Annex 5: Dissenting Opinion of Judge Solomy Balungi Bossa on Grounds One and Two

Dissenting Opinion of Judge Solomy Balungi Bossa on Grounds One and Two

I. INTRODUCTION

1. For the reasons that follow, I would grant the second ground of the Prosecutor's appeal against the Trial Chamber's decision to acquit Mr Gbagbo and Mr Blé Goudé. The Prosecutor argues that the Trial Chamber 'was never clear as to what legal standards and approaches it would apply' regarding the evidence.[1] I agree with this position, as the various documents that compose the contested decision to acquit, as well as the procedure leading up to it, show a lack of agreement between the two judges forming the majority, in particular, as to the standard of proof to be applied to the evidence at the no case to answer stage.

2. Given the nature and effect of the decision under appeal, it was not enough for the two judges in the majority to agree on the outcome – that the two accused were to be acquitted. It was also necessary for them to define and agree upon the standard of proof they applied in assessing the evidence. The standard of proof is the lens through which a chamber assesses evidence and, depending on the standard, the result of its analysis may differ. Clarity as to the standard is also essential for the parties and participants to the proceeding, as well as, eventually, the Appeals Chamber, when determining the reasonableness of the findings of the first-instance chamber. Failure to have such clarity in the present case amounted to errors of law, which materially affected the decision.

3. This failure also calls into question whether there even was, in substance, a majority decision. In my view, the Trial Chamber's decision should have been set out in one document, reflecting the views of both the majority and the minority, in accordance with article 74(5) of the Statute. Failure to issue 'one decision' gives rise to the apprehension that the two judges who decided to acquit the two accused did not actually agree on the precise reasons therefor, in particular in light of the failure to define and agree upon the standard of proof. Thus, it is doubtful whether the decision

[1] Prosecution Document in Support of Appeal, 17 October 2019, ICC-02/11-01/15-1277-Red (confidential version notified on 15 October 2019) ('Prosecutor's Appeal Brief'), para. 132.

at hand can be considered a 'decision […] taken by a majority of the judges', as required by the article 74(3) of the Statute.

4. On the basis of the above, and for the reasons further explained below, I would uphold the appeal of the Prosecutor. I believe that the decision was materially affected by the errors under the second limb of article 83(2) of the Statute.

5. I should underline that I consider it unnecessary for the purposes of this Opinion to provide a full summary of the procedural history or of all the arguments of the parties and participants. In this regard, the reader is referred to the Judgment of the majority of the Appeals Chamber.

II. THE TRIAL CHAMBER'S FAILURE TO DEFINE AND AGREE ON THE STANDARD OF PROOF

6. I recall that the Prosecutor submits that the Trial Chamber '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'.[2] In her view, Judge Henderson's Reasons contain mere 'afterthoughts', which were developed after orally acquitting the two accused on 15 January 2019,[3] and 'did not demonstrate that the Majority Judges had that – or indeed *any* – standard in mind at the crucial time when deciding to acquit (before 15 January 2019)'.[4] She argues that '[o]ne cannot determine that there is no evidence at the close of the Prosecution's case without first clarifying what standard of proof would apply to examine if there was indeed no such evidence'.[5]

7. Before turning to the substance of the Prosecutor's submissions, it is convenient to recall the applicable standard of review on appeal. The Prosecutor submits that the failure to identify and agree on a standard of proof amounted to a legal and procedural error.[6] It is consistent jurisprudence that, regarding alleged errors of law, the Appeals

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[2] In particular, *see* Prosecutor's Appeal Brief, p. 59, paras 122-125.
[3] Prosecutor's Appeal Brief, para. 142.
[4] Prosecution's submissions in response to the Chamber's questions on the Appeal, 22 May 2020, ICC-02/11-01/15-1349 ('Prosecutor's Response to the Appeals Chamber's Questions'), para. 30 (emphasis in original).
[5] Transcript of hearing of 22 June 2020, ICC-02/11-01/15-T-238-Red2-ENG ('22 June 2020 Appeal Hearing'), p. 72, lines 2-4.
[6] Prosecutor's Appeal Brief, paras 122, 131.

Chamber 'will not defer to the Trial Chamber's interpretation of the law' and that 'it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law'.[7] In relation to procedural errors, the Appeals Chamber has noted that they 'may occur in the proceedings leading up to an impugned decision'[8] and that '[a]n allegation of a procedural error may be based on events which occurred during the trial proceedings and pre-trial proceedings'.[9] These standards will guide the further analysis of the Prosecutor's arguments.

