International Criminal Court
Appeals Chamber
Situation: Republic of Côte d'Ivoire
In the case of The Prosecutor v. Laurent Gbagbo and
Charles Blé Goudé - ICC-02/11-01/15
Presiding Judge Chile Eboe-Esuji, Judge Howard Morrison,
Judge Piotr Hofmański, Judge Luz del Carmen Ibáñez Carranza, and
Judge Solomy Balungi Bossa
Appeals Hearing - Courtroom 1 via Interactio
Tuesday, 23 June 2020
(The hearing starts in open session at 10.08 a.m.)
THE COURT OFFICER: [10:08:33] All rise.
The International Criminal Court is now in session.
Please be seated.
PRESIDING JUDGE EBOE-OSUJI: [10:09:03] Thank you very much and welcome back everyone.
We will not be taking new appearances, we will assume we remain as we were yesterday. Unless there's any change in appearances, someone can raise their hand electronically so we can take a note of that.
Yes, I see Ms Brady.
Can you please, on the record, reflect any change in appearances.
MS BRADY: [10:09:53] Your Honours, the appearances are the same with one exception, Mr Guariglia will only be joining us from the second session today.
Thank you.
PRESIDING JUDGE EBOE-OSUJI: [10:10:04] Thank you very much.

So no more hands raised, so the appearances remain as they were.
Now, announcements. Today, counsel for victims will kick off submissions on ground 2. After that, counsel for Gbagbo, followed by counsel for Blé Goudé in the usual order.
Then after the submissions of counsel for Mr Blé Goudé, we will take the first segment of Judges' questions at that point, instead of waiting all the way till the end for Judges' questions to come. We believe it's more convenient to do it that way at this stage.
So questions from the Judges will come -- the first segment of questions from Judges will come at the end of submissions from Mr Knoops.
So we then, having got that announcement out of the way, we will proceed with our hearing.
Ms Massidda, it's your turn now to submit on ground 2.
MS MASSIDDA: [10:11:29] Thank you very much, your Honour.
I will proceed with our submissions on ground 2.
The majority failed to identify the standard of proof applicable to a no case to answer motions before issuing its 15 January 2019 oral decision. As a result, the majority erred in law and failed to articulate a clear approach in assessing the sufficiency of the evidence for the purposes of a no case to answer motion.
Further, Judge Tarfusser's opinion and Judge Henderson's reasons provided *ex post facto* two separate and conflicting reasoning, including a separate and conflicting standard of review for vacating the charges against Mr Gbagbo and Mr Blé Goudé.
The majority's failure to set a clear defined standard of proof for a no case to answer proceedings amounts to a legal and procedural error, which, in turn,

precluded the proper assessment of the evidence before the Trial Chamber.
It is a common principle that a chamber cannot properly determine whether a fact or state of affairs exists without applying the relevant standard of proof to that determination. In addition, in the absence of a clear provision within the Court's legal texts specifying the standard for a no case to answer motions, it was the Chamber's duty to inform all participants on how the relevant proceedings will unfold in order to achieve certainty.
The overall failure of the Trial Chamber in dealing with a no case to answer proceedings, including the failure to provide notice to all participants, is mainly rooted on its inability to agree on the applicable standard and to properly articulate it before and when issuing the decision.
In addition, the lack of notice about the applicable standard is also a standalone error, which further impacts on the fairness of the proceedings and on the outcome of the decision.
The procedural history of this case shows that the majority reached its decision on whether or not the Prosecution presented sufficient evidence to continue with the trial without knowing which standard of proof it was to apply.
If such a standard was ever clarified in the respective minds of the two Judges forming the majority, this was only after the 15 January 2019 oral decision had been issued, and at which point the determination vacating the charges against the two defendants had already been made.
The individual effort made by Judge Tarfusser and Judge Henderson to define the applicable standard of proof in the 16 July 2019 reasons cannot remedy the failure to apply a standard at the time the majority took its decision putting an end to the trial.

In reading the three annexes supposed to form the basis for the 15 January 2019 oral decision, it is clear that the three Judges failed to agree on a common applicable standard. In fact, in the written reasons, the three Judges made no secret that they looked at the evidence against three different thresholds. While such fractured views are acceptable between the majority and the dissenting Judge, a disagreement of this magnitude within the majority itself is inadmissible. The majority cannot simply agree on the outcome of the proceedings, an acquittal, in this case, without agreeing on the reasons why the two defendants are to be acquitted and how to reach such a conclusion.

As a consequence of the Trial Chamber's failure to agree on one applicable standard, the evidence was not properly assessed and the decision is vitiated in toto and therefore invalid.

In this sense, the errors identified in the first and second grounds of appeal have a common root. The majority inability to agree - one, on the very nature of and legal basis for issuing the decision; two, on the standard to be applied; three, on the approach to the evidence; and four, on how to reach a verdict, resulted in the issuance of a decision which fails to meet the mandatory requirements of Article 74(5) of the Statute and that does not identify, articulate and apply a common standard of proof.

The majority inability to agree on any of said crucial aspects before orally acquitting the defendants led the two Judges of the majority - to borrow an expression used yesterday by the Prosecution - to basically put the cart before the horse. First acquit, and then find the reasons to do so.

The issuance *ex post facto* of the two separate and conflicting reasonings for vacating the charges demonstrates that the disagreement within the majority

remained and that the evidence assessment of Judge Henderson was moulded to justify the 15 January 2019 oral decision.

This led to apply what has been defined by distinguished scholar, Professor Darryl Robinson, as an, I quote, "unprecedented evidentiary standard," end of quote. Professor Robinson, in his interesting analysis of the written reasons, noted the approach to evidence of the majority as being hypersceptical to potentially incriminating evidence. Looking at each item in isolation, scrutinising it for any possible reason to disbelieve or downplay it, including freely inventing alternative narratives for each item, even without any evidentiary support.

In his analysis, Professor Robinson provides a list of definition of errors, which I would like to use before going to specific examples.

He indicates that the approach of a majority is characterised by a consistent speculative doubt, insofar evidence is discredited to mere possibilities and alternative narratives are not subjected to critical assessment of their plausibility.

Most importantly, there is no assessment of the cumulative implausibility of all of the different exonerating theories invented for each piece of evidence.

Credulity to exonerating evidence, insofar the hyperscepticism to incriminating evidence is combined with uncritical credulity toward potential exonerating evidence.

Pointillistic corroboration, a novel, narrow conception of corroboration focused on fine details and failing to apply standard reasoning tools for assessing patterns.

Rigid formalism over substance, insofar analytical categories are applied with

a rigidity beyond any national system. While a more standard approach considers context that may make a particular piece of evidence highly reliable. Fastidiousness, insofar evidence is rejected because of minor inconsistencies that are commonplace in human recollection or the reasoning insists on a level of critical tidiness and precision.

PRESIDING JUDGE EBOE-OSUJI: [10:21:47] Ms Massidda, a pace alert.

MS MASSIDDA: [10:21:57] Thank you very much, your Honour, I'm guided. Fastidiousness, insofar evidence is rejected because of minor inconsistencies that are commonplace in human recollection or the reasoning insists on a level of clinical tidiness and precision that may be unattainable, even from an omniscient perspective.

And finally, novel barriers for crimes against humanity, requiring proof of perpetrator motives, perceiving rape as opportunistic and unconnected to surrounding violations and inquiring whether all members of an organisation carry out inhumane acts at every opportunity.

And indeed, your Honours, in numerous instances there is no reasoning supporting many of the crucial factual findings of the Trial Chamber or said reasoning is flawed in several aspects. In fact, when existing, the reasoning shows a general lack of proper consideration of items of evidence that were relevant on their face, and as such should have been addressed.

The majority also failed to adopt a holistic approach to evidence. In particular, failing to assess individual items of evidence and/or specific facts in light of the elements in the entire record of the case and in the context of other key corroborating evidence and/or other significant facts.

For the purposes of explaining how the majority's acquittal is unreliable and

the decision unsound, I will briefly refer to five examples of findings in Judge Henderson's reasons and Judge Tarfusser's opinion that are the most relevant to the interest of the victims, borrowing from Professor Robinson the use of the categories of errors I have just quoted.

Starting with the 16-19 December 2010 rapes in connection with the RTI march, the first charged incident.

A rigid formalism led Judge Henderson, despite abundant evidence in this regard, to ignore the ethnical targeting of the Dioula women taking part at the march. Refraining from entering a finding of existence of a policy to rape female pro-Ouattara demonstrators on the basis of hearsay evidence - and, ignoring that direct evidence of formal adoption of a policy is not required - and that a policy need not to be formalised, but can be inferred from the manner in which the acts occurred.

In relation to the 25th February 2011 clashes on Boulevard Principal, the second charged incident, pointillistic corroboration and fastidiousness are clear in the failure by the majority to analyse the evidence in its entirety. Applying instead a fragmentary approach, and discarding evidence following an overly strict standard of proof expecting all witnesses to be entirely concordant as to the exact timing of the events.

The hypersceptical approach led Judge Henderson to speculating on the reasons for which the police shot on the civilians, mentioning in paragraph 1668 of his reasoning that the police, and I quote:

"Police shooting was [...] possibly aimed at averting a situation which endangered their own physical integrity rather than at attacking the civilians in front of them."

End of quote.

This alternative inference is not supported by the evidence in the record of the case, which to the contrary does not allow for such a conclusion.

In relation to the 3 March 2011 attack on the women's demonstration, the third charged incident, again, the hypersceptical approach cumulated with the speculative doubt led Judge Henderson to provide a set of alternative hypotheses in assessing the evidence as to the attribution of gunfire to the FDS convoy on that day.

Instead of proceeding to a rigorous assessment of the evidence, the analysis offers a different scenario in which there might have been armed individuals amongst the women's march and/or victims could have been injured by ricocheting bullets. However, there is not a single piece of evidence in the record of the case pointing to the presence of any armed person who could have fired against the crowd. Such a scenario remains fully unsupported and even contradicted by the evidence in the record, including eyewitness testimonies and forensic evidence showing that the wounds observed on the three victims - for which it was possible to recover the body and to do a positive DNA test - all appear to be injuries by bullets coming from left to right. Showing a clear pattern within them as they were all found to have remarkably similar injuries at the same level, neck and shoulder area.

In relation to the 17 March 2011 shelling of the Abobo market, the fourth charged incident, a rigid formalism over substance led Judge Henderson to completely disregard all eyewitness testimonies, disregarding them as hearsay. However, being inside the house - while the house itself is being shelled or being hit and losing consciousness during the bombing or even arriving at the

place of the incidents a few minutes after the shelling took place - does not turn any of the evidence provided into hearsay evidence.

Finally, in relation to the 12 April 2011 rapes in Yopougon, the fifth charged incident, despite finding that the crimes committed displayed a pattern of criminality motivated by ethnic animosity, Judge Henderson created a novel barrier for crimes against humanity in concluding at paragraph 1860 of his reasoning that, and I quote:

"[...] it is not possible to make a precise determination as to how many of the victims were killed because they were Dioula". End of quote.

And that the crimes committed by some perpetrators were opportunistic in nature and not aimed at harming Ouattara supporters.

So a conclusion was reached merely relying on two instances alleging a sudden change in mind of the perpetrators, that instead of leaving the house of the victims after the rape, decided to stay and also to kill.

This deduction is purely speculative. No reasonable trial chamber would have come to such a conclusion if the totality of the evidence had been correctly analysed, including the indication of mass graves containing numerous bodies of individuals of Dioula ethnicity; the fact that individuals of Guéré ethnicity showed to the attackers the Dioula houses; and the threats made to all Dioulas on the day preceding the attack.

Your Honours, these errors not only demonstrate that the majority decision is unsafe, but also show that the majority failed to properly assess the extent of the victimisation suffered. A determination that in light of the outcome of the trial was more than necessary to the hundreds of victims participating in this case.

Victims noted with deep regret that the decision did not even mention their targeting, sufferings and the dramatic consequences of the crimes on them, their families and their communities.

This concludes, your Honour, my submission on the second ground, which I submit should also be granted.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [10:33:02] Thank you very much, Ms Massidda.

Now we will take submissions from counsel for Mr Gbagbo.

MR ALTIT: [10:33:13](Interpretation) *Good morning Mr. President. Good morning, your honours.

It is Professor Jacobs who, and on behalf of the Defence team for Mr Gbagbo, will plead on the second ground of appeal.

PRESIDING JUDGE EBOE-OSUJI: [10:33:31] You may proceed, Mr Jacobs.

MR JACOBS: [10:33:35](Interpretation) Good morning, your Honours.

As we pointed out yesterday, it is striking to note that the 900-page *document on the reasons of Judge Henderson, endorsed by Presiding Judge Tarfusser is conspicuous by its absence from the Prosecution's appeal brief."

As I was saying yesterday, the Prosecutor himself concedes that he does not challenge the standard of proof adopted by Judge Henderson. *Going further, the Prosecutor says, in her appeal brief, that she is not requesting the Appeals Chamber, generally speaking, and I quote: Is not asking to apply the factual standard of review overall and declare on that basis that the majority's overall conclusions on the five charged incidents were unreasonable, such that it led to a miscarriage of justice warranting reversal of the acquittals. End of quote.

So to be clear, and in a word, the Prosecution is not challenging the acquittal as such. On that basis, it is difficult to make sense of where precisely the Prosecution is finding fault with the Judges in her second ground of appeal, because the Prosecution merely provides unsupported and unrelated assertions as to the errors supposedly committed by the Judges.

But if one examines these assertions one by one, it is easy to ascertain that they are devoid of any merit. Indeed, the Judges followed a normal no case to answer procedure which allowed everybody to express themselves with regard both to the standard of proof to be adopted at this stage of the proceedings and the merits of the case.

