that out of the thousands of pro-Gbagbo forces that were present in Abidjan during the post-electoral crisis, on any given day, 75 of them had an opportunity to harm at least one suspected Ouattara supporter, this would still mean that there were more than 10,000 such opportunities throughout the relevant time-period. If the Prosecutor's alleged total number of 528 victims was fully accepted and were all counted as single incidents, this would mean that in only slightly more than 5% of cases where a pro-Gbagbo force member had an opportunity to implement the policy, they actually did so. In reality, the percentage was probably much lower still.[372]

393. What does the Prosecutor take from that exposition? "None of the numbers or estimates relating to the Majority's mathematical analysis (above) find support in the case record".[373]

[371] ICC-02/11-01/15-1207-Conf-Anx, para. 419.
[372] ICC-02/11-01/15-1263-Conf-AnxB, paras. 1892-1893.
[373] ICC-02/11-01/15-1277-Conf, para. 252.

394. This calls for a number of remarks.

395. First, the Prosecutor inadvertently admits to her own failings: the Judges were obliged to make educated guesses about the population of Abidjan precisely because the Prosecutor failed to give the Chamber all the information it needed to perform its task, as the Majority moreover noted: "It is fully recognised that the numbers used are based on educated guesswork and mere assumptions. However, this is due in the first place to the fact that the Prosecutor did not provide the Chamber with sufficient information."[374]

396. Above all, what the Majority says here is purely by way of example and relates only to one aspect of the Judges' reasoning – that relating to the Prosecutor's failure to give it any information enabling it to place the incidents in the wider context of what may have happened in Abidjan during the crisis:

> In addition to the evidentiary considerations outlined above, it is important to underline another fundamental weakness of the Prosecutor's arguments in relation to the existence of patterns of criminality. The main flaw in the Prosecutor's argument is that no attempt has been made to demonstrate that the 24 incidents she relies upon to prove the existence of a pattern are representative of what happened in Abidjan during the post-election crisis. Anyone can claim the existence of a pattern by cherry-picking examples that fit preconceived characteristics and ignoring all other information that does not conform. The burden is upon the Prosecutor to show how and why she selected the incidents relied upon in her Response.[375]

397. The Majority goes on to say:

[374] ICC-02/11-01/15-1263-Conf-AnxB, footnote 4223.
[375] ICC-02/11-01/15-1263-Conf-AnxB, para. 1887.

> Considering the duration of the post-election crisis and the size of Abidjan, it is impossible to assume that the incidents relied upon by the Prosecutor were the only occasions during which the different constituents from the so-called pro-Gbagbo forces came into contact with the civilian pro-Ouattara population. This is critical, because, in the absence of evidence about how the "pro-Gbagbo forces" interacted with the pro-Ouattara population in general, it is impossible to determine whether the incidents constitute a representative sample of a wider pattern or whether they are really exceptions.[376]

398. The Majority's meaning is clear: since there is no relevant information about the context in which the incidents occurred – and even if they are assumed for the purposes of argument to be proven – it is impossible to ascertain whether they could have formed part of a general policy.

399. Otherwise stated, after reviewing the Prosecutor's evidence over several hundred pages in their reasons and concluding that it did not substantiate her allegations that there was a purported common plan or a policy aimed at attacking civilians, the Judges were addressing there the question from a different angle, that of the placement of the Prosecutor's allegations in their factual context. Whereas the Chamber notes the shortcomings in the Prosecutor's arguments concerning the prevailing situation in Abidjan at the time, those remarks do not form part of the rationale given by the Judges for reaching the conclusion that there was no common plan or policy. Although the Judges used figures here, they did so to flesh out their criticism of the Prosecutor: her failure to place the incidents that she alleges in the broader context of all the possible interactions between the population between the various groups (including the security forces) present in Abidjan at the time. Accordingly, not only do those remarks – which the Prosecutor tries to exploit to delegitimize the Judges' rationale regarding the absence of common plan or policy – not form part of the Judges' rationale and are instead redundant, but the fact that the Judges used figures does not in any way alter their reasoning in relation to that

[376] ICC-02/11-01/15-1263-Conf-AnxB, para. 1889.

argument; their intention was merely to illustrate in an instructive manner the blatancy of the Prosecutor's shortcomings given such a complex context, such a populous city and such a long time frame.

400. Second, it should be noted that, by using those figures, the Judges were merely attempting to contextualize the Prosecutor's allegations in order to test whether they could sustain the notion of a recurring pattern of behaviour. They were simply trying to clarify what the Prosecutor might have intended to say, using figures to help gauge the course the alleged incidents took.