8. I recall that the decision that is the subject of the Prosecutor's appeal was issued after the close of the Prosecutor's presentation of evidence and on the basis of an assessment of the evidence that had been presented so far. It was a decision of highest importance because it put an end to the proceedings and acquitted Mr Gbagbo and Mr Blé Goudé of all charges against them. On 15 January 2019, the two judges forming the majority, stating that they had 'thoroughly analysed the evidence and taken […] into consideration all legal and factual arguments',[10] determined that 'the Prosecutor has failed to satisfy the burden of proof to the requisite standard as foreseen in Article 66 of the Rome Statute' and, on that basis, decided to acquit the two accused.[11]

9. It is of note that the above quote from the 15 January 2019 Decision refers to the *burden* of proof, but does not provide any further guidance on the *standard* of proof against which the two judges in the majority had assessed the evidence. Indeed, although the two judges agreed on the outcome – *i.e.*, the acquittal – the procedural history of this case (discussed in detail below) discloses that there was no agreement

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[7] Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red (confidential version notified the same day) ('*Bemba et al.* Appeal Judgment'), para. 90, *quoting* Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red (confidential version notified the same day), ('*Lubanga* Appeal Judgment'), paras 18-19; Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 7 April 2015, ICC-01/04-02/12-271-Corr ('*Ngudjolo* Appeal Judgment'), para. 20.

[8] *Lubanga* Appeal Judgment, para. 20

[9] *Bemba et al* Appeal Judgment, para. 99, *quoting* *Lubanga* Appeal Judgment, para. 20 and *Ngudjolo* Appeal Judgment, para. 21.

[10] Transcript of hearing of 15 January 2019, ICC-02/11-01/15-T-232-ENG ('15 January 2019 Decision'), p. 2, line 25 to p.3, line 1.

[11] 15 January 2019 Decision, p. 4, lines 15-16.

between the two judges as to the standard of proof on the basis of which they had reached this outcome.

10. I note that the applicable standard of proof to adjudicate the no case to answer motions was the subject of intense litigation during trial, but the issue was never properly resolved. After the Prosecutor had concluded the presentation of her evidence, the Trial Chamber, on 9 February 2018, issued the 'Order on the further conduct of the proceedings', inviting the Prosecutor to file 'a trial brief containing a detailed narrative of her case in light of the testimonies heard and the documentary evidence submitted at trial'.[12] It also directed Mr Gbagbo and Mr Blé Goudé to indicate 'whether or not they wish to make any submission of a no case to answer motion or, in any event, whether they intend to present any evidence'.[13] On 19 March 2018, the Prosecutor filed her mid-trial brief,[14] and on 23 April 2018, Mr Gbagbo and Mr Blé Goudé filed their respective observations, stating their intention to file no case to answer motions.[15]

11. On 4 June 2018, the Trial Chamber issued the 'Second Order on the further conduct of the proceedings', in which it declared that 'the presentation of the evidence of the Prosecutor is closed'.[16] It also ordered Mr Gbagbo and Mr Blé Goudé to file submissions addressing 'the specific factual issues for which, in their view, the evidence presented is insufficient to sustain a conviction', and '[m]ore specifically, […] why there is insufficient evidence which could reasonably support a conviction'.[17] It is important to note that the Trial Chamber stipulated here, for the first time, a potential

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[12] Order on the further conduct of the proceedings, 28 October 2015, ICC-02/11-01/15-1124 ('First Order on the Conduct of the Proceedings'), para. 10.
[13] First Order on the Conduct of the Proceedings, para. 14.
[14] Prosecution's Mid-Trial Brief submitted pursuant to Chamber's Order on the further conduct of the proceedings (ICC-02/11-01/15-1124), 19 March 2018, ICC-02/11-01/15-1136.
[15] *See* Observations de la Défense présentées à la suite de l'ordonnance de la Chambre « on the further conduct of the proceedings », 2 May 2018, ICC-02/11-01/15-1157-Red (confidential version notified on 23 April 2018), paras 18-33. Counsel for Mr Gbagbo also referred to the approach adopted in the *Ruto and Sang* case; however, he argued that the Trial Chamber should not be limited in that approach in the instant case. Corrected Version of 'Defence's written observations on the continuation of the trial proceedings pursuant to Chamber's Order on the further conduct of the proceedings (ICC-02/11-01/15-1124)', 25 April 2018, ICC-02/11-01/15-1158-Corr-Red (confidential version notified on 24 April 2018) para. 3. In his observations, counsel for Mr Blé Goudé submitted that the Trial Chamber 'is not bound by the constraints of [Ruto and Sang] Decision No. 5, and that it 'has the freedom of fully assessing the credibility and reliability of the Prosecution's evidence' (paras 18-19, 25).
[16] Second Order on the further conduct of the proceedings, 4 June 2018, ICC-02/11-01/15-1174 ('Second Order on the Conduct of the Proceedings'), p. 7.
[17] Second Order on the Conduct of the Proceedings, para. 10.

standard against which it would assess the no case to answer motions – namely whether the Prosecutor's evidence was 'insufficient to sustain a conviction'.[18] However, no further explanation of the standard was provided.