As to the standard of proof, the procedure followed by the Judges is that -- that any Judge would have followed. The parties and participants were able to express themselves at length - both in writing and during the hearings held in October and November 2018 - on their understanding of the standard of proof applicable to a no case to answer proceedings. And the Judges ruled on this question, *first of all by acquitting Gbagbo on 15 January 2019, and by explaining the standard they had adopted in their written reasons of July 2019.

Moreover, we should recall that this is more or less what happened in the Ruto case because during the no case to answer, the parties had expressed a disagreement as to the standard to adopt. The parties were heard and the issue was ruled upon in the Judges' decision dated the 5th of April 2016, exactly as happened in the case at bar.

Up against such a state of affairs, the Prosecutor is hard-pressed to be able to present the Appeals Chamber with examples of authorities in support of *her claim that the judges did not follow a normal procedure.

The only example the Prosecutor harks back to again and again in its written submissions is that of the Ayyash case. This jurisprudence, *as we have reiterated, is absolutely not transposable to the case at hand. Indeed, in the Ayyash case, *the record shows that the trial chamber asked for the parties and participants to provide their views on the standard of proof to be applied after - I repeat, after entering the decision.

This enabled the appeals chamber in the Ayyash case to come to the conclusion that the trial chamber had not clearly decided upon a standard of proof when reaching a decision. Here, the Prosecutor is incapable of demonstrating that at the time of entering the acquittal in January 2019, the Judges had not analysed the Prosecutor's evidence, according to a well-defined standard, *following a meticulous analysis of the said evidence in accordance with the standard set out in the reasons of July 2019, and which the Prosecutor does not challenge.

What is more, when presenting its evidence at trial before the Trial Chamber, the Prosecution was only too aware of the applicable standard of proof, that of beyond *reasonable doubt.

It is, therefore, logically in the light of this standard that the Prosecution presented its evidence at trial. At that time, knowledge of the no case to answer standard that the Chamber might have applied would have been of little use, especially if, by definition, the Prosecutor thought that its evidence could satisfy the higher standard - the standard of beyond *reasonable doubt - the Prosecutor would certainly have thought it could satisfy the lower standard, which is that applicable to a no case to answer proceedings.

Accordingly, the fact that a lower standard existed during the no case to

answer proceedings is of no import if a higher standard existed that the Prosecution applied. To claim as the Prosecutor does that it was unaware of the standard applied whilst it was presenting its evidence is therefore not convincing.

During the no case to answer proceedings themselves, the Prosecutor expressed herself to the full with regard to her evidence. She cannot claim that she was in any way limited by either the absence of any standard or the absence of any freedom.

The Prosecutor was granted all the necessary latitude during the no case to answer proceedings. In the 542 pages of its mid-trial brief and also in the 1,057 pages of its response to the no case to answer motion filed by the Defence, and during the three days of oral submissions in October 2018 to explain just how solid, reliable, authentic and corroborated its evidence is.

So the Prosecution was able to present its evidence as it deemed fit. This is why the Prosecutor is incapable of answering a very simple question put by the Defence since the outset of this appeal; namely, how would communicating a specific no case to answer standard of proof to the Prosecution beforehand have changed the manner in which the Prosecution presented its evidence during trial? Or the manner in which it defended its evidence during the no case to answer?

The simple question that the Defence is putting is, what more could the Prosecution have done?

The Prosecution has failed to answer this question in its appeal brief. Nor does the Prosecution answer this question in its responses to the Judges' questions. And yesterday, it continued to fail to respond to this question once

again in its oral submissions. This is not surprising as it was granted the most extreme latitude when presenting its evidence *to do so as they wished. Based on the fact that the Judges followed a normal no case to answer procedure and explained the standard they adopted to acquit Laurent Gbagbo in their written reasons of July 2019, the Prosecutor is attempting to draw an illogical conclusion, *or rather, an illogical consequence; namely, that the Judges entered an acquittal in January 2019 without having previously decided upon the standard to apply. Once again, the Prosecutor is impugning the motives of the majority in its appeal brief and it should be clearly pointed out that the Prosecutor presents no elements whatsoever in support of this allegation. Indeed, neither the fact that the standard of proof was discussed during the no case to answer itself, nor the fact that the Judges failed to *specifically explain in their judgment of January 2019 which standard they had adopted, can support the assertion that the Judges failed to adopt a specific standard at that moment in time. Nor could it support the assertion that they failed to analyse the evidence in the light of this standard.

Another point. The Prosecutor seems to be finding fault with the Judges for having failed to reach an agreement on the standard of proof applicable at the time of entering an acquittal. Such a position is a caricature of the analysis presented by Judge Tarfusser in his opinion with regard to the applicable standard of proof.

Therefore, even if Judge Tarfusser does indeed mention the standard of beyond *reasonable doubt as being applicable in theory to a no case to answer proceedings, he specifies, nevertheless, in his opinion, that in the matter at hand, he and Judge Henderson are entirely in agreement as to the manner in

which the evidence should be reviewed.

May I quote paragraph 67 of the separate opinion of Judge Tarfusser, I quote: "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." End of quote.

Judge Tarfusser then goes on to explain very clearly that in the matter at hand, the question of standard is of little practical consequence considering that the Prosecution evidence is so weak that it does not meet any standard of proof, even the lowest.

Judge Tarfusser explained in the clearest of manners, according to the standard applied, that is to say, the standard defined in Judge Henderson's written reasons, that there is nothing to support the Prosecution's allegations.

The majority Judges are, therefore, in complete agreement as they have, *in the instant case, followed the same approach, applied the same standard and reached the same conclusions.

There is, therefore, no need to dissect Judge Tarfusser's theoretical observations on the beyond all reasonable doubt standard. As Judge Tarfusser explains that in his opinion and according to Judge Henderson, the Prosecution has not met the lower standard; that adopted by the majority. If the Prosecution has failed to meet the lower standard, it has, by definition, failed to meet the higher standard, that of beyond all reasonable doubt.

Generally speaking, it must be underscored that what the Prosecutor attempts to portray as the expression of disagreement is an entirely routine practice in international criminal law. It is common for a judge in the majority to issue

a separate or concurring opinion clarifying subtle differences in the approach he or she would have taken to things.

Numerous examples of this practice are to be found among the Court's previous decisions, and the Defence has presented a number of them in its written responses to questions raised by the Appeals Chamber, *drawn from the Ruto and Lubanga cases and also from the Afghanistan situation.

In all of these examples, it is frequent for judges whilst -- it is apparent that it is a regular occurrence for judges ruling with the majority to express in a separate or concurring opinion slightly divergent views and, in some instances, theoretical disagreement as to the chamber's approach to a particular issue without calling into question the decision itself.

The Judges in this case at bar, therefore did nothing out of the ordinary and it is difficult to ascertain exactly what the Prosecutor reproaches them for.

Before moving on to my last point, that is, the issue of factual examples presented by the Prosecutor, I would like to say a brief word about the standard of proof to be applied during the no case to answer proceedings.

Firstly, as the Prosecutor does not challenge the standard of proof adopted by the majority, the issue of the definition of this standard of proof would seem, in our opinion, to exceed the scope of the present appeal.

Secondly, with regard to the Defence's position as to what the standard of proof for a no case to answer proceeding should be, I would refer you to the submissions that we made orally during the no case to answer and also to the response we provided to the questions of the Appeals Chamber Judges.

Here, we should simply note that the Prosecution is - and has done on each occasion in its written submissions - continuing to ignore the decision in the

Ruto case, in which both Judges Fremr and Eboe-Osuji clearly and convincingly outlined the reasons why it is the duty of the Judges to delve into the quality of the Prosecution evidence within a no case to answer proceedings.

Finally, a word on the factual examples presented by the Prosecutor as illustrating, according to her, the errors of law and procedure that the majority Judges are alleged to have committed.

Firstly, the Prosecutor does not demonstrate on a single occasion that the supposedly problematic application of the standard in the examples it provides was a result of the so-called gray area surrounding the question of this standard in no case to answer proceedings.

*The Prosecutor cannot demonstrate this, as there is no logical link between the no case to answer proceedings and the adoption of the standard, and the way it was applied in the July 2019's reasons. Secondly, if these factual examples in reality have no bearing upon the Prosecutor's second ground of appeal, this begs the question as to what purpose they actually serve. As the Prosecution admits itself, these examples cannot be used to challenge the acquittal.

Further still, the Prosecutor contends, and I quote, paragraph 260 of the Prosecutor's appeal brief, quote:

One cannot expect an appellant appealing against an almost 1,000-page decision of acquittal in a complex case such as this, involving multiple predicate factual findings, to demonstrate that the final disposition of the case would necessarily have been any different.

End of quote.

This is precisely what one does expect of an appellant; namely, that it shows the -- or demonstrates the errors and the impact of the errors *on a decision.

The scale of the decision on acquittal, which we should recall is a result of the scale of the Prosecutor's case, cannot serve as an excuse for the Prosecution to shirk its requirement, to conduct -- or to identify errors that would have affected the final decision. The Prosecution cannot subsequently, under the pretext that the exercise is too complicated, claim that legally speaking there was no need for it to be carried out.

Under such circumstances, the Appeals Chamber should ignore these factual examples in the context of the present appeal. If the Appeals Chamber were nevertheless to consider them, I have a number of rapid observations to make.

Firstly, the Prosecutor would have to file further submissions in order to meet its requirement to demonstrate, according to * the standard on factual errors, that these errors exist and affected the impugned decision. The Defence would then need to be in a position to respond to such submissions.

If we look at the factual examples themselves, and because of time it's difficult to come back to them in detail, it's difficult, namely, for me to answer the general observations of the Prosecution and the specific observations of the LRVs with regard to each incident, * within the time allocated to the Defence, but we can notice a number of approaches.

The Prosecution has isolated --

PRESIDING JUDGE EBOE-OSUJI: [10:59:19] Mr Jacobs, you have five minutes left.

MR JACOBS: [10:59:20] (Interpretation) -- certain factual conclusions. Thank you, your Honour.

The Prosecution isolates certain factual conclusions to give the impression that the Judges relied on just one item of evidence or one testimony to establish

a factual finding; whereas, the factual findings of Judges were based on an exhaustive analysis of the Prosecution evidence. We can take the example of sexual violence mentioned by the LRV at an earlier stage today. * She is trying to gloss over the fact that the analysis of these allegations was, on the contrary, undertaken in the context of the analysis of the existence of a common plan or an organisational policy. Far from analysing these allegations in an isolated manner, the Judges analysed them in a detailed manner, * over dozens of pages the allegations by the Prosecution as to the existence of a common plan in order to reach the conclusion that there was no evidence as to a common plan * or a policy.So to try and have people believe that the Judges isolated those questions and did not consider them or review them as part of the evidence * in its entirety is untrue.

* There are other practices employed by the Prosecution which, for example, frequently changes the narrative, including in its appeal brief, a practice that they used throughout the trial. Or the Prosecution goes on to say that the Judges supposedly ignored other evidence, other witness testimony, without ever mentioning which, and thereby suggesting that other items of evidence exist, which is not the case.

*In reality - and this will be my last point, your Honour - these examples seem to serve another purpose, that of luring the Appeal Judges onto a factual terrain, as if the Prosecutor's factual allegations could still be considered of any substance whatsoever. They did not survive the litmus test, that is, the test of the trial and the adversarial proceedings. The Prosecutor is merely referring to minor disagreements with the Trial Chamber, as if the trial had never occurred and arguing in the same way that they did on the first day of the trial - * The

Appeals Chamber cannot follow or validate the Prosecution in this approach, which involves ignoring the two years of trial and the comprehensive and exhaustive analysis of the evidence by the majority judges.

By way of conclusion, the Appeals Chamber simply cannot validate the Prosecution approach which involves using smokescreens to have us forget that, in reality, it is incapable of challenging the acquittal. Thank you.

PRESIDING JUDGE EBOE-OSUJI: [11:03:24] Thank you very much, Mr Jacobs.

We will now rise for our morning break for 45 minutes.

When we return, counsel for Mr Blé Goudé will make his submissions.

The Court will rise now.

THE COURT OFFICER: [11:03:48] All rise.

(Recess taken at 11.03 a.m.)

(Upon resuming in open session at 11.52 a.m.)

THE COURT OFFICER: [11:52:25] All rise.

Please be seated.

PRESIDING JUDGE EBOE-OSUJI: [11:52:56] Thank you very much, everyone.

Mr Knoops, it's your turn now.

MR KNOOPS: [11:53:11] Thank you, Mr President, your Honours.

The Defence for Mr Blé Goudé will entertain today three topics: First, the alleged lack of clarity of the applicable standard; secondly, some remarks about the standard of review applying to the six examples the Prosecution did mention in its submissions; and thirdly, the material effect of those alleged appeal grounds on the acquittal.

Mr President, the Prosecution asserts that one cannot apply the beyond reasonable doubt standard at the NCTA stage. However, as already found by the honourable Judges Fremr and yourself in the Ruto and Sang case, the decision number 5 in that case rendered, does not limit the Judges to terminate a weak case at the end of the Prosecution presentation of evidence, even if a reasonable trier of facts could have convicted under the traditional NCTA test. The submissions of the Defence of Mr Blé Goudé are fully consistent, as was also highlighted by your opinion in the NCTA case in Ruto and Sang, where in paragraph 112 you submitted that there can be no legitimate complaint from the Prosecution if the case is terminated following a thorough review of the Prosecution evidence that correctly reveals the case as too weak to continue. Furthermore, speaking about the Prosecution submitting that the Defence of Mr Blé Goudé were not to be consistent in its approach, in paragraph 126 of your opinion, your reasoning in the Ruto and Sang case, in the NCTA decision, your Honours submitted that no case to answer proceedings do not constrain the amplitude of statutory powers permitting the Chambers to do its own operation. And that is to say, your Honours, that the Court's statutory framework in no way binds Trial Chambers to apply one single standard of proof or approach to the assessment of the evidence at hand in a specific NCTA case of a trial. It is fully within the Trial Chamber's discretion to determine which test and approach it will apply which is tailor-made to the case before it. And of course that discretion is not absolute. It has to be administrated within the boundaries of Article 66 of the Statute.