401. In addition, the Prosecutor's assertion that the Majority's reasoning does not "find support" in the record of the case is misleading.[377] The Prosecutor proceeds here as if the figures mentioned by the Judges had led to their conclusions in this section, whereas the Judges' only concern was in fact to use figures to illustrate their thinking. Furthermore, by raising the question of the figures, the Prosecutor is seeking to suggest that the Judges pursued a line of reasoning not based on the record. In reality, if the figures mentioned there are disregarded, each step of the Majority's reasoning is underpinned by a detailed analysis of the Prosecutor's allegations. It therefore constructed its reasoning on what was submitted by the Prosecutor herself, and the figures served merely to illustrate one aspect of its reasoning. What the Judges are saying here is that, had a common plan been devised and implemented for 10 years by all the State bodies (including the police, gendarmerie, the army and political groupings), as the Prosecutor maintains, there would inevitably have been many more, and more telling, incidents than those to which the Prosecutor refers. That observation remains true regardless of whether or not figures were used.

[377] ICC-02/11-01/15-1277-Conf, para. 252.

402. That the Chamber may have relied on figures or calculations which do not come straight from the case record changes nothing in the fundamental reasoning set out by the Majority Judges. In their view, the Prosecutor failed to prove that the facts she alleges could form part of a policy to attack the civilian population. The paragraphs to which the Prosecutor takes objection are completely unnecessary to their determination. The important point here is that it was the Prosecutor who should have provided the Judges with all the necessary information.

403. The Defence would mention in that respect the Prosecutor's utterly inappropriate reference to the ICTY's approach in *Gotovina*.[378] In that case, the Trial Chamber found that shelling did constitute an indiscriminate attack on the civilian population because it hit a target more than 200 metres from a military position. The point is that the question of the 200 metres was pivotal to that case since, on the basis of that finding of an attack against the civilian population the Chamber then went on to find that the firing was unlawful, said unlawfulness being the central pillar of its reasoning which led to the determination that there had been a joint criminal entreprise and the accused were responsible.[379] The Appeals Chamber criticized the Trial Chamber for failing to justify the 200-metre standard on the basis of the evidence on the record[380] and reversed the convictions of the Accused persons.[381] The question here is very different: the figures that the Majority gave in its reasoning are completely unrelated to the extensive reasoning it set out before finding that there was no policy of attacking the population. That finding was founded entirely and exclusively on the Judges' analysis of the evidence presented by the Prosecutor. At

[378] ICC-02/11-01/15-1277-Conf, para. 249.
[379] ICTY, *Prosecutor v. Ante Gotovina and Mladen Markać*, Judgment, para. 96.
[380] ICTY, *Prosecutor v. Ante Gotovina and Mladen Markać*, Judgment, para. 58.
[381] ICTY, *Prosecutor v. Ante Gotovina and Mladen Markać*, Judgment, para. 98.

no time – either in her arguments or by the remedy sought, a mistrial – does the Prosecutor challenge on any technical grounds the finding reached by the Majority Judges that there was no common plan/policy and which suffices to determine that the Prosecutor has no case.

404. Last, the Prosecutor concludes her line of argument by stating: "This further demonstrates that the Majority had not directed itself to the evidentiary approach it would apply in this case *before* it had assessed the evidence at the NCTA stage."[382] There is no logical link between the Judges' finding that the Prosecutor had not tendered evidence of a policy or of a common plan, and whether or not the Judges had relied upon a standard of proof before assessing the Prosecutor's evidence. This is a contrived and unconvincing attempt to provide a legal basis – and one which is reliant on the absence of a standard of proof – for her stated disagreement with the Judges' findings.

V. Some thoughts on the remedy, a mistrial, sought by the Prosecutor (section V of the Prosecutor's Brief) (paragraphs 264 to 267 of the Prosecutor's Brief)

405. The Prosecutor ends her appeal brief with the statement: "Circumstances such as these demand a declaration of mistrial."[383] In other words, it is her submission that she has set out in her brief a set of arguments whose logical outcome, should the Judges agree with her, must be a declaration of mistrial.

406. First, it should be noted that the Prosecutor is proposing that the Appeals Chamber order a remedy for which the Rome Statute makes no provision on appeal.

[382] ICC-02/11-01/15-1277-Conf, para. 252.
[383] ICC-02/11-01/15-1277-Conf, para. 265.

Article 83(2) of the Statute exhaustively lists the remedies available to the Appeals Chamber where it finds errors that have affected the impugned decision. In such a situation it may "(a) Reverse or amend the decision or sentence; or (b) Order a new trial before a different Trial Chamber".[384]

407. The Defence notes that here the Prosecutor is inviting the Appeals Chamber to depart from the Rome Statute, whereas elsewhere in her appeal brief, she argues for a strict and literal application of the Statute.