12. Shortly thereafter, on 8 June 2018, the Prosecutor requested the Trial Chamber to clarify the applicable standard at the no case to answer stage.[19] According to the Prosecutor, 'given the diverging positions of the Parties', 'there [was] a need for the Trial Chamber to clarify the applicable standard for a "no case to answer" submission' to 'assist the Parties in helping the Chamber with focused submissions and avoiding unnecessary arguments on matters inappropriate for a half-time submission'.[20] In particular, the Prosecutor sought clarification as to whether and to what extent 'the range of principles elaborated in the [Decision No. 5 of the] *Ruto* case applies', and also requested that the Trial Chamber 'adopt the Ruto Principles adopted in Decision No. 5 as to the standard for this stage of the proceedings'.[21]

13. The Trial Chamber, however, did not heed the Prosecutor's request. Rather, on 13 June 2018, Judge Tarfusser, acting as single judge of the Trial Chamber, noted that '[t]he Prosecutor's Request is premised on the assumption that […] this Chamber has decided to follow the steps taken by Trial Chamber V(a) in the *Ruto and Sang* case' and that '[t]his assumption amounts to a mischaracterisation of the procedural steps devised by this Chamber, which have been tailored to the specific circumstances of these proceedings'.[22] Noting that the *Ruto and Sang* case was the only relevant precedent in the jurisprudence of the Court, Judge Tarfusser considered it 'not necessary to take a position either as to the standards adopted by Trial Chamber V(a) or to the application of those principles in the final decision in that case'.[23] Judge Tarfusser also noted the

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[18] Second Order on the Conduct of the Proceedings, para. 10.
[19] Urgent Prosecution's motion seeking clarification on the standard of a "no case to answer" motion, 8 June 2018, ICC-02/11-01/15-1179 ('Prosecutor's Motion Seeking Clarification'), paras. 1, 31.
[20] Prosecutor's Motion Seeking Clarification, paras 3, 7.
[21] Prosecutor's Motion Seeking Clarification, paras 6, 31.
[22] Decision on "Urgent Prosecution's motion seeking clarification on the standard of a 'no case to answer' motion", 13 June 2018, ICC-02/11-01/15-1182 ('Decision on Prosecutor's Motion Seeking Clarification'), para. 11.
[23] Decision on Prosecutor's Motion Seeking Clarification, para. 13.

submissions by the Defence, according to which the Second Order on the Conduct of the Proceedings was 'clear'.[24]

14. From the above statement, it appears that Judge Tarfusser considered that the standard of proof that had been set out in the *Ruto and Sang* Decision No. 5 would not be applied to the assessment of the no case to answer motions in the case against Mr Gbagbo and Mr Blé Goudé, as the procedure in the case at hand had been 'tailored to the specific circumstances'.[25] However, he failed to set out the applicable standard, on the basis that the procedure was 'clear' to the Defence teams.[26] That the standard apparently was not 'clear' to the Prosecutor did not seem to concern Judge Tarfusser.

15. Thus, when, on 23 July 2018, Mr Gbagbo and Mr Blé Goudé filed their respective no case to answer motions,[27] and on 10 September 2018, the Prosecutor and the OPCV filed their respective responses,[28] the standard of proof against which the motions had been assessed had not been clarified by the Trial Chamber, despite an express request by the Prosecutor for such clarification.

16. Nor was the standard of proof clarified in the 15 January 2019 Decision, by which the Trial Chamber, by majority, Judge Herrera Carbuccia dissenting, acquitted the two accused of all charges.[29] As noted above, during the hearing at which the decision was delivered, Judge Tarfusser stated on behalf of the majority that the Prosecutor had 'failed to satisfy the burden of proof to the requisite standard as foreseen in Article 66 of the Rome Statute'.[30] He did not, however, clarify what that standard was or how the

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[24] Decision on Prosecutor's Motion Seeking Clarification, para. 15.
[25] Decision on Prosecutor's Motion Seeking Clarification, para. 11.
[26] Decision on Prosecutor's Motion Seeking Clarification, para. 15.
[27] *See* Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, 25 September 2018, ICC-02/11-01/15-1199-Corr; Corrigendum to the 'Blé Goudé Defence No Case to Answer Motion', 28 September 2018, ICC-02/11-01/15-1198-Corr-Red (corrigendum of a confidential version notified on 6 August 2018).
[28] *See* Prosecution's Response to Defence No Case to Answer Motions, 10 September 2018, ICC-02/11-01/15-1207; Response to Defence Submissions on the specific factual issues for which the evidence presented could be insufficient to reasonably support a conviction (ICC-02/11-01/15-1198-Conf and ICC-02/11-01/15-1199), 28 September 2018, ICC-02/11-01/15-1206-Red (confidential version notified on 10 September 2018).
[29] 15 January 2019 Decision, p. 1, line 15 to p. 5, line 7.
[30] 15 January 2019 Decision, p. 4, lines 15-16.

two judges in the majority had applied it. Instead, the Trial Chamber indicated that it would 'provide its full and detailed reasoned decision as soon as possible'.[31]

17. Further confusion as to the applicable standard of proof was added on the following day, 16 January 2019. On that day, the Trial Chamber issued an oral decision and dismissed, by majority, Judge Herrera Carbuccia dissenting, the application of the Prosecutor filed under article 81(3)(c)(i) of the Statute, requesting that the Trial Chamber finds that there are exceptional circumstances to maintain the detention of the accused, and that conditions be placed on the release of Mr Gbagbo and Mr Blé Goudé; should the application be denied, she requested the stay of the unconditional release of the accused, pending the Appeals Chamber's decision on suspensive effect of the Prosecutor's appeal.[32] When delivering the oral decision on the Prosecutor's application, Judge Tarfusser stated, on behalf of the majority, *inter alia*, that the Prosecutor's evidence against Mr Gbagbo and Mr Blé Goudé had been 'exceptionally weak'.[33] With reference to a statement contained in Judge Herrera Carbuccia's dissenting opinion to the decision to acquit of the previous day, in which she had suggested that the majority had applied the beyond reasonable doubt standard, Judge Tarfusser observed that:

> [T]he dissenting judge is mistaken in stating that the majority has acquitted Mr Gbagbo and Mr Blé Goudé by applying the beyond a reasonable doubt standard. The majority limited itself to assessing the evidence submitted and whether the Prosecutor has met the onus of proof to the extent necessary for warranting the Defence to respond. Adopting this standard, it is not appropriate for these proceedings to continue.[34]

18. It is noteworthy that, once again, the judges of the majority did not clarify which standard of proof they had applied when determining the no case to answer motions. The only indication as to the standard of proof was a negative one: that the judges of the majority had *not* applied the beyond reasonable doubt standard contained in article 66(3) of the Statute.

19. Even when the two judges subsequently filed extensive opinions setting out their reasons for having acquitted Mr Gbagbo and Mr Blé Goudé, the standard of proof they

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[31] 15 January 2019 Decision, p. 3, line 18.
[32] Transcript of hearing of 16 January 2019, ICC-02/11-01/15-T-234-ENG ('16 January 2019 Decision').
[33] 16 January 2019 Decision, p. 4, line 5.
[34] 16 January 2019 Decision, p. 4, lines 11-16.

had applied remained unclear. In particular, it appeared that Judge Henderson and Judge Tarfusser did not share a common understanding as to the standard of proof; in addition, certain statements of Judge Tarfusser appeared to be in direct contradiction of his earlier statements made on 16 January 2019, casting further doubt on whether there was an agreed standard of proof between the judges forming the majority.

20. The first section of Judge Henderson's Reasons is devoted to the '"No case" standard'.[35] Here, Judge Henderson explained that, when faced with a no case to answer motion, the 'key question to be determined in these proceedings, with respect to each charge, is whether the Prosecutor has submitted sufficient evidence in support of that charge such that a reasonable chamber could convict'.[36] He noted that, 'as initially adopted by Trial Chamber V(A), trial chambers should not assess reliability and credibility but should consider the Prosecutor's evidence at its highest – relying on an assumption that the Prosecution's evidence is reliable and credible – unless the evidence is "incapable of belief" on any reasonable view',[37] but that it was subsequently found by the same Trial Chamber that 'it makes little sense to completely prevent trial judges from assessing the quality of the evidence at the no case to answer stage'.[38] He also noted that the resulting decision was 'not a formal judgment of acquittal on the basis of the application of the beyond reasonable doubt standard in accordance with article 74 of the Statute', although 'it has an equivalent legal effect in that the accused is formally cleared of all charges and cannot be tried again for the same facts and circumstances'.[39]

21. Thus, Judge Henderson, while taking the approach initially endorsed in the *Ruto and Sang* case (namely, the one set out in the Decision No. 5) as the starting point, sought to apply a somewhat modified standard of proof to the no case to answer motions, not necessarily taking the Prosecutor's evidence 'at its highest', but allowing for the assessment of reliability and credibility of the evidence. Importantly, Judge

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[35] Reasons of Judge Geoffrey Henderson, 16 July 2019, ICC-02/11-01/15-1263-AnxB-Red ('Judge Henderson's Reasons'), paras 1-9.
[36] Judge Henderson's Reasons, para. 2.
[37] Judge Henderson's Reasons, para. 3, *referring to* Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure, 3 June 2014, ICC-01/09-01/11-1334, para. 24.
[38] Judge Henderson's Reasons, para. 3, *referring to* Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11-2-27-Red-Corr (confidential version notified the same day), Reasons of Judge Fremr, para. 144; Reasons for Judge Eboe-Osuji, paras 105-125.
[39] Judge Henderson's Reasons, para. 17.

Henderson never stated that the applicable standard of proof at the no case to answer stage was the beyond reasonable doubt standard; rather, by noting that the impugned decision was 'not a formal judgment of acquittal on the basis of the application of the beyond reasonable doubt standard', Judge Henderson seems to reject the beyond reasonable doubt standard.

22. In contrast, after having stated that no case to answer proceedings 'have no place in the statutory framework of the Court and are unnecessary as a tool to preserve the interests and rights they are meant to serve',[40] Judge Tarfusser stated that '[t]here is only one evidentiary standard and there is only one way to terminate trial proceedings', namely the '*beyond reasonable doubt*' standard 'set forth in article 66, paragraph 3' of the Statute.[41] This statement stands in direct contradiction with Judge Tarfusser's statement at the hearing of 16 January 2019, namely that the judges of the majority had *not* applied the beyond reasonable doubt standard. Judge Tarfusser's statement seems also inconsistent with the Second Order on the Conduct of the Proceedings, in which the Trial Chamber directed counsel for Mr Gbagbo and Mr Blé Goudé to file submissions addressing 'the specific factual issues for which, in their view, the evidence presented by the Prosecutor is insufficient to sustain a conviction' and 'why there is insufficient evidence which could be reasonably support a conviction'.[42] If anything, these statements indicated that the standard that the Trial Chamber would apply was *not* the beyond reasonable doubt standard.