Mr President, this is exactly what was done by the majority in this case. You find in the reasonings of Judge Henderson's majority opinion at paragraphs 4

till 7 exactly the various specific factors which he took into account which led the majority to apply the standard as it did apply, Mr President.

There were no constraints in line with the jurisprudence as to the evaluation of the quality of the evidence. The Chamber was confronted with a submission regime instead of an admission regime. There was no proper proceeding to correct the reliability and credibility of Article 68(2) witnesses and the Prosecution led evidence based on leading questions.

Also Judge Fremr found in paragraph 19 of his reasoning in the Ruto and Sang NCTA decision that indeed if the Chamber, after assessing the evidence in accordance with its standard, comes to the conclusion that after the Prosecution has finished its case, that it could not support a conviction beyond reasonable doubt, then it should enter an acquittal and therewith end the proceedings, even, your Honours, even if it were possible for a different trier of fact to be satisfied beyond reasonable doubt of the guilt of the accused on the basis of the same evidence.

Now, your Honours, the second part of the complaint of the Prosecution is that there was no clarity in the standard applied by the majority. This argument is, with all due respect, without foundation. Actually, the Prosecution in paragraph 32 of its answers to the Chamber expects from a Trial Chamber an evidentiary menu which it has and can comply with in order to arrive at a conviction. Because if you read paragraph 32 of the answers of the Prosecution, Prosecution submits, I quote:

"Knowing merely that the Prosecution must prove the accused's guilt beyond reasonable doubt or that [the] evidence must be 'sufficient' to sustain conviction is inadequate. Neither of these obvious propositions" still quoting

the Prosecution "reflects the ... nuanced aspects of any NCTA standards of proof ..."

Now, Mr President, law is not, as the Prosecution made an analogy yesterday, a game. Nowhere in the Prosecution's submissions do we see the affirmation that its evidence at the close of its case was capable at all of proving that Charles Blé Goudé was guilty beyond a reasonable doubt. For this an evidentiary menu, as apparently required based on the submission of the Prosecution, is not necessary. Mr President, and yet, the evidence at the close of its case was capable of proving that Charles Blé Goudé was guilty beyond a reasonable doubt was what you could have expected from a Prosecution after a trial which commenced over four years ago. A trial, by the way, whereby the Pre-Trial Chamber in the case of Mr Gbagbo already gave the Prosecution a first chance. As the Bench might recall, the Pre-Trial Chamber gave the Prosecution six months extra notice with a list of questions it had to comply with in order to have the charges confirmed. That was already a first chance, Mr President, in this case.

Still, even today, Mr President, your Honours, the Prosecution is unable to clearly state to the Chamber whether it will be able to successfully retry Mr Charles Blé Goudé because it knows it will run into the same procedural evidentiary stumbling block as it did in the first trial, namely a complete lack of evidence to sustain its case.

Mr President, it must be recalled that when the Chamber, the Trial Chamber, by the way, unanimously, with the consent of Ms Carbuccia Herrera, unanimously determined there was a basis to allow a no case to answer, the Prosecution had already closed its case. You find it in the second conduct of

proceedings order, paragraphs 1, 9 and 10 of the Trial Chamber.
Unanimously, Mr President, unanimously.
By then, the evidence should have passed every test, every test on an NCTA which could be imagined. By then the Prosecution should have passed any test. It closed its case. And the question was: What was the Prosecution waiting for? This menu to comply with like the Pre-Trial Chamber gave them on a plate when it suspended the confirmation of charges decision for six months?
Even, let us hypothetically say, had the Prosecution been given such an evidentiary menu card from the Trial Chamber for an NCTA, would this have changed the evidence, Mr President? No. The weakness was right from the start there and it didn't change. It became only weaker after the close of the Prosecution case of two years. It would not have changed one bit, Mr President. The complaint of the Prosecution is purely artificial.
And at this juncture I would like to rectify two erroneous submissions made by the Prosecution which are related to the clarity of the standard in the present proceedings.
The first error in the Prosecution argument is that the Defence shifted its views on the NCTA, and the second relates to the Prosecution's submission regarding the Trial Chamber's approach towards corroboration.
As to the first erroneous remark of the Prosecution, the position of the Defence was from beginning of this case really clear. We never, not once, changed our position. We were the ones to ask the Judges that a no case proceeding case should be entertained in the case of Charles Blé Goudé. This was submitted in 2015 based on the Ruto principles and that this principles -- those principles

could apply in the instant case. And we also mentioned decision number 5 that the criteria for an NCTA cannot be interpreted in such a way as to constrain the powers under Article 64(2) to not allow for the assessment of credibility and reliability in order to terminate a weak case.

This interpretation was also put forward by the Defence team of Charles Blé Goudé in response to the Chamber's order - again unanimous order, Mr President - when the Chamber invited every party whether they wished to proceed with a no case to answer or not. That invitation itself from the Bench unanimously speaks for itself. A unanimous, as mentioned, order. And in this order, with the consent of Mrs Carbuccia Herrera, you find already the standard. There was a standard. The standard was: Can the Prosecution please explain to us why there is insufficient evidence which could reasonably support a conviction. That was the standard. It was clear from the beginning. The Defence didn't ask for clarification. The standard was clear. We therefore never once, Mr President, your Honours, altered our views as to the elements required to satisfy an NCTA motion.

The second erroneous submission by the Prosecution regarding the lack of clarity, alleged lack of clarity, relates to corroboration. Prosecution submits in paragraph 33 of its responses to your Honours' questions that Judge Henderson had an overly rigid approach versus corroboration and that the Prosecution was misguided and should have been guided by the previously and broad approach endorsed by the Appeals Chambers. And it refers to the Bemba Appeals Chamber case, paragraph 1018.

But, Mr President, this judgment Bemba does not support the Prosecution submission in the slightest. That paragraph 1018 merely states that the Trial

Chamber in that case found that the question to what extent corroboration is needed is a matter of assessing the evidence and cannot be ruled upon in the abstract. And it also held that no witness is per se unreliable because they previously had given a false testimony. The Chamber in that scenario found no error in the Trial Chamber's approach.

But, Mr President, your Honours, this authority does therefore not support the Prosecution's argument in this case since the citation does not provide for a particular approach or definition towards corroboration. It's important to recall that it was the Prosecution in this case, Mr President, who tried to define corroboration in the abstract and requested the Trial Chamber to adopt the definition applied by the ICTR. The Prosecution therefore was well aware that the Trial Chamber could adopt the approach it did since Judge Henderson made it perfectly clear in a previous decision that he had misgivings regarding this overly broad interpretation of corroboration as by the Prosecution.

I refer your Honours to the Rule 68 decision, with the dissenting opinion of Judge Henderson. That decision, Mr President, your Honours, dates back already to 2017, so well before the Defence submissions on the no case to answer. And the Prosecution was therefore well put on notice on how the Chamber perceived corroboration.

Your Honours, this will conclude my first part by saying that Judge Henderson's reasons reveal therefore, contrary to the Prosecution's submission, that the majority of the Chamber actively engaged with the parties. He provided, Judge Henderson, a definition, although not required to do so, because the definition of a corroboration, as suggested by the Prosecution, was greatly disputed between the parties and this dispute began simply because the

Prosecution started this submission.

Mr President, second point, the standard of review related to the six examples. Very briefly on this. You will find in our submissions the response to the Prosecution document to support the appeal in paragraph 222 already that these examples are totally unrelated to the Prosecution's second ground of appeal, namely that the Trial Chamber allegedly did not have a standard in mind.

What the Prosecution forgets to say also during the hearings in these days, that the Prosecution itself asked for the charges against Charles Blé Goudé to be dismissed regarding Abobo, the 3 March 2011 incident and the 17 March 2011 incident. Therefore, out of these so-called six incidents, these six examples, only three examples remain in the document in support of the appeal, which is of course utterly insufficient to sustain the second ground of appeal.

Second remark is the circularity in the Prosecution arguments regarding these six examples. In essence, the Prosecution in its paragraphs 40 to 43 of its answers to the Bench say actually that the lack of a clear standard led by the Chamber also caused a flawed approach in its evidence. However, the Prosecution has not shown any connection between the lack of a clear standard and the supposed flawed approach. For instance, how is the Chamber's finding that alleged victims of sexual violence were not raped simply because they were pro-Ouattara supporters, but rather, their support served as a pretext for crimes, how does this at all relate to the Chamber not having a standard in mind?

Slow down.

You will find no answer, Mr President, in the Prosecution's submissions.

How can you say the errors in the first ground materially affected the decision because the majority's decision was not fully informed? That's a circular reasoning, Mr President, and cannot be sustained in a court of law.

My final point, the third point relates to the material impact which I already touched upon, as you know, yesterday.

The Prosecution argues that it need not show that Mr Blé Goudé was guilty beyond a reasonable doubt on appeal because no first instance -- no Chamber in first instance has considered that test. That argument is quite inconsistent.

THE COURT OFFICER: [12:14:37] I'm sorry to interrupt you, Mr Knoops. I notice no French interpretation.

We do. Thank you very much.

Mr Knoops, please.

MR KNOOPS: [12:14:50] (Microphone not activated)

PRESIDING JUDGE EBOE-OSUJI: [12:15:20] Mr Knoops --

MR KNOOPS: [12:15:23] Sorry, red button. It has multiple meanings, the red button, but for today I think it's to speak.

As to the last point, the material impact, the Prosecution argument is inconsistent with its first ground of appeal. On the one hand it argues that acquittals are governed by Article 74, must comply with Article 74. On the other hand it argues that an appeal of an NCTA acquittal should not be governed by the standard of review as articulated in Article 74. These arguments are right and clearly inconsistent.

Mr President, your Honours, no matter what test the Chamber would apply, even if it would apply the less stringent standard of the material effect we discussed yesterday and deviates from Article -- from paragraph 284 of the

Ngudjolo Appeals Chamber decision, even then the Prosecution appeal must fail. There's not even the remotest possibility that the majority's decision would have been different had it not committed the alleged errors because, as the majority noted, none of the alleged 11 contributions of Charles Blé Goudé were actually to be linked to the crimes. The Prosecution did not dispute this finding. It did not base its appeal on errors of fact.

The crux of the matter, and the Prosecution avoids this discussion by simply canvassing six examples - in fact, there are just three left - that have nothing to do with Charles Blé Goudé. And given the complete lack of evidence to link Mr Blé Goudé to the crimes, as correctly observed by the majority, it was simply of no consequence what standard was used to make that assessment.

Mr President, my final remark is the following: The Prosecution conceives and concedes in paragraph 30 of its answers to the Bench that Judge Henderson articulated the correct test in his July 2019 reasoning but that it was too late. This is purely speculative. The Prosecution speculates that this standard was not in the minds of the Judges at the time when they decided to acquit. This is without foundation and purely speculative. No one of us in this courtroom or outside were, in those six months the Chamber deliberated, in the presence of the Judges. How can we say, how can we possibly say, Mr President, that this standard was not in the minds of the Judges at the time of the acquittal?

And finally, as to the LRV, with all due respect to Professor Robinson and his intellect, it's not to a professor of law to comment on errors. It's purely opinion.

PRESIDING JUDGE EBOE-OSUJI: [12:19:16] You have three minutes.

MR KNOOPS: [12:19:20] Yes.

This is exactly why in this Court opinion evidence is not allowed to individuals who are not qualified to be experts in these courts and admitted as experts in these courts. It's not appropriate to comment on a verdict. Of course academically you could, but it has no value in a court of law.

And secondly, as to the LRV observation the majority decision would be unsafe, that is the argument of the LRV, the acquittal would be unreliable. Well, Mr President, in my submission this is totally inappropriate to say this in a court of law while the witness and the LRV does not have a standing to comment on guilt or innocence. And apart from this, it's totally outside the scope of the appeal. The Prosecution appeal is not about that the decision would be unsafe. There's no appeal ground formulated on alleged errors of law -- fact. The six examples were qualified as mini errors by the Court -- by the Prosecution, and under this disguise, under this procedure disguise the Prosecution intends to indirectly also submit errors of fact while suggesting that this is not the basis of their appeal.

Mr President, this concludes our submissions with respect to the second appeal ground. Thank you.

PRESIDING JUDGE EBOE-OSUJI: [12:21:12] Thank you, Mr Knoops.

We will now take questions from the Judges at this stage, the first segment of questions from the Judges. And I will invite Judge Ibáñez to ask a question.

JUDGE IBÁÑEZ CARRANZA: [12:21:49] Thank you for the floor, Mr President.

This is for all the parties, about the principle of legality.

The principle of legality is a mandatory source of law that requires that

criminal laws, both substantive and procedural, being *lex specialis*, be publicly available before their application and that all parties and participants be on notice of such special laws and procedures for fairness of the accused as well as the Prosecution and victims.

This principle is reflected in Articles 22 to 24 of the Statute as a requirement of due process of law and the proper administration of justice. It is also part of international human rights law as reflected in Articles 11 of the Universal Declaration of Human Rights, 15 of the International Covenant on Civil and Political Rights, 8(1) and 9 of the American Convention of Human Rights, 7 of the African Charter on Human and Peoples' Rights, and 7 of the European Convention on Human Rights.

Taking this into account, I would like to ask the parties:

Did the proceedings conducted at trial and the acquittals entered by the majority of Trial Chamber comply with the principle of legality, considering that neither the Statute nor the Rules mention the no case to answer procedure nor the standard of proof applicable for that specific procedure?