408. The Defence also notes that the Prosecutor relies on an appeal decision in *Bemba et al.*[385] even though that decision did not in any way concern a mistrial since in *Bemba* the appeal judges did not envisage any form of "relief" other than that which falls within the Statute.[386]

409. Further, that a mistrial is not an appropriate remedy on appeal is confirmed by the ICTY, which has consistently held that a mistrial declaration is "not available or necessary in the appeal phase of a case."[387] It is on account of the very nature of a mistrial that the Judges denied it the status of a "remedy" on appeal. A mistrial allows proceedings to be brought to an end − on the basis for example of the infringement of a fundamental right of an accused − absent adjudication of the merits and so is an eventuality that can occur only at first instance. Where a Trial Bench does not declare a mistrial and the infringement of the right is posed for resolution before the Appeals Chamber, the Appeals Bench will hear that matter

[384] Article 83(2) of the Rome Statute.
[385] ICC-02/11-01/15-1277-Conf, footnote 552.
[386] ICC-01/05-01/13-2275-Red, para. 108.
[387] ICTY, *Prosecutor v. Mico Stanišić and Stojan Župljanin*, Decision, para. 33.

under a standard ground of appeal and the remedy afforded will be the standard remedy afforded on appeal.

410. In *Stanišić and Župljanin* the Accused persons had been convicted at first instance and had appealed. The Defence for Stanišić had applied to the Appeals Bench to declare a mistrial, claiming that "a reasonable observer, properly informed, could reasonably apprehend bias in favour of conviction on the part of Judge Harhoff."[388] The Appeals Bench noted that none of the domestic authorities cited by the Defence supported "the 'extraordinary remedy' requested in the Motions" (a mistrial), pointing out that "[t]he decisions either referred or remanded the cases to a different judge or re-constituted bench";[389] accordingly they rejected the application for a mistrial and examined the matter of bias vis-à-vis standard remedies available on ordinary appeal.

411. That observation alone should be sufficient grounds for dismissing the Prosecutor's request.

412. Second, although the Prosecutor bases her argument on the *Ruto* precedent, it is worth noting that it is not relevant in the instant case.

413. In *Ruto*, it will be recalled, the two majority Judges, Judge Eboe-Osuji and Judge Fremr, found that (1) the Prosecutor had no case and (2) the logical consequence of that finding was an acquittal decision. Taking into account the

[388] ICTY, *Prosecutor v. Mico Stanišić and Stojan Župljanin*, Decision, para. 6.
[389] ICTY, *Prosecutor v. Mico Stanišić and Stojan Župljanin*, Decision, para. 30.

interference and pressure on witnesses that had occurred during the trial,[390] the majority nevertheless decided to declare a mistrial.

414. The approach taken by Judge Eboe-Osuji in his separate opinion is of interest. After stating first of all that he agreed with Judge Fremr in finding the Prosecutor's case to be weak,[391] he went on to say:

> [W]as the Prosecution's case weak because there really was no better evidence left to be obtained and tendered without the factor of witness interference and political intimidation? Or was it weak because the Prosecution did the best they could with the only evidence they could eke out amidst difficult circumstances of witness interference and political intimidation? Because of the tainted process, I am unable to say. It is for that reason that I prefer declaration of a mistrial as the right result.[392]

415. That reasoning is clearly not applicable here. Nowhere in her appeal brief does the Prosecutor claim that she encountered any difficulties in presenting her case as a result of external interference. On the contrary, as already described (see above, paragraph 182), the Prosecutor was able to investigate over a number of years with the full support of the new government in Côte d'Ivoire and, at the trial, she was able to tender her evidence freely and exhaustively and was able in particular to call all the witnesses she considered necessary.

416. There is therefore no doubt in this respect: the weakness of the Prosecutor's evidence is caused solely by her inability to build a sound, compelling case. As the Majority Judges correctly noted, that weakness is intrinsic to the Prosecutor's case. The Judges did not wrongly assess the evidence presented to them and thus fail to appreciate its significance: there quite simply was no evidence at all. How the no case to answer procedure was conducted has no bearing on that fact. This is

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[390] ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, para. 2.
[391] ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, para. 1.
[392] ICC-01/09-01/11-2027-Red-Corr, Reasons of Judge Eboe-Osuji, para. 2.

attested by the fact that as early as 2013, when it adjourned the confirmation hearing, the Pre-Trial Chamber found the Prosecutor's evidence to be weak, in particular in respect of the contextual elements of the crimes against humanity.[393] The Majority Judges in turn made the same finding in their acquittal decision, on the basis of a rigorous and comprehensive analysis of the Prosecutor's evidence.