23. Notably, it is also clear from Judge Tarfusser's Opinion that, although Judge Tarfusser purported to agree with 'the factual and legal findings' contained in Judge Henderson's Reasons and with the overall conclusion to acquit the two accused,[43] the two judges did not have the same understanding of the applicable standard for the no case to answer proceedings. While Judge Tarfusser suggested that the applicable standard was the beyond reasonable doubt standard, Judge Henderson never expressed, during the proceedings or in his reasons, that he endorsed such standard. To the contrary,

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[40] Opinion of Judge Cuno Tarfusser, 16 July 2019, ICC-02/11-01/15-1263-AnxA ('Judge Tarfusser's Opinion') para. 65.
[41] Judge Tarfusser's Opinion, para. 65 (emphasis in original).
[42] *See supra*, para. 11.
[43] *See* Judge Tarfusser's Opinion, para. 1.

as noted above, he seems to have considered that this standard was *not* applicable at this stage.

24. In sum, not only was the standard of proof not clarified before the Trial Chamber decided to acquit Mr Gbagbo and Mr Blé Goudé or when it issued the 15 January 2019 Decision, but the uncertainty also continued once Judge Henderson and Judge Tarfusser filed their opinions explaining their reasons for the acquittals. The latter indicate that the two judges had a different view as to whether the beyond reasonable doubt standard was applicable.

25. Counsel for Mr Gbagbo and Mr Blé Goudé argue that the two judges agreed on the standard of proof set out in Judge Henderson's Reasons,[44] and that Judge Tarfusser's views on the beyond reasonable doubt standard merely constitute '*obiter dicta*'.[45] I am not persuaded by these arguments. In light of the procedural history summarised above, it is clear that there was no agreement between the judges. The lack of agreement pertained to an essential issue for the determination of the no case to answer motions, namely the applicable standard of proof. The standard of proof is the lens through which the judges of a chamber assess the evidence and, depending on the standard, the result of the evidentiary analysis may differ.[46] Therefore, a chamber has to identify and agree on the standard of proof. Clarity as to the applicable standard of proof is also essential for the parties and participants, as it will allow them to understand the reasoning and findings of the chamber's decision. And clarity as to the applicable standard is required for the Appeals Chamber, as it will inform the Appeals Chamber's review of the first-instance chamber's factual findings.

26. In this regard, I note the *Ayyash et al.* case, to which the Prosecutor has referred. In that case, the Trial Chamber of the Special Tribunal for Lebanon (the 'STL') issued

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[44] Defence Response to the 'Prosecution Document in Support of Appeal', 9 March 2020, ICC-02/11-01/15-1315-Red (confidential version notified on 6 March 2020) ('Mr Blé Goudé's Response'), para. 180; Defence Submissions pursuant to the "Decision rescheduling, and directions on, the hearing before the Appeals Chamber" (ICC-02/11-01/15-1338), 22 May 2020, ICC-02/11-01/15-1350-tENG, paras 49-50.

[45] Mr Blé Goudé's Response, para. 206; *see also* 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, 13 March 2020, ICC-02/11-01/15-1314-Red-tENG (confidential version dated 6 March 2020), paras 204-206.

[46] *See infra*, Section III on material effect.

an 'interim' oral decision, finding that there was not 'sufficient evidence' meeting the requisite standard to convince the Trial Chamber that Mr Badreddine, one of the accused in that case, had deceased and, consequently, that the proceedings against him should be terminated.[47] The STL Trial Chamber failed, however, to specify the standard of proof it had applied to reach its conclusion. On appeal, noting that 'neither the Tribunal's Statute […] nor its Rules specify the standard of proof to which a Chamber must be satisfied of an accused's death', the STL Appeals Chamber considered it 'indisputable that a Chamber cannot properly determine whether a fact or state of affairs exists without applying the relevant standard of proof to that determination'.[48] Although it acknowledged that 'it is a common and uncontroversial practice for a trial chamber not to set out expressly the standard of proof it applies, especially when delivering an oral decision', it found that 'the Trial Chamber's subsequent conduct in court evinces that such a standard was lacking in its "mind" when it made its determination'.[49] The STL Appeals Chamber noted that, 'at the time [the STL Trial Chamber] made the relevant determination, [it] had not decided on a particular standard'.[50] It found that 'the Trial Chamber's failure to apply a standard of proof when making its factual determination regarding Mr Badreddine's death constitutes an error of law'.[51]

27. The same applies in the case at hand. At the time the Trial Chamber issued its 15 January 2019 Decision acquitting Mr Gbagbo and Mr Blé Goudé of all the charges against them, there was no clarification as to the standard of proof which the two judges forming the majority had applied to the assessment of the evidence at the no case to answer stage of the proceedings. The written reasons that were subsequently filed in July 2019, rather than demonstrating that the two judges had actually a common

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[47] STL, Appeals Chamber, *The Prosecutor v. Salim Jamil Ayyash et al.*, Decision on Badreddine Defence Interlocutory Appeal of the 'Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings', 11 July 2016, STL-11-01 ('*Ayyash et al*. Appeal Decision'), para. 4.
[48] *Ayyash et al.* Appeal Decision, paras 37-38.
[49] *Ayyash et al.* Appeal Decision, para. 39. According to the STL Appeals Chamber, even after having issued the oral decision, the questions and comments on the applicable standard from the judges of the STL Trial Chamber during the subsequent hearing showed that they had not yet agreed as to the standard of proof.
[50] *Ayyash et al.* Appeal Decision, para. 40.
[51] *Ayyash et al.* Appeal Decision, para. 41.

understanding of the standard of proof, disclosed the contrary: that there was no such common understanding.