And (b) Accordingly, the principle of legality, Article 21 and 22, can the jurisprudence of the ad hoc tribunals on the no case to answer and its applicable procedure, for example, the Rule 98 *bis* of the rules of the ICTY, be preferred to the laws and procedures that were previously publicised under the Rome Statute --

PRESIDING JUDGE EBOE-OSUJI: [12:24:26] Judge Ibáñez, there is a technical difficulty.

JUDGE IBÁÑEZ CARRANZA: [12:24:30] Okay.

PRESIDING JUDGE EBOE-OSUJI: [12:24:32] Ms Massidda, you -- I

understand you have issue with sound?

MS MASSIDDA: [12:24:42] Yes, your Honour. Now I have refreshed three times and it appears that -- sorry, can someone speak because I'm not sure that I can hear you.

PRESIDING JUDGE EBOE-OSUJI: [12:24:53] Okay. I asked you is the problem resolved now.

MS MASSIDDA: [12:24:57] Yes, your Honour. I was not able to hear the question of Judge Ibáñez because I was not hearing since I think at least eight minutes. So I couldn't follow the last part of Mr Knoops' presentation and I couldn't hear the question by Judge Ibáñez.

Thank you, your Honour. Now it seems okay.

PRESIDING JUDGE EBOE-OSUJI: [12:25:21] All right. One second.

Judge Ibáñez will summarise her question.

JUDGE IBÁÑEZ CARRANZA: [12:25:56] Thank you, Mr President. I'm sorry because the difficulties, the technicalities.

To summarise the first question is regarding the principle of legality as a mandatory source of law under the legal framework of Rome Statute as *lex specialis*. That means that all the substantive and procedural laws need to be publicly noticed by all the parties and participants as a source of fairness for everybody, and this principle and human right proper -- guarantee of proper administration of justice is enshrined in a number of treaties on international human rights law.

Then taking into account this mandatory nature of principle of legality, the questions are as follows:

(a) Did the proceedings conducted at trial and the acquittals entered by the

majority of Trial Chamber comply with the principle of legality, considering that neither the Statute nor the Rules mentioned a no case to answer procedure and the standard of proof for that specific procedure?

(b) According to the principle of legality, Article 21 and 22, can the jurisprudence of the ad hoc tribunals on the no case to answer and its applicable procedure be preferred to the laws and procedures that were previously publicised under the Statute, that is to enter an acquittal under Article 74 and apply the standard of proof under Article 66(3) of the Statute?

(c) Even taking into account the jurisprudence of this Court, can the Judges invoke their discretion to acquit in a way other than that provided by Articles 74 and 66(3) of the Statute?

And (d) Is this procedure equally fair for the accused as for victims and the Prosecutor?

That will be the first set of questions.

PRESIDING JUDGE EBOE-OSUJI: [12:28:45] All right. Judge Ibáñez's question was directed to all counsel.

Yes. Who wants to raise their hand? Why don't we do it this way. Yes, I think so, I was actually going to begin with Ms Brady. Let's go in the order since the question is to all counsel.

Briefly, Ms Brady. After you, we will go to victims' counsel and then Mr Gbagbo's counsel and Mr Blé Goudé's counsel.

Ms Brady, proceed, please.

MS BRADY: [12:29:28] Thank you, thank you, your Honour. To answer this, this is to organise our answer, Mr Gallmetzer will respond and then Ms Narayanan will also say a few words after him. Thank you.

PRESIDING JUDGE EBOE-OSUJI: [12:29:44] Mr Gallmetzer.

MR GALLMETZER: [12:29:47] Thank you very much.

So it is our position that indeed the principle of legality is a fundamental principle that is applicable at all case and at all stages of the proceedings.

And turning to question (a) of Judge Ibáñez, the Trial Chamber did not comply with the principle. It did not comply with this principle from a procedural point of view and not from a substantive point of view.

From a procedural point of view, of course we said that the Chamber has discretion in the conduct of the proceedings, and we were very specific in response to question (a) to your, to your questions. We said that it does have, under Article 64 and different provisions, leeway to organise the proceedings and it has indeed a duty to conduct the proceedings in an expeditious manner. So it can entertain, it has a discretion to entertain a request for a no case to answer with a view to expediting the proceedings, but when it comes to deciding a no case to answer motion, and if the Chamber decides to acquit the accused, then the procedure that has to be followed is the mandatory one that is expressly set out under the Statute, and that is Article 74. There is no other provision. The Chamber has no discretion. And in the application of the principle of legality, the only way for a Chamber to issue a decision of acquittal, a final decision of acquittal that * produces all the effects, it must be entered under Article 74 and it must comply with all the requirements set out in Article 74(5).

On question (b) Articles 21 and 22, including the ICTY's jurisprudence, * they are interpretive guides for the Trial Chamber in interpreting in the first place, obviously, the legal basis of a decision of acquittal under Article 74, a Chamber

may be guided on how to interpret Article 74. But in no way can it just identify an alternative legal basis altogether and dispense of all the guarantees and all the safeguards under Article 74 and enter a final acquittal decision on a legally inexistent basis to justify such an acquittal and all its effects.

*The ICTY's jurisprudence, to the extent that it is of guidance, it supports our case, it supports that *a final decision of acquittal is, as they call it at the ICTY, a judgment of acquittal, to which all the procedural and substantive effects of a decision in our Court under Article 74 apply.

This -- actually, I think I have already answered question (c). Article 74 is indeed the only legal provision that can be applied to enter a judgment under Article 74, and the Chamber erred in failing to comply with that provision and with the requirements as foreseen in Article 74(5).

And the process is, and this is turning to question (d), the process laid out by the Statute is indeed equally fair to all the parties and participants. The Defence laments that if the Chamber rejects -- sorry, if the Prosecution has a direct right to appeal, that creates an inequality of arms. But that is not true because the Prosecution can appeal directly because this is a final decision. If the Chamber rejects a no case to answer, that would be an interlocutory decision and the proceedings will continue. But eventually the Chamber will continue the trial, it will get to the end of the trial and will enter a final decision on -- of conviction or acquittal, and that decision, then the Defence can equally appeal directly. So there is no inequality and the procedure that has been * correctly thought through by the drafters of the Statute is indeed equally fair to all parties and participants.

PRESIDING JUDGE EBOE-OSUJI: [12:35:00] Thank you, Mr Gallmetzer.

Ms Narayanan, briefly, please.

THE COURT OFFICER: [12:35:23] You now have the floor.

MS NARAYANAN: [12:35:26] Thank you very much, your Honours. I'm sorry, I think there was a slight technological problem there.

Judge Ibáñez, thank you very much for your question. I just wanted to add from the perspective of ground 2 to what Mr Gallmetzer has already said. We believe that the point that you raise about the necessity for predictability * in procedural law is exactly where the majority failed in this case.

Now the no case to answer standard of proof is fundamental and what makes it even more necessary to have predictability in this case is that it is a novel issue, it was a novel issue, it remains one, and it is, unlike what the Defence has said, a highly complex subject.

Now, your Honours, it is a question of fairness and proper administration of justice so your question goes right to that. And if I might add, it also goes to how the pool of evidence was treated in this case. And, your Honours, this was the pool of evidence in a case of serious charges brought under international criminal law and are deserved to be treated fairly and predictably.

Thank you very much, your Honour.

PRESIDING JUDGE EBOE-OSUJI: [12:36:41] Thank you.

Ms Massidda, your turn next.

MS MASSIDDA: [12:36:46] Thank you very much, your Honours.

Thank you, Judge Ibáñez, for your question. I will have a slight different perspective. I fully agree with what Mr Gallmetzer has just said, but I just wanted to underline in relation to the issue of principle of legality and

principle of certainty and the no case to answer motion.

Now a decision on whether or not to conduct a no case to answer motion is discretionary in nature. This is something which has already been said several times by the practice of the Court. However, in dealing with a no case to answer motion, and I will quote the Ntaganda judgment of 5 September 2017, paragraph 43 and 44, decision 2026 of the Appeals Chamber. A no case to answer procedure is discretionary in nature. However, the discretion must be exercised on a case-by-case basis, and I quote, "in a manner that ensures that the trial proceedings are fair and expeditious pursuant to Article 64(2) and 64(3)(a) of the Statute." End of quote.

Now, this quote is actually reiterating the same reasoning in the Ruto and Sang decision number 5 of 3 June 2014 at paragraphs 15 and 16. The number of the decision is 1334.

Now, in the present case, the majority actually failed to do so. The no case to answer procedure was never intrinsically fair, nor contributed to overall fairness of a trial, and it was also extremely long in nature.

This said, once the result of a no case to answer proceedings is an acquittal, we also reiterate, as the Prosecution, that the provision to be applied is Article 74(5).

Now, Article 74(5), as correctly noted by Judge Ibáñez, has to be interpreted in accordance with Article 21(3) of the Statute, namely, in a way which grants the respect of international human rights.

So Article 21(3) - and I link this observation to the ICTY practice which could be a tool for the Chamber - in the absence of provisions in the Rome Statute, then the jurisprudence of other tribunals or of the European Court of Human

Rights or of the Inter-American Court of Human Rights or other internationalised tribunals may be of assistance to the relevant Chamber in interpreting the relevant provisions of the Rome Statute and other text.

And finally, I think that I have stressed several times in my interventions how the entire proceeding lacked, to some extent, a fairness, a fairness which I repeat what I said yesterday, a proceedings has to be fair towards all parties and participants - and this goes to your last question, Madam Judge - to the Defence, the Prosecution and the victims alike. And as I noted also in my written submissions, victims had and still have the feeling that to some extent fairness was not granted in these proceedings.

I hope that I have answered your questions. Otherwise I will be happy to elaborate further.

Thank you very much, Mr President.

PRESIDING JUDGE EBOE-OSUJI: [12:41:17] Ms Massidda, don't hang up yet. While you are on the line -- I will give the floor later to counsel for Mr Gbagbo and Mr Blé Goudé. But on this issue, I am -- you said that you agreed with the submissions of Mr Gallmetzer, then you added to the extent you did not -- your fuller additions did not detract from what he said. That's the sense of it. Fair enough. Mr Gallmetzer's submissions to the effect that, yes, indeed, there is room for no case to answer procedure itself in the Statute. His problem was how it was applied in this case. That's what I understood him to be saying in the context of the complaint of the Prosecutor, that Article 74(5) was not complied with. That was the difficulty Mr Gallmetzer said they have, but not with the idea of no case to answer itself.

Do you agree with that or not?

MS MASSIDDA: [12:42:43] Your Honour, if I understand correctly, your point is more in relation to the possibility or not within the Rome Statute framework of entertaining a no case to answer motion.

PRESIDING JUDGE EBOE-OSUJI: [12:42:56] Yes.

MS MASSIDDA: [12:42:56] Now, in our written submissions we have pleaded that there is no provision. And this goes also actually to the observation by Mr Jacobs yesterday on grounds 1 on our submission. We pleaded that there is no strictly a provision in title, if I can put it that way, no case to answer motion proceeding. It doesn't exist in the Rome Statute. I think that we can all agree on that.

Now, this does not mean that a no case to answer procedure cannot entertain. But in our submission a no case to answer motion can only be entertained only in exceptional circumstances. And we also indicated in our submission that in this specific case there was no indication of exceptional circumstances which could have allowed or justified the entertainment of a no case to answer motion. This was our position and this remains our position in relation to the specific possibility of entertaining the no case to answer motion.

PRESIDING JUDGE EBOE-OSUJI: [12:44:23] As I was reading your submissions, your answers to the questions, your written answers to the questions, you say in paragraph 3, you say in paragraph 3 that the victims have constantly, constantly indicated that a no case to answer proceedings have the potential of prejudicially affecting the interests of the victims in seeking justice. The point there is that the victims have constantly indicated that there's a potential for prejudicial effect.

Now, for the record, though, is it correct to say that there are only two cases

where the no case to answer proceedings have been done in this Court?

MS MASSIDDA: [12:45:23] That's correct, your Honour.

PRESIDING JUDGE EBOE-OSUJI: [12:45:26] Yes.

MS MASSIDDA: [12:45:27] My reference was to the discussions of these matters, not only in the two cases, but also in the other cases before the Court in which the Defence tried to activate a no case to answer motion and the Trial Chamber did not entertain the motion.

PRESIDING JUDGE EBOE-OSUJI: [12:45:48] All right.

MS MASSIDDA: [12:45:49] And the reference is to the Ongwen case and to the Ntaganda case.

PRESIDING JUDGE EBOE-OSUJI: [12:45:53] All right. Okay.

But in the Ruto case, for example, the victims counsel did support the idea of a no case to answer process. You recognise that.

MS MASSIDDA: [12:46:13] I know that, your Honour. And for the full background of the story, he was advised not to, by the way, by the Office of Public Counsel for Victims. But of course a legal representative of victims is free of taking or not taking any advice. As far as counsel from the office are concerned, we constantly opposed the proceeding.

PRESIDING JUDGE EBOE-OSUJI: [12:46:37] But, you see, the difficulty is that I'm not sure that it's fair to that counsel who is not here now to testify as to the discussion you may have had with him or her -- it was a him in that case.

But the interesting thing, though, is paragraph 9 of decision number 5 in the Ruto case. I think it may be fair to put it on record. It says this, quote: "The Legal Representative submits that 'no case to answer' motions should be permitted by the Chamber. He submits that the filing of such motions is

'consistent with the need to keep victims appraised of developments in the case and will further help to manage victims' expectations, based on the evidence that shall have been adduced by the close of the Prosecution's case'. More generally, the Legal Representative recognises that the practice is consistent with the right to a fair trial, and the procedure adopted by the ad hoc tribunals, as well as the criminal courts of Kenya. He submits that the participating victims are therefore likely to be familiar with and aware of the practice." Unquote.

So that was the submission that the Bench in that case heard. They did not hear any submission from the representative of victims saying no, do not do this. That's fair enough.