417. Seeking to circumvent the fact that *Ruto* does not apply, the Prosecutor argues in her appeal brief: "In *Ruto and Sang*, external factors prejudiced the proceedings. In this case, internal factors – the Majority Judges' own approach, it is submitted with respect – prejudiced the proceedings."[394] Here again the Prosecutor is unpersuasive. In what respect could something that happened during the no case to answer procedure – an ill-advised approach to the standard of proof, in her view – have prevented the Prosecutor from presenting her case as she saw fit during the trial, which was the test used by the Judges in *Ruto*?

418. The Defence notes lastly that by relying on the *Ruto* precedent, the Prosecutor is in effect conceding that she has no case since in *Ruto* the Judges were in agreement on finding that the Prosecutor had no case. In other words, the mistrial in *Ruto* substituted an acquittal even though the Prosecutor did not claim to have a case. Here the mistrial request therefore means *ipso facto* that the Prosecutor acknowledges that she has no case.

419. Third, the Prosecutor argues that a mistrial ruling "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".[395] In other words, the Prosecutor wants to remain master of

[393] ICC-02/11/01/11-432, para. 35.
[394] ICC-02/11-01/15-1277-Conf, para. 265.
[395] ICC-02/11-01/15-1277-Conf, para. 266.

Laurent Gbagbo's fate for the rest of his days, free to prosecute him to her heart's content as and when she wishes. Since the Prosecutor is not contesting the acquittal – given that she states in her appeal brief that she is not moving the Appeals Chamber "to apply the factual standard of review overall 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"[396] – to ask the Chamber to declare a mistrial is an abuse of procedure, since Laurent Gbagbo, having been acquitted, would not then enjoy the *non bis in idem* protection afforded him by the Statute and would be at the mercy of the Prosecutor. Otherwise stated, the Prosecutor is asking the Appeals Chamber to hand her a sword of Damocles that she would hang over Laurent Gbagbo's head.

420. The Prosecutor's desire to use a mistrial declaration out of expediency and to suit her purposes was clearly apparent at the hearing of 6 February 2020, when the Prosecutor stated her intention to conduct a new trial if her appeal was allowed,[397] while suggesting that her decision whether or not to conduct a new trial would depend on many factors.[398] The Prosecutor also claimed that her intention had always been to have a new trial,[399] even though in her appeal brief she states that she is moving the Appeals Chamber to declare a mistrial "instead of" asking it to order a new trial.[400] What should be made of that contradiction between what the Prosecutor states in the appeal brief and what she said on 6 February 2020 if not that she is in reality asking the Judges, without any cogent legal basis, to give her the upper hand over Laurent Gbagbo.

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[396] ICC-02/11-01/15-1277-Conf, para. 129.
[397] ICC-02/11-01/15-T-237-CONF-FRA ET, p. 35, lines 21-27 and p. 50, lines 1-3.
[398] ICC-02/11-01/15-T-237-CONF-FRA ET, p. 49, lines 11-15.
[399] ICC-02/11-01/15-T-237-CONF-FRA ET, p. 35, lines 21-27 and p. 43, lines 9-22.
[400] ICC-02/11-01/15-1277-Conf, para. 266.

421. The common law has recognized that potential for abuse of the mistrial. In *Arizona v. Washington*, the Supreme Court of the United States held:

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad-faith conduct by judge or prosecutor" . . . threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict" the defendant. Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.[401]

422. Last, although the Prosecutor is using mistrial as a weapon against Laurent Gbagbo, it should be noted that she is also using it first and foremost to shirk her own responsibility by trying to place the blame for her failure on the shoulders of the Trial Bench. That appears to be the objective of her appeal brief, and explains why in that brief the Prosecutor has carefully avoided discussing the true question that her case raises: that question is and always will be – from whatever angle the Prosecutor's evidence is examined – the weakness of that evidence. That is borne out by the fact that the Prosecutor herself declares that she is not questioning the acquittal decision as such[402] and concedes that she has not even sought to establish that the alleged errors, and the factual errors in particular, had any impact on the final decision to acquit.[403] That is why she cannot prove (1) any error on the part of the Judges whatsoever and (2) that any of those purported errors had any bearing at all on the acquittal decision. In reality she is not contesting that decision. Accordingly, the Appeals Chamber should dismiss the Prosecutor's appeal in its entirety, affirm the acquittal of Laurent Gbagbo on all the charges against him and immediately end all measures restricting liberty.

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[401] U.S. Supreme Court, *Arizona v. Washington*.
[402] ICC-02/11-01/15-1277-Conf, para. 129.
[403] ICC-02/11-01/15-1277-Conf, para. 260.

FOR ALL THE ABOVE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

- **Dismiss** the Prosecutor's appeal in its entirety;
- **Affirm** the acquittal of Laurent Gbagbo on all the charges against him;
- **Immediately** end all measures restricting liberty.

And justice will be done.

[signed]

Emmanuel Altit

Lead Counsel for Laurent Gbagbo

Dated this 13 March 2020

At The Hague, Netherlands