28. A trial chamber must have clarity as to the applicable standard of proof prior to determining no case to answer motions. In the absence of clarity – and agreement – as to the standard of proof, the basis for granting or rejecting the no case to answer motions will remain unclear. The lack of clarity as to the standard of proof also impacts on the transparency and predictability of proceedings. It must be noted in this context that the standard of proof at the end of the trial is spelt out in the Statute: article 66(3) of the Statute provides that, '[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt'. In contrast, no case to answer proceedings are not expressly provided for in the legal texts of the Court and the applicable standard of proof is therefore not spelt out. Thus, if a trial chamber decides to entertain a no case to answer motion, its failure to clearly define and agree on the standard of proof, before deciding on such motions, amounts to an error of law.

29. I note further that, in addition to the absence of agreement on the applicable standard of proof, the two judges in the majority had different views also on the legal basis for the no case to answer decision and on the applicability of such proceedings at the Court. Judge Henderson was of the view that the legal basis for the decision on no case to answer motions can be found in article 66(2) of the Statute, and not article 74.[52] In contrast, while Judge Tarfusser agreed on initiating the no case to answer proceedings,[53] he later put into question the applicability of the no case to answer procedure at the Court, and stated that article 74 of the Statute is the only legal basis to end trial proceedings.[54]

30. In light of the foregoing, I am of the view that each of the above disagreements by the judges forming the majority constitute errors of law. In this regard, while the Prosecutor advances further arguments on other evidentiary standards (*inter alia*, the Trial Chamber's approach to corroboration) and six examples stemming from Judge Henderson's Reasons, I consider that it is unnecessary, for the reason above, to discuss

[52] Judge Henderson's Reasons, paras 15, 17.
[53] *See supra*, para. 11.
[54] Judge Tarfusser's Opinion, para. 65.

these remaining arguments. In the following section, it will be assessed whether these legal errors materially affected the decision of acquittals.

III. MATERIAL EFFECT OF THE TRIAL CHAMBER'S ERRORS

31. The Prosecutor contends that the Trial Chamber's failure to define and agree on the standard of proof 'vitiated both the process of decision-making and thus the decision itself'.[55] In the Prosecutor's view, this is because, '[w]hen the process of adjudication is tainted, so is the decision to acquit'; 'this decision […] can hardly be considered reliable or to have led to a valid legal outcome at all'.[56] She submits that such lack of standard at the moment of the 15 January 2019 invalidated the acquittal,[57] and that this meets 'the impact test of "materially affecting the decision" at the ICC'.[58]

32. In this regard, the Prosecutor submits, by reference to the *Ayyash et al.* case before the STL, that the Trial Chamber's legal error to direct itself to agreed evidentiary standards 'is sufficient by itself to invalidate the decision'.[59] According to the Prosecutor, this means that the Trial Chamber's 'legal error (with impact) could lead to reversal on appeal on its own (without any further error)'.[60] The Prosecutor argues that the 'Majority's legal error "materially affected" the decision' because its ambiguity on the standard of proof 'vitiated both the process of decision-making and thus the decision itself'.[61]

33. The Prosecutor also argues that the 'the Majority's procedural error "materially affected" the decision'.[62] She contends that, since the error consists of the Trial Chamber's 'failure to adopt a course of action (rather than any specific actions it undertook *per se*)', it is sufficient for the Prosecutor 'to highlight the Majority's legally and procedurally erroneous approach to seek reversal of the verdict'.[63]

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[55] Prosecutor's Response to the Appeals Chamber's Questions, para. 35.
[56] 22 June 2020 Appeal Hearing, p. 73, line 24 to p. 74, line 1.
[57] Prosecutor's Appeal Brief, paras 142, 151.
[58] Prosecutor's Response to the Appeals Chamber's Questions, para. 35.
[59] Prosecutor's Appeal Brief, paras 147-151, 254.
[60] Prosecutor's Response to the Appeals Chamber's Questions, para. 34.
[61] Prosecutor's Response to the Appeals Chamber's Questions, para. 35.
[62] Prosecutor's Response to the Appeals Chamber's Questions, para. 36.
[63] Prosecutor's Appeal Brief, para. 256; Prosecutor's Response to the Appeals Chamber's Questions, para. 36.