MS MASSIDDA: [12:48:24] Your Honour, if I may, I do not think there is necessarily a contradiction --

PRESIDING JUDGE EBOE-OSUJI: All right.

MS MASSIDDA: [12:48:31] -- in what was submitted in the Ruto case and what we are submitting now because the bottom line is that a no case to answer motion is permissible before the Court. There is already practice about that. For us, the point is that a no case to answer motion is permissible under certain conditions and that a no case to answer motion proceeding is fair if certain barriers, if certain rules are known and followed since the beginning of a discussion of entertaining a no case to answer motion, which in our submission is not what happened in this case.

PRESIDING JUDGE EBOE-OSUJI: [12:49:22] Thank you.

I think Judge Ibáñez has a question for you.

JUDGE IBÁÑEZ CARRANZA: [12:49:27] No, not exactly a question. Thank

you, Mr President. It's just to thank you for your follow-up questions. But I'm afraid that the line of questioning has slightly changed.

My questions are directed to ask about the principle of legality and its observation, not only in entertaining the no case to answer motions, but in the standard of proof and all the procedures. So I would like the parties to answer about this. Okay? Thank you very much.

PRESIDING JUDGE EBOE-OSUJI: [12:50:07] Thank you.

Now it looks like Judge Ibáñez -- yes, fair enough. So why don't we then continue.

Mr Altit? All right. And then we come back to Mr Knoops.

Mr Altit, your turn next.

MR ALTIT: [12:50:33](Interpretation) Thank you, your Honour.

Professor Jacobs will be responding to Judge Ibáñez's * very important query and in his presentation he had begun at least an initial response to the question put.

PRESIDING JUDGE EBOE-OSUJI: [12:50:59] Mr Jacobs, then over to you.

MR JACOBS: [12:51:03] (Interpretation) Thank you, your Honour.

Thank you, Judge Ibáñez, for that very important question.

In relation to the principle of legality, I will respond with three points.

First of all, as I began explaining and as I summarised in my earlier presentation, the principle of legality was respected because the proceedings were entirely normal. There was an adversarial * debate between parties and participants, both taking written form and during hearings, regarding the standard of proof, and that those proceedings led to a decision, which is the normal way of going about these matters.

*The Prosecution, furthermore, cannot provide any contrary examples of

jurisprudence. I think we need to recall once again what the Prosecution would have us forget during the appeals. Just because there are proceedings, that doesn't mean that there is * uncertainty. When the proceedings turn to the question of standard of proof, there was a precedent, namely the Ruto case. And as I reminded the Court, the Judges clearly explained what standard of proof was correct to apply in the case of a no case to answer application : *the standard of proof that relates to the solidity of the evidence of the Prosecution, that standard existed and the Prosecution themselves conceded that it was the standard that was generally applied by the Judges of the majority, which they did not challenge. The fact that the Prosecution throughout the entire proceedings attempted by all means to impose another standard of proof that had never been applied at the ICC doesn't mean that there is uncertainty.

So that is my first point.

Now, my second point has to do with the law that is applicable. Once again, I think that the principle of legality was respected. As we said earlier, the issue, since no case to answer did not exist in the Rome Statute, the question was: What provisions of the Statute could inspire the Judges as they handed down a decision and throughout the course of the proceedings?

*So it was not a matter of determining whether 74(5) or 81 would be strictly applicable, but rather, what principles of the spirit of the Rome Statute could inspire the Judges. And if we look beyond the theoretical discussion, namely whether 74(5) applies or not, one can find that the spirit of the Statute was respected, and the Prosecution is having difficulty demonstrating * a true problem. We had public proceedings in January 2019 and the sole aim of those proceedings was to respect the right to freedom of Mr Gbagbo.

And let me stress, once again, we have seen in the responses given earlier today, we heard the Prosecution and the Legal Representative of Victims, they have invited the Chamber to interpret 74(5) * in conformity with Article 21(3) of the Statute, except when it comes to respecting the rights of Mr Gbagbo.

* We have a ruling with reasons, 950 pages, 950 pages of reasons have been given and once again the Prosecution is unable to challenge them in their overall conclusions. Furthermore, the Prosecution was entitled to file an appeal under the normal conditions because the deadlines began once the decision had been notified.

Another point, the issue of the content of the oral decision, which, as we pointed out in our response to the Prosecution's brief, was in accordance with human rights. The end of the proceedings, that is to say, the acquittal, and the simplified grounds for the acquittal were given. There is no document that the Prosecution can point to that from an objective point of view would allow one to say that the Judges have forgotten something.

So we can clearly see that beyond the theoretical discussion, the spirit of the Rome Statute was respected at each and every stage of the proceedings.

My third point has to do with the general unfairness. * Already there has been no unfairness – and we shall continue to stress this - towards the acquitted person, Mr Gbagbo. " * The respect of his rights was at the heart of his acquittal decision of January 2019. I'm starting with this point because the principle of legality, as set out in the Statute, * Articles 22, 23 and 24, is formulated as a right of the accused person, the person who is on trial. This also can be seen in human rights jurisprudence. It is a right that belongs to the person who is facing trial, first and foremost.

There was no more fairness or unfairness towards the Prosecution. As we pointed out earlier, the Prosecution was able to provide their evidence freely throughout the course of the trial and the Prosecution was able to defend her case during the no case to answer proceedings.

There was no harm to the Prosecution. The Prosecution cannot demonstrate any harm. So there has been no unfairness towards the Prosecution. Nor has there been any unfairness towards the victims represented here. They were able to express their views and concerns, as is set out in the Statute, throughout the course of the trial and during the no case to answer proceedings.

I won't hark back to this because it's been already mentioned in our submissions, but really it was the decision of the Legal Representative of Victims not to call witnesses, not to exercise her rights. It was not the Judges' fault.

And one last point, Mr President, * Judge Carranza, I note that the Legal Representative of Victims has once again returned to this issue that goes beyond the legal framework, namely the general unfairness of the proceedings. I already have spoken to that yesterday*, and there is no foundation for it whatsoever. And above all, she did not complain about this during the course of the proceedings, not a single time. Sometimes when the Judges made decisions about prior recorded testimony, she had no remarks then*, only to complain today about the adoption of such a procedure.

Today's complaints, this challenging the -- about the Judges throughout the trial can be attributed to only one thing, the fact that there has been an acquittal, as if she was entitled to a conviction. Such a challenge of the entire

proceedings on this basis is not acceptable.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [13:00:01] Thank you.

Mr Knoops, why don't we take our break and when we come back, you will take your turn on the question, all right? Thank you.

The Court will rise.

THE COURT OFFICER: [13:00:32] All rise.

(Recess taken at 1.00 p.m.)

(Upon resuming in open session at 1.52 p.m.)

THE COURT OFFICER: [13:53:00] All rise.

PRESIDING JUDGE EBOE-OSUJI: [13:53:34] Mr Knoops, if you can be brief, and don't be shy to adopt any answer somebody else may already have given.

MR KNOOPS: [13:53:46] Of course.

JUDGE IBÁÑEZ CARRANZA: [13:53:54] Thank you.

Just to remind that the question is focused in the mandatory nature of the principle of legality and it's in part in the no case to answer proceed, standard of proof or whatever. Please, focus on that. Thank you.

MR KNOOPS: [13:54:19] Thank you, Mr President, Honourable Judge Ibáñez for your question.

I think it's not in dispute that the NCTA proceedings are, as such, the inclusion thereof, not unfair or in violation with the principle of legality, despite that the NCTA proceedings are not governed in the Statute of Rome. I dare to say, your Honours, that it would not be fair to a defendant, and it would even contrary to human rights law, if the defendant has to stand trial and not have the right to not to respond to a case where the evidence doesn't meet the

threshold of the required evidence. My first remark.
Secondly, and my submission is that this is something which is inherently connected to the system of the ICC, legality starts with how a system of law is built. The ICC system, as being a hybrid system in nature, actually undeniably violates the principle of legality as such, because it's inevitable that if you bring together an inquisitorial and an adversarial system of law and you create Trial Chambers, they have to be laboratories of a *sui generis* nature.
So the preliminary question to I think the question of Judge Ibáñez is, is legality not -- does legality not start with how the system is built? If you look, for instance, at each chamber in this Court can determine whether or not to allow witness preparation, whether or not to apply a system of submission or admission, visibility of documents, and each chamber can define the mode of questioning according to whether the calling or non-calling party is conducting the examination. If you compare the Rule 85 and Rule 90 of the ICTY and ICTR Rules of Procedure and Evidence with Article 64 of the Statute and the Rules of Procedure and Evidence of this Court, you'll see that all these elements are not defined neither in the Statute nor the Rules of Procedure and Evidence. There starts the principle of legality. If there is no legality on those principles, you can question, of course, the legality of the system as such.
But I still believe that despite that the ICC system as being a hybrid system, undeniably can ever comply strictly with the principle of legality --
JUDGE IBÁÑEZ CARRANZA: [13:58:25] Sorry, sorry, sorry. Sorry, are you stating that Article 64 of the Statute is against the principle of legality? Did I misunderstand you? Please correct me, if any. Okay. Thank you.
MR KNOOPS: [13:58:44] Thank you, your Honour Judge Ibáñez.

No, I might express myself not fully accurately. I'm saying Article 64 of the Statute is administrating to Trial Chambers a broad discretion to determine the conduct of proceedings.

So preliminary to the question whether an NCTA proceedings are legal or fair and whether the absence of that proceedings and the absence of a standard is unfair or not legal, I think we first have to look how the ICC system as such is built, if that system already in itself cannot comply strictly with the principle of legality. Because my client here, Mr Blé Goudé, faces a different procedure than a defendant in another chamber in this court, simply because the chambers are not unanimous in whether witness preparation should be allowed, where there is a system of admission of -- submission of documentary evidence, how the mode of questioning is being conducted. If on those principle issues there is no unanimity in this Court simply because it's not governed by the Statute or the Rules and the Chambers differ in their interpretation because they come from different countries, at the basis of this system *ab initio* a defendant therefore never faces a legality, because his trial might be differently conducted than another defendant. That is my point. That is my point. And it's not -- (Overlapping speakers)

JUDGE IBÁÑEZ CARRANZA: [14:00:44] (Microphone not activated)

THE COURT OFFICER: [14:00:48] I'm sorry, Mr Knoops, you need to reengage your microphone.

MR KNOOPS: [14:01:00] Done.

JUDGE IBÁÑEZ CARRANZA: [14:01:06] A follow-up question: Are you asserting that the discretion given in Article 64 to the judges allows them to interpret the law against the written provisions of Rome Statute? Are you

arguing that this discretion allows the judges to act or to resolve with no observation of the written norms of Rome Statute? Can you clarify this, please.

MR KNOOPS: [14:01:42] Thank you.

No, Honourable Judge Madam Ibáñez, that's not my submission.

My submission is that when we are opening the box of Pandora about legality here, in regard to an NCTA proceeding, and we are discussing whether or not that procedure as such or the standards applied by a chamber in an instant case is fair or not fair or legal or not legal, we touch upon the fundamental of this Court. And I think it's undeniable that every chamber in this honourable Court, given the text of Article 64, has to interpret it, the Statute, in accordance with the spirit and nature.

But from the prospective of the defendant, like Mr Blé Goudé, he received a certain trial based on a certain procedure, yet another Trial Chamber applies a different procedure in terms of witness preparation, admission, submission regime and mode of questioning, three fundamental issues of a criminal trial.

So there I think discussion should start and I think if we come to criticise the NCTA procedure as such because it's not governed in the Statute or that the standard is not clear or chambers might differ in standard, I think it's not fair to the proceedings as such because they are built on a system which from the beginning, from the perspective of defendant, does not comply with legality.

And finally, if I may conclude my answer to your questions, Honourable Judge Madam Ibáñez, I still believe --

JUDGE IBÁÑEZ CARRANZA: [14:03:54] Wait a moment, please.

Just to clarify the last point, the last part of your answer: Are you equating

the issue of preparation of witnesses with the fundamental issues raised in no case to answer which procedure is same to the termination of the proceedings, to the termination of a trial and, of course, to reach an acquittal, are you equating preparation of witnesses with this fundamental procedure to end a trial?

Thank you.

MR KNOOPS: [14:04:32] Very interesting question, Madam.

Although it seems a minor issue compared to the overarching principle of legality of fair trial, yet I dare to say that the way witnesses are prepared or not, or witnesses are questioned on the basis of a certain mode, might be decisive for the outcome of a fair trial.

And this is one of the factors Judge Henderson mentioned in the reasons why he with Mr Tarfusser didn't adopt the Ruto Sang model, simply because the characteristics of the trial which enroled in the case of Charles Blé Goudé were quite different, that the way the Prosecution questioned witnesses was actually decisive also for the outcome of the case. You will find this in paragraphs 4, 5 and 7 of his majority opinion.

But despite this more philosophical remark on your questions 1, 3 and 4, Honourable Judge Ibáñez, I still believe, based on the spirit and nature, that both procedurally and substantively the proceedings which led to acquittal were in accordance with the legality, within the parameters of the hybrid system of this court, with this caveat, and procedurally, it was quite clear from June 2018, when the Trial Chamber unanimously agreed to allow this NCA proceedings, from that moment it was crystal clear procedurally and in terms of the standard of evidence, what was expected from the Defence. We never

asked for a clarification, we know what our job was in the NCTA. And for the Prosecution, it was totally aware, it was totally clear what test it had to meet to sustain a conviction or to proceed.

So, to conclude, legality, indeed, very important, crucial. But then we should look at the whole system as such and the NCTA is derivative of the start of a criminal law system which starts with the rules of evidence, conduct of proceedings. And, secondly, the proceedings within these parameters of the hybrid system did comply with fairness and legality.

Thank you.