34. I am persuaded by the Prosecutor's submissions as to the material effect of the identified errors. The second limb of article 83(2) of the Statute provides:

> If the Appeals Chamber finds […] that *the decision or sentence appealed from was materially affected by error of fact or law or procedural error*, it may: (a) Reverse or amend the decision or sentence; or (b) Order a new trial before a different Trial Chamber.[64]

35. The Appeals Chamber has held that, '[a] judgment is "materially affected by an error of law" if the Trial Chamber "would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error"'.[65] Similarly, a judgment is materially affected by a procedural error if it is demonstrated 'that, in the absence of the procedural error, the judgment would have substantially differed from the one rendered'.[66]

36. It is noteworthy that the Appeals Chamber has considered that, in determining whether, without the error, the first-instance chamber would have issued a 'substantially different decision', not only the outcome of the decision is determinative, but also the basis to reach that outcome.[67] In other words, even where the result of a decision might have remained unchanged, had it been reached on the basis of the correct legal assessment or without the procedural error, the error nevertheless would have materially affected the impugned decision.[68] The Appeals Chamber has also found that an error of law regarding a chamber's application of the standard of proof amounts to an error that materially affects its decision.[69]

37. In this regard, I again recall the STL Appeals Chamber's finding in the *Ayyash et al.* case. Having found that 'the Trial Chamber's failure to apply a standard of proof

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[64] Article 83(2) of the Statute (emphasis added).
[65] *Bemba et al* Appeal Judgment, para. 90, *quoting* *Lubanga* Appeal Judgment, paras 18-19 and *Ngudjolo* Appeal Judgment, para. 20.
[66] *Bemba et al* Appeal Judgment, para. 99, *quoting* *Lubanga* Appeal Judgment, para. 20 and *Ngudjolo* Appeal Judgment, para. 21.
[67] *See* Appeals Chamber, *Situation in The Democratic Republic of The Congo*, 'Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"', 13 July 2006, ICC-01/04-169 ('*DRC* Appeal Judgment'), para. 84.
[68] *See* *DRC* Appeal Judgment, para. 84.
[69] *See* Appeals Chamber, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, 'Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"', 3 February 2010, ICC-02/05-01/09-73, para. 41.

when making its factual determination regarding Mr Badreddine's death constitutes an error of law', the STL Appeals Chamber found that this error of law 'invalidates the Trial Chamber's factual determination and thereby the Impugned Decision'.[70]

38. The same considerations apply to the case at hand. Without a defined and agreed standard of proof in mind, the judges of the Trial Chamber were unable to make proper and reliable factual determinations at the moment of entering the acquittals. As noted by the Prosecutor, the present case is in some respects even more problematic than the *Ayyash* case.[71] Not only did Judge Herrera Carbuccia disagree with the assessment of the evidence by the two other judges of the Trial Chamber,[72] but there was a disagreement within the majority as to the applicable standard of proof.[73] Without an agreed standard of proof, it was impossible for them to validly enter findings on the evidence.

39. It is therefore irrelevant for the purpose of determining whether the identified errors had material effect to speculate whether, given their views as to the overall weakness of the Prosecutor's evidence,[74] Judge Tarfusser and Judge Henderson might have acquitted Mr Gbagbo and Mr Blé Goudé even if they had defined and agreed on the standard of proof before 15 January 2019. Such a decision to acquit, based on a properly defined and agreed standard of proof, would have been substantially different from the decision issued in the case at hand, where the factual findings entered cannot be relied upon, given the failure to define and agree upon the applicable standard of proof.

40. Accordingly, I am of the opinion that, in the instant case, the Trial Chamber's failure to define and agree on the standard of proof at the moment of entering the

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[70] *Ayyash et al.* Appeal Decision, para. 41.
[71] Prosecutor's Appeal Brief, para. 150.
[72] Dissenting Opinion of Judge Herrera Carbuccia to the Chamber's Oral Decision of 15 January 2019, 15 January 2019, ICC-02/11-01/15-1234, paras 40, 41 (noting that the applicable 'standard is that of "whether there is evidence on which a reasonable Trial Chamber could convict"' and that a no case to answer motion must be 'expeditious and superficial (*prima facie*)'). *See also*, Dissenting Opinion of Judge Herrera Carbuccia, 16 July 2019, ICC-02/11-01/15-1263-AnxC-Red (confidential version notified the same day), paras 26-29 (noting that '[a]n assessment of the credibility of evidence at this stage of the proceedings is exceptional and may be made only where the evidence in question is incapable of belief by any reasonable Trial Chamber and, even then, with certain parameters'.)
[73] *See supra*, paras 6-30.
[74] *See* 16 January 2019 Decision, p. 4, lines 3-5. *See also* Judge Henderson's Reasons, *e.g.*, paras 1, 2 (in Preliminary Remarks), 36, 2038; Judge Tarfusser's Opinion, *e.g.*, paras 3, 4, 73-74.

acquittals materially affected its decision to acquit Mr Gbagbo and Mr Blé Goudé. As a consequence, I would uphold the appeal of the Prosecutor on the second ground.

IV. APPROPRIATE REMEDY

41. Under article 83(2) of the Statute, having concluded that a decision was materially affected by an error of law or procedure, the Appeals Chamber may:

(a) Reverse or amend the decision or sentence; or

(b) Order a new trial before a different Trial Chamber.