JUDGE IBÁÑEZ CARRANZA: [14:07:29] Thank you.

(Appeals Chamber confer)

JUDGE IBÁÑEZ CARRANZA: [14:08:46] Thank you. I will continue, please, and I suggest, suggest -- this is question for our Professor Jacobs, please concrete answers. The first is regarding inspiration versus sources of law in Rome Statute.

It was submitted, and Professor Jacobs have submitted yesterday, that the judges do not have to find the no case to answer procedure in the provisions of Rome Statute, but, I quote:

"It is only natural for the judges to seek inspiration on a case-by-case basis from the provisions of the Statute whose contents can assist and guide them throughout the proceedings." This is in page 38, lines 22 of yesterday's transcripts.

I note that, and you know, that in Article 21(1) the Statute clearly establishes what is the hierarchy of the sources of law.

I don't have to repeat it.

And the question is regarding this article: Is the inspiration a valid source of law to put an end to a trial proceedings and can the inspiration override the literal and strict interpretation of Article 74 and 66(3) of the Statute to put an end to a trial?

And the second part of this question for Counsel Jacobs is about the spirit of Rome Statute versus the object and purpose of Rome Statute.

It was also submitted yesterday, and today it was repeated, and also it's in paragraph 16 of the written submissions, that the spirit of the Statute allows for an acquittal pursuant a no case to answer motion, so I would like to ask the counsellor, what do you understand by the spirit of Rome Statute and could not, rather, be correct the way of interpretation under the Vienna Convention on the Law of Treaties of 1969 and according Article 31(1) to find the object and purpose of Rome Statute -- of the Statute as reflected in the spirit of the treaty and its settle in the preamble of the Statute, that is, namely to put an end to impunity for atrocious crimes.

That will be the question, thank you.

PRESIDING JUDGE EBOE-OSUJI: [14:11:37] Mr Jacobs, that's to you. Try and answer it in two minutes.

MR JACOBS: [14:11:48] (Interpretation) Thank you, your Honour.

Thank you, Judge Carranza, for her questions and I shall try to answer them rapidly.

Firstly, it is important that the point of departure of the discussion be, that is, the no case to answer, is to protect the rights of the defendant. This is a procedure that has been accepted in the Ruto case and was recognised as applicable in the appeal judgment Ntaganda as protecting the fairness of the

proceedings. So the point of departure is that it is indispensable, these proceedings, the no case to answer proceedings, to safeguard the rights of the accused and to mean also that the Defence does not have to present a case if the Prosecution's case is not sufficiently strong *to support the charges. So the rights of the defendant are really at the heart of this discussion.

Now, in the same ilk, other proceedings before the ICC have been acknowledged by the judges without having been * specifically provided for in the Statute, for example, the abuse of due process.. So we need to find an applicable law here, we can't simply say that such-and-such an article will automatically come into play, as the Prosecutor does.

* Hence the logic of what we explained. Where there are no provisions of the Statute that can be automatically applied, one has to then look in the Statute, inspire oneself from its contents with a view to ascertaining which provision can be applied. * On the contrary, the idea is not to thwart the application of the Statute. Let us be clear about that. We have to make the no case to answer procedure operational, as it has been recognised by other cases before the Court to be indispensable for the rights of the defendant.

So one can seek inspiration from the requirements of Article 74(5) in terms of reasons and in terms of publicity which have been expected without, however, reaching the conclusion that Article 74(5) is indeed applicable.

Lastly, and to remain brief but I can specify if you so wish, your Honour, with regard to the aim or object and purpose of the Statute. The fight against impunity is the objective, the general objective of the ICC, we cannot deny that. *But the Court was set up with a view to making sure that this fight was within

a procedural framework, at the heart of which should be the respect of the rights of the accused person. The fight against impunity cannot be a way of denying the individual the respect of their rights. This is an objective that we all share, but we also share the objective of putting in place these proceedings in an exemplary manner, in a democratic and modern manner, by respecting the rights of individual.

The rights of Laurent Gbagbo were at the centre of the proceedings, there was no lack of fairness towards the Prosecution or the Legal Representatives for Victims and justice was done.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [14:15:34] Mr Jacobs, beginning with you, you do say that we can derive inspiration from provisions of the Rome Statute, should I say, that approximates what should apply, more or less, even though it may not have -- the applicable provision may not have been spelt out as such in a given case, and you said it's in that regard that it is possible to derive inspiration from Article 74(5), but that doesn't mean that that article necessarily applies. If that is the case, by what provision are we then to judge those norms that we are to derive inspiration from, vis-à-vis article 74(5)? In other words, if there is a question that a provision in the Rome Statute had been violated, where would that violation be situated? For instance, in a case of judgment of acquittal in no case to answer proceeding, what provision should be the standard that guides what the judgment should look like, if the approximate provision would be Article 74(5)? That I say we can derive inspiration from it doesn't mean it apples. Which provision should then be applied to see whether or not judgment was correct in form?

MR JACOBS: [14:17:42] (Interpretation) Thank you, your Honour.
The answer, the simple answer to that question is that there is no article in the Statute that is strictly applicable because the no case to answer proceedings is not foreseen explicitly within the Statute, or not provided for, so one cannot say *ab initio* that such-and-such an article of the Statute would be applicable to NCTAs. * The issue at stake is the logic of the procedure.
PRESIDING JUDGE EBOE-OSUJI: [14:18:19] (Overlapping speakers) you now see the difficulty there in the sense then that no case to answer judgments become then unregulated as a matter of their form, whereas other judgments are regulated as a matter of their form.
MR JACOBS: [14:18:42] Thank you, your Honour.
No, no. I was just coming to that.
Article 74(5), as we said, crystallises the intention of the drafters of the Statute, that there are some * requirements when drafting a decision, that is to say the reasons, the publicity, the fact that the decision needs to be clear. So in the light of these major principles or general principles of law that are provided for in Article 21 of the Statute, one can judge whether the decision issued at the end of a no case to answer proceedings follows such a rationale, like any other decision.
* It doesn't automatically render Article 74(5) applicable, but there is some common sense in its provisions--but the true question here is whether everything has been respected, whether the rationale of the proceedings has been followed, whether the requirements in terms of human rights that the drafters of the Statute have foreseen when handing down * a decision were respected in the decision handed down by the judges. We are of the opinion

that they have been, and this can be concretely verified, as can -- as was the case in the Ruto decision, for example, which was issued in a similar manner, more or less.

PRESIDING JUDGE EBOE-OSUJI: [14:20:06] Thank you. I now turn it over to Mr Knoops, still on this issue but not exactly the same question.

Mr Knoops, you -- perhaps there comes a point where you and Mr Gallmetzer might have started from the same starting point, although you didn't quite conclude, you clearly did not conclude in the same place.

This is what I am talking about: You in your submission, Mr Knoops, said that in the Ruto Sang case, I am looking at -- you did cite, I believe, paragraph 1 of the reasons of Judge Fremr and you said that that paragraph says that the judgment in that case was based on Article 64, 66 and 67 of the Rome Statute and not Article 74.

Is there any other passage in the Ruto Sang judgment that -- from which you rest the submission that Article 74 did not apply in that case? Apart from paragraph 1, is there any other passage? And that also should go to Mr Gallmetzer who also seemed to have suggested that - unless I got him wrong - that the Ruto Sang was not based on Article 74(5).

Mr Knoops?

MR KNOOPS: [14:22:12] Thank you, Mr President.

PRESIDING JUDGE EBOE-OSUJI: [14:22:13] Let me tell you why so you may take it all in stride as well.

If you look at paragraph 1 of Judge Fremr's reasons, he doesn't actually say that Article 74 does not apply. If is there any other passage in that judgment upon which you rest the view that Article 74 did not guide that judgment, that

would be good to know.

MR KNOOPS: [14:22:44] Thank you, Mr President.

No, you are right, Honourable Judge Fremr doesn't say expressly that Article 74 is not applicable. But we deduce from paragraph 1 the non-mentioning of Article 74, that for him, like in the majority opinion of the Charles Blé Goudé case, and also in the dissenting opinion of Ms Carbuccia Herrera, indeed the basis should be Article 66(2). That comes the closest, if I read the reasoning of Judge Fremr, that comes the closest to the nature of the NCTA, notwithstanding that of course the decision itself on an NCTA in its effect could have an acquittal and has to comply of course with certain standards how to motivate that decision.

We can even take it further to say the decision, the nature of the proceedings should be governed by 66(2), but the decision itself, how it's being put on paper could be governed by the principles of Articles 40 -- 74(5). Not to say that 74 as such applies, but the principles of 74(5) could apply to the reasoning and the way the judges motivate an acquittal as such based on an NCTA.

Is there then a different between the fact that in the Ruto Sang case the charges were vacated, and in the case of Charles Blé Goudé there was not a formal acquittal but a decision which could be materially equated with an acquittal?

I don't believe so, Mr President. I don't think that the way the case ended, the difference in ending the case in Ruto Sang compared to the ending of the case in the case of Mr Gbagbo and Charles Blé Goudé is decisive to say then 74 should in its entirety apply, including the automatic right to appeal. Because there are numerous law systems in the world where certification for NCTAs is required, such as in England, England and Wales, and that is simply because of

the fact that the Prosecution has different proceedings.
May I point your Honours to an interesting dissertation of Mr Djukic, he defended his thesis in 2017, and in his thesis he explains why in case of an NCTA a certification should be required in case of a granting of such a request, because it's a significant inroad into the double jeopardy principle if the Prosecution would have an unfettered right to appeal without certification an NCTA decision. And he relies on the Criminal Justice Act 2003, England and Wales, sections 57(4) and 58(8), to make his point.
Now to conclude my answer to you, Mr President, indeed Judge Fremr didn't exclude the applicability of 74, but we deduce from his decision that he clearly had in mind the spirit and nature of 66(2) and, when reading his decision in full, we believe that was the proper standard, the proper basis, the provision in the Statute which comes closest to the nature of an NCTA. Because - and then I will also answer maybe the question of the Honourable Judge Ibáñez to Mr Jacobs - it's a --
PRESIDING JUDGE EBOE-OSUJI: [14:27:27] Before we do that, let's clean up this one first, please, and so once we finish then we can do that. I want to -- (Overlapping speakers)
MR KNOOPS: (Overlapping speakers)
PRESIDING JUDGE EBOE-OSUJI: -- (Overlapping speakers) that deduction you were talking about, let's see how far it goes.
If you look at paragraph 1 of Judge Fremr's judgment -- reasons, rather, the reference to Article 64, Article 66 and Article 67. Now let's leave Article 64 to the side, because you did allude to it just now, 64(2) I think you said, leave that to the side and look at Article 66 and 67, Article 66 deals with the presumption

of innocence and Article 67 deals with the rights of the accused person.
Is it fair to say that in every judgment of acquittal rendered pursuant to Article 74(5), these two provisions could also be in operation, presumption of innocence and the right of the defendant? You see where I am coming from?
MR KNOOPS: [14:28:57] Yes, yes.
PRESIDING JUDGE EBOE-OSUJI: [14:28:58] All right. Assuming that that is the case then, so what are we to make of 64? You alluded to it. Is it fair to say that all that 64 -- the reference to 64 does there is to find a foothold within the Statute for the whole procedure of no case to answer in the first place, if you don't have that foretold you cannot do that? Is it fair to look at that, look at it in that way?
MR ALTIT: [14:29:33] Yes.
PRESIDING JUDGE EBOE-OSUJI: [14:29:33] So that you now compare it to what happens in, say, Article 65 of the Rome Statute. Article 65 deals with guilty pleas and that's the foothold for guilty pleas, 65, but then the judgment still has to comply with 74(5). Is that a reasonable way to look at what paragraph 1 of the reasons of Judge Fremr is telling us?
MR KNOOPS: [14:30:09] Yes.
Mr President, indeed, first remark, my response to you, of course Article 74(5) actually makes implicitly reference to 66(2), because otherwise how can you acquit at the end of the trial without looking at 66(2)?
Article 74, if you look also at the academic commentaries, such as even the commentary cited by the Prosecution, Mr Vasiliev in the Klamberg commentary, you will see that 74 was enacted on the basis that the totality, the entirety of the proceedings were concluded. So I would suggest

a differentiation; 74(5), with 66(2), applies to formal acquittals which are based on the merits of both prosecution and defence case, therefore it's the totality, the entirety of the proceedings. 66(2), without 74, apart from 74(5), applies to halfway judgments like NCTAs, because if we accept that 74(1) till (4) apply to full judgments on the full merits of the case whereby the Court has heard both the Prosecution and the Defence case, that is what we understand of the merits of the case, it means that a halfway proceeding is not covered by 74 as such, that was not the intention of the drafters of the Statute. Look at the commentaries, Mr President. And therefore, if you are looking for analogy within this hybrid system we just discussed, the closest which comes to an NCTA basis to dispose of is 66(2), without 74(1) till (4), and of course we can argue about 74(5) because that relates to how the judge writes it down. Of course that also applies to a halfway decision and that was complied with in the instant case.

So I think Judge Fremr was totally right and he must have seen it this way, it's the way I read his opinion, that he said, look, if he would have accepted that the decision in Ruto Sang where the charges were vacated was a full judgment, he would have applied 74. No, he didn't do so, Mr President. He saw that this was a halfway station so he couldn't rely on 74, he had to apply 66(2) in combination with 67. Because it's of course a natural right, it's derivative of the habeas corpus right and relief of a defendant - speaking about overarching human rights - it's a habeas corpus relief that every defendant, every criminal law system can ask for the charges to be dismissed as a derivative of his natural right to habeas corpus. So we don't need actually an article in the provision or in the Statute, because it's a natural right that every defendant can ask a judge

to dismiss a case if the Prosecution didn't meet its burden, it's the habeas corpus principle.

But let us look into the Statute, there should be a differentiation made - and that's what I think Judge Fremr clearly saw in paragraph 1, otherwise he would have reasoned differently - that once we deal with actually a very novel phenomenon like NCTA, which is indeed not governed by the Statute, and we don't find it, a judge looks at the provision which comes close to the nature; and that's the disposal of the burden of proof, 66(2), not 74, because that deals with everything the judge has been delivered with.

I hope, Mr President, that this answers your question in a way.

PRESIDING JUDGE EBOE-OSUJI: [14:34:51] But it raises others. When you say full judgment or full trial, then 74 applies; because there is no full trial, Rule 74 doesn't apply. What makes a full trial? Is it a mere formality or is the attractant to it because a defence called evidence? What makes a full trial that should attract, that should attract Article 74(5)?

MR KNOOPS: [14:35:25] Full trial, Mr President, and I can give you now, if you wish, the citation of the gentleman I mentioned.

PRESIDING JUDGE EBOE-OSUJI: [14:35:36] You don't have to give citation, just you can make the submission.

MR KNOOPS: [14:35:41] A full trial, I am just a simple --

PRESIDING JUDGE EBOE-OSUJI: [14:35:43] (Overlapping speakers) the gentleman you are talking about is no authority for us, just give other submission.

MR KNOOPS: [14:35:50] I am happy to hear. That might sound the same for Mr Robinson then of the LRVs for submissions. I'm grateful, Mr President.

Now, I'm just a simple lawyer, Mr President. I would say a full trial is a prosecution and defence case. There is no other option. That's a full trial.

PRESIDING JUDGE EBOE-OSUJI: [14:36:08] Do you contemplate at all that in that sense -- you can have that sense of a full trial if at the conclusion of the Prosecution case Defence does this, gets up, says, "Your Honours, I'm going to open my case. Here is my case: The case of the Prosecution is weak, dismiss it. I'm calling no evidence, I close my case right here." No evidence has been called. What is the material difference between that scenario and one in which all that has happened was absence of that submission as brief, maybe a two-minute, one-minute case for the Defence, all you are left is the bulk of the evidence called by the Prosecution, would 74 apply in that case and not in the other one?

MR KNOOPS: [14:37:25] Mr President, I have just a brief answer to your very interesting question. I once said -- I did once a trial in the United States with a colleague and we didn't call witnesses, and we said to the judge, "Our defence case, Honourable Judge, is that we don't have witnesses. That's our defence case." And that statement of the Defence was clearly a defence because it said everything. So, in other words, even if the defendant chooses in his defence case, having given the chance to provide the Defence, says "I don't call witnesses," that's a defence case, because that is something very strong in certain cases.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [14:38:11] You are not answering my question, my question is: In that kind of scenario, are you saying that what happened there with you and your colleague, your friend in the US, if it

happened at the ICC then Article 74 will guide the judgment or will control the judgment --

MR KNOOPS: [14:38:39] Yes.

PRESIDING JUDGE EBOE-OSUJI: [14:38:40] -- of the Trial Chamber. But if that didn't happen and all you had was only witness and evidence from the Prosecution and the case stopped at the no case to answer stage, Article 74 cannot apply. If that is your view, tell me what is the material difference between the two scenarios, material as opposed to form.

MR KNOOPS: [14:39:06] Yes. Very simply, Mr President, we also answered this yesterday, we submitted this: The standard of proof. The standard of proof. The standard of proof is different because -- and that's also what Madam Carbuccia Herrera said in her dissent at halfway stage, the standard of proof is different from -- with the Defence case. That's the material difference.

PRESIDING JUDGE EBOE-OSUJI: [14:39:34] Did you see the standard of proof -- well, let me stop there because other colleagues may have --

MR GALLMETZER: [14:39:49] Your Honour, may I also address this question?

PRESIDING JUDGE EBOE-OSUJI: [14:39:54] Before Judge Ibáñez comes in, Mr Gallmetzer, I believe I hear him, he wants to intervene, because actually this question was also directed at you in a sense. So, Mr Gallmetzer.

MR GALLMETZER: [14:40:07] Yes, indeed, and that is why I took the liberty to intervene.

So now obviously * the discussion has quite evolved now while you were asking questions to my learned colleague, and I've made notes.

I will try to now start again from the beginning and talk the issue through.

So the first point is that indeed Judge Fremr or the Ruto decision as a whole does not expressly mention Article 74. I had time to double-check it now and the only mention to Article 74 is in footnote 492, but that is simply because your separate opinion relies on an article -- on a different quote from an Article 74 judgment, so it is not an indication that Article 74 was the legal basis. And as I mentioned yesterday, the Ruto decision is a very different decision from the 15 January acquittal decision in this case. It vacated the charges without prejudice, so it was not an acquittal. And therefore, it is not necessarily a guiding precedent for determining the issues on appeal that are before you in this case, your Honour.

In any event, let me say that, in fact, though, however, when rendering their judgment, the Appeals Chamber came -- sorry, the Trial Chamber in the Ruto case came very close, came very close to complying with all the requirements under Article 74(5). The judges, although they both issued -- the majority judges, they both issued their own opinions, there was full agreement on the factual reasons and that were actually developed in Judge Fremr's opinion, and Judge Chile Eboe-Osuji started off by saying he is in full agreement without all the factual findings and there is no need to repeat. Although Judge Tarfusser says the same here, we see that there are significant differences in this case, there are significant differences on the standard of proof, on the legal basis of the decision, and these inconsistencies simply do not exist in the Ruto case. Also, the Ruto decision was issued in one day, there was no deference to a future reasoning, so there as well the Ruto decision was compliant with the Article 74 requirements.

On the next point, both the Ruto decision and in fact also the cover -- the cover

decision, if you want to, the 6 July reasoning, the short statement, quote a number of provisions that inform the decision. They include Article 64, 66, 67, 69. These provisions all of course are applicable in the trial proceedings, they are applicable in informing the decision in the border sense to ensure that the proceedings are conducted in a fair and expeditious manner in compliance with the Statute. The cover decision also includes Article 74, and this is at page 3, which the Ruto decision does not. However, that does not mean that all these provisions are the basis for the actual acquittal in that case. There is an express provision in the Statute and that is Article 74. An acquittal decision under the Statute can only be entered under Article 74. And this goes back to Judge Ibáñez's * question on principle of legality. There is no reason to invent, by inspiration or any other means, an alternative legal basis when we have one that is as clear as Article 74. And * Article 74 is not just a matter of formality. What matters most, your Honour, is that Article 74 sets out very clear requirements and safeguards in subparagraph (5). These safeguards have a purpose and the purpose is to ensure that the decision is fully informed and the public at large can have full trust in the outcome of the proceedings. That is why they are there and that is why it is mandatory for the Chamber to comply with them.

Next, that the Court has a hybrid -- (Overlapping speakers)

PRESIDING JUDGE EBOE-OSUJI: [14:44:56] You have to, you have to slow down.

MR GALLMETZER: [14:44:58] I apologise. I apologise.

So the next point is that the Court indeed has a hybrid procedural legal system and that judges have some discretion in conducting, in how to conduct the

procedures before them. There is no excuse for not complying with the clear and express legal provisions that there are. Article 74 is exactly that, Article 74 determines that this is the legal provision that is applicable for decisions on -- of conviction or acquittal and it sets out precise requirements, no inspiration can be sought to bypass that legal provision.

And finally the question of a full trial, the trial is full exactly because the Chamber has to take into consideration all the evidence that has been submitted and discussed before it. It was the Defence who made a no case to answer motion. The Defence cannot now go back and say, well, because we made this motion the trial wasn't full. It was in the Defence's discretion to make or not to make it and, therefore, it had to live with the consequences. And because the decision that followed from the no case to answer motion is a decision of acquittal that terminates the proceedings, that triggers all the effects, including *ne bis in idem*, there is absolutely no alternative legal basis under the Statute other than * Article 74 to terminate this decision and the requirements have to be mandatorily enforced in order to ensure the legality of that decision.

PRESIDING JUDGE EBOE-OSUJI: [14:46:58] Thank you very much.

(Appeals Chamber confer)

PRESIDING JUDGE EBOE-OSUJI: [14:48:15] Mr Gallmetzer, you spoke last. I am going to take you to some other points, another question. A brief one, because we should be rounding up soon.

In your submission you argued that what was done in January by the Trial Chamber was not a summary of the judgment and therefore what was done in July was reasoning given after the fact of rendering the judgment itself.

On the basis of that submission, would it be the case that your position that at the ICC a Trial Chamber could never render a verdict with reasons to follow? Is that what you're saying?

MR GALLMETZER: [14:49:37] Your Honour, there are two aspects I need to address here. First of all, we say that the last sentence of Article 74 - and please let me just read it to make sure I do not misstate anything - sorry, just a second please.

Okay, it says: "[A] decision or a summary thereof [of the decision] shall be delivered in open court."

So the reference to the summary in this provision refers to the manner in which a chamber ensures publicity of the decision. This, in principle, should not be seen as a legal basis for proceeding in a way that the Trial Chamber has in this case, namely by issuing a verdict with no reasons whatsoever and then to provide reasons five months later (Overlapping speakers).

PRESIDING JUDGE EBOE-OSUJI: [14:50:50] I understand, I understand that to be your position, there is no question. But that's exactly the reason why I ask you the question. Are you saying, by that reading of Article 74(5), the last sentence of that, your interpretation of it, does it then boil down to -- let's assume you are correct, that by January the -- assuming again *arguendo* that as of January the Trial Chamber had not developed their reasons, assuming you are right on that, and you are right that it was only after that that they crafted the reasons and then rendered it in July. If you are right in that submission, does it not mean that that interpretation you have of Article 74(5) precludes the facility of a Trial Chamber finishing a trial and saying, "Here is our verdict. Reasons to follow"? Is that your position?

MR GALLMETZER: [14:52:16] As you will recall, your Honours, we put here two positions in the alternative. Our primary position was exactly that, that -- and this again takes us back to Judge Ibáñez's point on the principle of legality. The Statute appears to be clear on this point, so the decision needs to be delivered in full and the Chamber needs to issue one decision, a decision that cannot be integrated, amended or in any way complemented at a later stage.

However, in our secondary point that we make on this issue, we do concede that there may, there may be situations where a chamber has discretion to issue a verdict and to render its reasons at a later stage. However, that needs to be done under very strict conditions to ensure all the underlying principles that Article 74, and in particular 74(5), is meant to uphold. That decision is fully informed, that there is one decision, that there is no backwards reasoning, that the decision is made accessible to the public. And both in our appeal brief and in response to -- in our written response to question 8 of the Appeals Chamber, we set out what we think should be the requirements in such a case under Article 74 of an oral summary decision that would need to accompany the verdict. A verdict alone we say would always be insufficient, but a summary -- a substantive summary that in summary form sets out all the Chamber's factual findings and conclusions, where it is clear that the Chamber has indeed made all of these and what remains are only -- is only the completion of the editorial process, that there is no backwards reasoning, that the principle of one decision and a fully informed decision and its publicity, if all of these provisions are complied with then in theory it might be possible.

But let me be very clear, in this case the Chamber's 15 January decision by no means, not even closely, complied with these requirements. It simply stated -- PRESIDING JUDGE EBOE-OSUJI: [14:54:55] Is it possible that -- I am trying to understand, especially when I read your submissions about when it might be acceptable, if I might characterise it that way. You said in certain -- if there is going to be a departure there are some rules that must be respected and you give, I believe, some of those. To what extent then is your complaint about error in this regard one of degree as opposed to an absolute requirement that must be respected? To what extent is that a matter of degree? Give you an example now to help you, perhaps: What if it was clear that at the time the Trial Chamber was rendering their verdict, perhaps in a short case hypothetically -- (Overlapping speakers)

THE INTERPRETER: [14:55:51] Message from the English booth: Sorry to interrupt, but there's a major echo. The French interpretation are having problems.

PRESIDING JUDGE EBOE-OSUJI: [14:56:01] (Overlapping speakers) And release it the next day, or a week later. Are we still in the same zone of concern?

MR GALLMETZER: [14:56:15] Your Honour, again I must say it, our primary * position is obviously that the decision needs to be rendered as a whole in one instalment, not several.

Now, if we come to these hypothetical questions - and again let me just as a premise say that the decision, * the appealed decision is far out any hypothesis that we may discuss now - if it was indeed clear that the Chamber had made in a short and confined case with two witnesses and one document,

if the Chamber had made all their findings on the evidence and drawn all their conclusions, in such a small case may be humanly possible, then perhaps, then perhaps this is possible, but in that case the Chamber would also be able to summarise its findings and conclusions.

In this case with over a hundred witnesses, with over 4,000 documents, it is * humanly not possible to do exactly that without writing it down. And let me please recall some of the, of the statements that senior and experienced judges have made, and we have quoted them in our appeal brief, it is not uncommon for a judge during the writing process to change a course of reason initially taken and to revert the outcome. So initial impressions on the evidence while sitting at trial, during the trial and hearing the witnesses, they are of value, perhaps, to get first impressions. But a judgment cannot be based on first impressions, a judgment is based on a systemic analysis of all the evidence in its context and then to draft it in order to make sure that the decision and the conclusion can be justified. And that is why the conclusion has to come at the end. It cannot be made based on preliminary * impressions and then the conclusions are simply there to justify an already preconceived outcome.

In cases as complex as this, this Court cannot do it, we need to acknowledge that cases before this Court are not small or simple enough to, to take this course of action. And I think this is the time to put this down in our jurisprudence to make sure that this doesn't happen again in the future.

PRESIDING JUDGE EBOE-OSUJI: [14:58:55] All right, we will leave it at that for me for now. There will be more questions tomorrow. But Judge Ibáñez wants to pose a question to you to think about overnight, if I understand correct.

JUDGE IBÁÑEZ CARRANZA: [14:59:09] Yes.