42. I note that the remedy of 'mistrial' requested by the Prosecutor is not among those provided for in article 83(2) of the Statute. It has also remained unclear throughout the appellate proceedings what precisely the Prosecutor considered the procedural effect of such a declaration of a 'mistrial' would be. I therefore consider that a declaration of a mistrial would not be an appropriate remedy in the case at hand.

43. It is also of note that, while, theoretically, it might be considered whether following a successful appeal against a decision on a no case to answer motion, the trial should simply continue before the original trial chamber, there would be legal and practical obstacles for this to happen in the present case (leaving aside the fact that such a possibility is also not foreseen in article 83(2) of the Statute). First, it is important to note that the two judges of the majority have stated their opinions on the Prosecutor's evidence in the case in no uncertain terms (arguably, at least one of them, applying the standard of 'beyond reasonable doubt'). Thus, the Prosecutor – as well as the participating victims – could rightfully apprehend that the majority of the Trial Chamber has already formed a definitive view on the case, rendering any further proceedings before the same chamber futile. Furthermore, it is of practical significance that one of the judges of the Trial Chamber has already left the Court, while the mandates of the two other judges are about to expire. Thus, continuation of the trial before the same trial chamber seems to be both legally and practically impossible.

44. In such circumstances, I am of the view that the most appropriate remedy is to order a new trial before a newly constituted trial chamber. In this regard, while I do not consider it necessary in this opinion to delve into the questions of scope and parameters of such new trial, I note that some of the evidence already collected, especially testimonial evidence, could be used if the requirements are met. Rule 68(1) of the Rules

of Procedure and Evidence (the 'Rules') provides that a trial chamber may, under certain conditions 'allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused'. In particular, rule 68(2) of the Rules states that '[i]f the witness who gave the previously recorded testimony is not present before the Trial Chamber', the chamber has the discretion to allow the introduction of the recorded testimony if (a) '[b]oth the Prosecutor and the defence had the opportunity to examine the witness during the recording' or (b) it 'goes to proof of a matter other than the acts and conduct of the accused'.

V. CONCLUDING REMARKS

45. In light of the foregoing considerations, I would uphold the Prosecutor's appeal on the second ground and consider it appropriate to order a new trial before a different trial chamber.

46. With regard to any remaining arguments raised by the Prosecutor in the present appeal, *inter alia*, those related to the first ground of appeal, I agree with the majority of the Appeals Chamber that the no case to answer procedure can form a part of trial proceedings before the Court and that, where a decision of acquittal is entered further to such proceedings, article 74 of the Statute applies.[75] Unlike the majority, I consider the provisions of article 74 mandatory.

47. I agree with Judge Hofmański regarding the Trial Chamber's error in failing to comply with the requirement of a decision 'in writing' under article 74(5), and the materiality of such error.[76]

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[75] Judgment on the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, 31 March 2021, ICC-02/11-01/15-1400, ('Judgment of the Appeals Chamber'), paras 102-124. With regard to the standard of proof, mentioned in paragraph 111, I consider however that standard of the proof as set out by the Majority is too high and that the appropriate standard applicable at the no case to answer proceedings requires trial chamber to conduct a *prima facie* review of the evidence presented by the Prosecutor, taking the evidence 'at its highest, as explained in Judge Ibáñez's Dissenting Opinion. *See* Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal of the Prosecutor against the oral verdict of Trial Chamber 1 of 15 January 2019 with written reasons issued on 16 July 2019, 31 March 2021, ICC-02/11-01/15-1400-Anx4, ('Judge Ibáñez's Dissenting Opinion') paras 6, 318-338.

[76] Separate Concurring Opinion of Judge Piotr Hofmański in relation to the Appeals Chamber's 'Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions' of 31 March 2021, 31 March 2021, ICC-02/11-01/15-1400-Anx3, paras 4-10.

48. Finally, to further clarify and summarise my view, I consider that that when a trial chamber decides to acquit an accused at this stage, it should assess all the evidence adduced at that stage, based on an agreed standard of proof and in compliance with article 74 of the Statute, whose provisions are mandatory. A trial chamber should issue one decision, containing the majority and minority opinions. The decision should be in writing and if it cannot be read wholly, at least a summary of it should be read and the full judgment issued within a reasonable time. The majority judges failed to apply and uphold the provisions of article 74 of the Statute when issuing the 15 January 2019 Decision. They failed to agree on the applicability of the no case to answer procedure, how and whether to assess all the evidence at this stage, and what the applicable standard of proof was. To that extent, I agree with Judge Ibáñez's dissent.[77] In effect, there was no majority decision. Except for failure to issue a written judgment or a summary thereof, the remaining errors were material and vitiated the judgment.

49. I consider that, in addition to the errors found above, these errors would also materially affect the Trial Chamber's decision to acquit Mr Gbagbo and Mr Blé Goudé.

Done in both English and French, the English version being authoritative.

Judge Solomy Balungi Bossa

Dated this 31st day of March 2021

At The Hague, The Netherlands

[77] *See* in particular Judge Ibáñez's Dissenting Opinion, paras 3, 5, 154, 156, 162-165, 183, 188-190, 218-221, 223-235.