PRESIDING JUDGE EBOE-OSUJI: [14:59:11] Not to answer now.

JUDGE IBÁÑEZ CARRANZA: No, no, no.

PRESIDING JUDGE EBOE-OSUJI: [14:59:11] She wants to give you questions, some homework, for us to mull over tomorrow. Remember the answers have to be brief even then tomorrow.

Judge Ibáñez.

JUDGE IBÁÑEZ CARRANZA: [14:59:21] Thank you, Mr President.

It's homework for tomorrow for the parties. It's regarding the standard of proof, the issue of standard of proof.

Regarding the submissions as to an alleged lack of agreement on standard of proof between Judge Henderson and Judge Tarfusser, how could the Appeals Chamber be sure that the judge who applied the higher standard agrees that no single piece of evidence met the lower standard so that the proceedings be continued when he was rather thinking whether the evidence left room for reasonable doubt? In other words, can we be sure that Judge Tarfusser did not reach an acquittal because he found reasonable doubts in the evidence while he was rather be supposed to simply assess whether the evidence was sufficient to convict and leave the issue of reasonable doubt assessment to the end of the case and let the proceedings continue?

For tomorrow, please, thank you.

PRESIDING JUDGE EBOE-OSUJI: [15:00:41] Thank you.

And there will be more questions on the standard of proof tomorrow in addition to that. But for now let's take our leave of the courtroom and meet again tomorrow.

The Court is adjourned.

THE COURT OFFICER: [15:00:55] All rise.

(The hearing ends in open session at 3.00 p.m.)

CORRECTIONS REPORT

The following corrections, marked with an asterisk and not included in the audio-visual recording of the hearing, are brought into the transcript.

Page 10 lines 10-11

''Thank you, your Honour, ladies and gentlemen.''

Is corrected by "Good morning Mr. President. Good morning, your honours."

Page 10 lines 16-18

''As we pointed out yesterday, it is striking to note that the 900-page judgment is incredibly absent -- is endorsed -- that is endorsed by Judge Tarfusser is incredibly absent from the Prosecution's appeal brief.''

Is corrected by '' As we pointed out yesterday, it is striking to note that the 900-page document on the reasons of Judge Henderson, endorsed by Presiding Judge Tarfusser is conspicuous by its absence from the Prosecution's appeal brief."

Page 10 lines 20-22

''Going further, the Prosecutor says that it is not requesting the Appeals Chamber, generally speaking, and I quote:''

Is corrected by '' ''Going further, the Prosecutor says, in her appeal brief, that she is not requesting the Appeals Chamber, generally speaking, and I quote:"

Page 11 line 16

''And the Judges ruled on this question in their final decision; namely, the written observations of July 2019.'' Is corrected by ''And the Judges ruled on

this question, first of all by acquitting Gbagbo on 15 January 2019, and by explaining the standard they had adopted in their written reasons of July 2019."

Page 11 line 25

''in support of its assertion that the Judges did not follow the appropriate and normal procedure.'' Is correctyed by '' in support of her claim that the judges did not follow a normal procedure."

Page 12 lines 2-3

''This jurisprudence is absolutely not transposable to the case at hand.''

Is corrected ''This jurisprudence, as we have reiterated, is absolutely not transposable to the case at hand."

Page 12 line 4

''the chamber -- the trial chamber asked for the parties and participants…''

Is corrected by ''the record shows that the trial chamber asked for the parties and participants…''

Page 12 lines 12-14

''quote:

Having meticulously reviewed the evidence and considered all the legal and factual arguments presented orally and in writing by the parties and participants. And this we can read in the majority's reasons of July 2019. And the Prosecutor does not challenge it.''

Is corrected by ''following a meticulous analysis of the said evidence in accordance with the standard set out in the reasons of July 2019, and which the Prosecutor does not challenge."

Page 12 line 17

''all reasonable doubt.'' Is corrected by ''reasonable doubt.''

Page 12 line 22

''all reasonable doubt'' Is corrected by ''reasonable doubt''

Page 13 lines 9-10

''The Prosecutor was granted all the necessary latitude during the no case to answer proceedings.'' Is corrected by '' The Prosecutor was granted all the necessary latitude to make observations on the quality of her evidence during the no case to answer proceedings.''

Page 14 line 2

''when presenting its evidence'' Is corrected by '' when presenting its evidence to do so as they wished.''

Page 14 line 6

''an illogical conclusion; namely,'' Is corrected by ''an illogical conclusion, or rather, an illogical consequence ; namely,''

Page 14 line 13

''the Judges failed to explain'' Is corrected by '' the Judges failed to specifically explain''

Page 14 line 23

''all reasonable doubt'' Is corrected by ''reasonable doubt''

Page 15 lines 14-15

''as they have followed the same approach,'' Is corrected by ''as they have, in the instant case, followed the same approach,''

Page 16 lines 5-6

''by the Appeals Chamber in the Ruto and Lubanga cases and also in the Afghanistan situation.'' Is corrected by ''by the Appeals Chamber, drawn from

the Ruto and Lubanga cases and also from the Afghanistan situation."

Page 17 lines 11-13

''And how can the Prosecutor have demonstrated this, since there is absolutely -- since it fails to challenge the standard adopted in the reasons by its own admission.''

Is corrected by ''The Prosecutor cannot demonstrate this, as there is no logical link between the no case to answer proceedings and the adoption of the standard, and the way it was applied in the July 2019's reasons "

Page 17 line 25:

"on a decision" is translated and added.

Page 18 lines 11-12:

"the recognised standard that these factual errors" is corrected to

"the standard on factual errors, that these errors"

Page 18 line 17:

"within the time allocated to the Defence," is translated and added.

Page 19 lines 4-6:

"She is trying to have us believe that the analysis of these allegations were undertaken as to the existence of a common plan or an organisational policy."

Is corrected to

"She is trying to gloss over the fact that the analysis of these allegations was, on the contrary, undertaken in the context of the analysis of the existence of a common plan or an organisational policy."

Page 19 line 8:

"over scores of pages" is corrected to "over dozens of pages".

Page 19 line 10:

"or a policy" is translated and added.

Page 19 lines 11-12:

"in its entirety" is translated and added

Page 19 lines 13-18:

"There are other approaches of the Prosecution. When she changes the narrative in its mid-trial brief or the Prosecution goes on to say that the Judges also ignored other evidence, other witness testimony without ever mentioning which, also leading us to believe that they have put to one side other items of evidence that don't actually exist."

Is corrected to

"There are other practices employed by the Prosecution which, for example, frequently changes the narrative, including in its appeal brief, a practice that they used throughout the trial. Or the Prosecution goes on to say that the Judges supposedly ignored other evidence, other witness testimony, without ever mentioning which, and thereby suggesting that other items of evidence exist, which is not the case."

Page 19 lines 19-25:

"In reality - and this will be my last point, your Honour - these examples seem to serve another purpose, that of luring the Judges onto a factual terrain, as if the factual allegations could still be considered of any substance whatsoever. Whilst the Trial Chamber, Judges found after several years of analysis that the Prosecution evidence was exceptionally weak and did not survive the litmus test - and, they go on to say as if the trial had never occurred and arguing in the same way that they did at the beginning of the trial –"

Is corrected to

"In reality - and this will be my last point, your Honour - these examples seem to serve another purpose, that of luring the Appeal Judges onto a factual terrain, as if the Prosecutor's factual allegations could still be considered of any substance whatsoever. They did not survive the litmus test, that is, the test of the trial and the adversarial proceedings. The Prosecutor is merely referring to minor disagreements with the Trial Chamber, as if the trial had never occurred and arguing in the same way that they did on the first day of the trial –"

Page 19 line 25 to page 20 line 3:

"the Appeals Chamber cannot follow or validate the Prosecution in this approach, which involves absolutely putting to one side the existence of two years of trial and the comprehensive and exhaustive analysis of the evidence."

Is corrected to

"The Appeals Chamber cannot follow or validate the Prosecution in this approach, which involves ignoring the two years of trial and the comprehensive and exhaustive analysis of the evidence by the majority judges."

Page 42 line 12:

"queries" is corrected to "very important query"

Page 42 line 20:

"proceedings" is corrected to "debate"

Page 42 line 24:

"The Prosecution had opportunities to provide examples of jurisprudence."

Is corrected to

"The Prosecution, furthermore, cannot provide any contrary examples of jurisprudence."

Page 43 line 2:

“certainty”is corrected to “uncertainty”

Page 43 lines 5-11:

“. The standard of proof that was applicable the solidity of the evidence of the Prosecution, that standard existed and the Prosecution themselves conceded that it was the standard overall held by the Judges of the majority. The Prosecution throughout the entire proceedings attempted to impose another standard of proof that had never been applied at the ICC . That doesn't mean that there is uncertainty.”

Is corrected to

“ : the standard of proof that relates to the solidity of the evidence of the Prosecution, that standard existed and the Prosecution themselves conceded that it was the standard that was generally applied by the Judges of the majority, which they did not challenge. The fact that the Prosecution throughout the entire proceedings attempted by all means to impose another standard of proof that had never been applied at the ICC doesn't mean that there is uncertainty.”

Page 43 lines 18-20:

“So it was not a matter of determining which provision was applicable, but rather, what principles of the spirit of the Rome Statute could inspire the Judges.”

Is corrected to

“So it was not a matter of determining whether 74(5) or 81 would be strictly applicable, but rather, what principles of the spirit of the Rome Statute could inspire the Judges.”

Page 43 lines 22-23:

"that was" is deleted

Page 44 lines 2-3:

"in a certain way" is corrected to "in conformity with Article 21(3) of the Statute,"

Page 44 lines 4-6:

"We have a ruling with grounds, 950 pages, 950 pages of grounds have been given and once again the Prosecution is unable to make their case and their conclusions." Is corrected to

"We have a ruling with reasons, 950 pages, 950 pages of reasons have been given and once again the Prosecution is unable to challenge them in their overall conclusions."

Page 44 lines 17-19:

"Already there has been no unfairness -- correction, there has been no fairness towards the acquitted person, Mr Gbagbo. "

Is corrected to

"Already there has been no unfairness – and we shall continue to stress this - towards the acquitted person, Mr Gbagbo. "

Page 44 lines 19-20:

"The respect of his rights was at the heart of his acquittal decision of January 2019." is translated and added.

Page 44 line 21:

"Article 22, 23 and 24, is decision"

Is corrected to

"Articles 22, 23 and 24, is formulated"

Page 45 line 14:

"your Honours " is corrected to "Judge Carranza"

Page 45 lines 17-18:

", and there is no foundation for it whatsoever." Is translated and added.

Page 45 lines 20-21:

", only to complain today about the adoption of such a procedure." Is translated and added.

Page 45 line 22:

"the – about" is corrected to "of the integrity"

Page 53 line 3:

"to support the charges"is translated and added.

Page 53 lines 6-7:

"foreseen in the Statute as abuse of procedure."

Is corrected to

"specifically provided for in the Statute, for example, the abuse of due process."

Page 53 line 10:

"So, hereby we can attach a rationale to" is corrected to

"Hence the logic of"

Page 53 lines 13-17:

"One is not going to say, well, we put the Statute to one side because it's not doing its job. No. We have to make the Statute operational. We have to make the no case to answer proceedings operational, as they have been recognised by other cases before the Court to be indispensable for the rights of the defendant."is corrected to

"On the contrary, the idea is not to thwart the application of the Statute. Let us be clear about that. We have to make the no case to answer procedure operational, as it has been recognised by other cases before the Court to be indispensable for the rights of the defendant."

Page 53 line 24 to page 54 line 2:

"But the Court was set up with a view to making sure that this fight was within the framework of proceedings and the fight against impunity cannot be a way of denying the individual the respect of their rights."

Is corrected to

"But the Court was set up with a view to making sure that this fight was within a procedural framework, at the heart of which should be the respect of the rights of the accused person. The fight against impunity cannot be a way of denying the individual the respect of their rights."

Page 55 line 5:

"The issue at stake is the logic of the procedure." is translated and added.

Page 55 line 13:

"intentions" is corrected to "requirements"

Page 55 lines 19-20:

"It doesn't automatically follow 74(5), but there are -- there is —"

Is corrected to

"It doesn't automatically render Article 74(5) applicable, but there is some common sense in its provisions—"

Page 55 line 23 to page 56 line 2:

"a decision was respected by the judges. We are of the opinion that they have been, and this can be concretely verified, as can -- as was the case in the Ruto

case, for example, more or less."

Is corrected to

"a decision were respected in the decision handed down by the judges. We are of the opinion that they have been, and this can be concretely verified, as can -- as was the case in the Ruto case, for example, which was issued in a similar manner, more or less.

SECOND CORRECTIONS REPORT

The following corrections, marked with an asterisk and not included in the audio-visual recording of the hearing, are brought into the transcript.

Page 34 line 20:

"reduces" is corrected to "produces"

Page 34 lines 23-24:

" their" is corrected to "they are"

Page 65 line 11:

"question of principle"is corrected to "question on principle"

Page 65 line 13:

"Article"is translated and added

Page 66 line 15:

" Article 54" is corrected to "* Article 74".

Page 69 line 20:

"decision" is corrected to "position"

Page 70 line 5:

"not" is deleted

Page 70 line 16:

"expressions" is corrected to "impressions"

The following corrections, marked with an asterisk and included in the audio-visual recording of the hearing, are brought into the transcript.

Page 35 line 5:

“The ICTY's jurisprudence to the extent” is corrected to “The ICTY's jurisprudence, to the extent”

Page 35 line 6:

“our”is corrected to “a”

Page 35 line 23:

“currently” is corrected to “correctly”

Page 36 line 7:

“and” is corrected to “in”

Page 63 line 23:

“the “ is added

Page 69 line 23:

“the appeal decision” is corrected to “the appealed decision”