Cour
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International
Criminal
Court

Original: **English**

No.: **ICC-02/11-01/15**
Date: **30 April 2021**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public
***with* Public Annex A**

Further public redacted version of "Prosecution Document in Support of Appeal", ICC-02/11-01/15-1277-Conf, 15 October 2019

Source: Office of the Prosecutor

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

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I. Introduction

1. The States which established the International Criminal Court, "[r]esolved to guarantee lasting respect for and the enforcement of international justice."[1] The legitimacy of the Court—namely the Court's *recognised* ability to exercise its powers—largely rests on those who are subjected to its authority having confidence in the Court. To build public trust, it is essential for the Court to act predictably and in accordance with the applicable law.[2]

2. Firstly, as set out in the Prosecution's first ground, conviction and acquittal decisions must comply with the specific legal requirements in article 74(5) of the Statute. By complying with these requirements, ICC Trial Chambers ensure that any decision on an accused person's guilt or innocence is based on a solid and reliable legal, procedural and factual foundation, so that the parties, the victims and the public at large can have full trust in the conviction or acquittal rendered, and regard it as legitimate. However, in this case, when acquitting Mr Gbagbo and Mr Blé Goudé at the conclusion of the Prosecution case, the Majority failed to comply with these requirements in several respects. It orally acquitted Mr Gbagbo and Mr Blé Goudé through an unreasoned and not fully informed decision. The decision is unlawful and cannot produce the effect of an acquittal. Nor were such deficiencies in the decision cured by the provision of reasons six months later.

3. Secondly, as set out in the Prosecution's second ground, conformity with the applicable law also requires the predictable and consistent application of the rules. These must be clear from the start to the Parties, the victims and the public at large, and should not change in the course of a trial. In this case, the procedure was chaotic and fractured. The rules of the no case to answer proceedings ("NCTA proceedings")

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[1] Preamble to the Rome Statute, para. 11

[2] *See*, for instance, *Planned Parenthood of Southeastern Pennsylvania v. Casey*: "[T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the […] law means and to declare what it demands."

were not clear, to the Parties and Participants nor within the Chamber itself. Moreover, as the examples in this brief demonstrate, the Majority Judges themselves were equivocal, and in some instances contradictory, on what evidentiary standards and approaches to apply in assessing the sufficiency of the evidence at this stage. The proceedings were effectively ruptured and, through the acquittal decision rendered in these circumstances, the Prosecution, the victims and the public were prejudiced.

4. In sum, justice was not served in this case. The acquittals of Mr Gbagbo and Mr Blé Goudé should be reversed and a mistrial declared.

II. Page limit and classification

5. The Prosecution files this Document in Support of Appeal in accordance with the page limit prescribed by regulation 63(3) of the Regulations of the Court.[3] The Prosecution further files this document confidentially pursuant to regulation 23*bis*(1) of the Regulations of the Court, as it refers to confidential information. The Prosecution will file a public redacted version of this document at the earliest opportunity.

[3] Regulation 63(3): "For a consolidated appeal brief and a consolidated response, as described in sub-regulation 1, the page limit shall be 100 pages plus a further 40 pages for each additional convicted or acquitted person. […]".

III. First ground of appeal: The Majority erred by acquitting Mr Gbagbo and Mr Blé Goudé in violation of the mandatory requirements of article 74(5) of the Statute, or alternatively erred in the exercise of its discretion by doing so

III.A. Overview

6. The Prosecution's first ground of appeal has two sub-grounds. In the first sub-ground the Prosecution submits that the Majority erred in law and/or procedurally by acquitting Mr Gbagbo and Mr Blé Goudé in its 15 January 2019 Oral Acquittal Decision in violation of the mandatory requirements in article 74(5) of the Statute, thereby not entering a proper decision of acquittal under the Statute. In particular, the Majority acquitted Mr Gbagbo and Mr Blé Goudé without entering a formal decision under article 74; by rendering an oral decision; by failing to provide a full and reasoned statement of the Majority's findings on the evidence and conclusions; by failing to provide a summary of the reasons in open court; by merely indicating that the reasons would be provided "as soon as possible", but without fixing a precise date for providing the reasons; and by violating the requirement that a Trial Chamber shall issue "one decision".

7. In the second sub-ground the Prosecution submits, in the alternative, that even if *arguendo*, the Chamber had some discretion under article 74(5) of the Statute, it erred in law and/or procedurally by exercising its discretion to acquit Mr Gbagbo and Mr Blé Goudé in its 15 January 2019 Oral Acquittal Decision without entering a formal decision under article 74; by rendering an oral decision; by failing to provide a full and reasoned statement of the Majority's findings on the evidence and conclusions; by failing to provide a summary of the reasons in open court; by merely indicating that the reasons would be provided "as soon as possible", but without fixing a precise date for providing the reasons; and by failing to issue "one decision".

8. The 16 July 2019 Reasons did not cure these errors. Nor does interpreting article 74(5) in light of article 21 of the Statute legitimise the Majority's approach or validate Mr Gbagbo's and Mr Blé Goudé's acquittals.

III.B. Background

9. The trial of Mr Gbagbo and Mr Blé Goudé commenced on 28 January 2016.[4] The testimony of the last witness called by the Prosecution ended on 19 January 2018.[5]

10. On 9 February 2018, the Chamber "invited" the Prosecution to file a "trial brief illustrating her case and detailing the evidence in support of the charges", and gave the Prosecution 30 days to do so.[6] It further "ordered" each defence team, upon receipt of the Prosecution's trial brief, to "indicate whether or not they wish to make any submission of a *no case to answer motion* or, in any event, whether they intend to present any evidence".[7]

11. On 19 March 2018, the Prosecution filed its "Mid-Trial Brief".[8] After this, Mr Gbagbo[9] and Mr Blé Goudé[10] both stated that they wished to file a no case to answer ("NCTA") motion and that they intended to present evidence, if the Chamber were to conclude that there was a case to answer.

12. On 4 June 2018, the Chamber issued its "Second Order on the further conduct of proceedings".[11] The Chamber first declared that the presentation of the evidence of the Prosecution was closed. After noting its discretion to entertain NCTA motions,[12] it referred to taking appropriate procedural steps to shorten the trial and to focus it by

[4] T-9-ENG.
[5] T-220-Red-ENG.
[6] First Conduct of Proceedings Order, p. 8.
[7] First Conduct of Proceedings Order, para. 14 (emphasis added).
[8] Prosecution's Mid-Trial Brief and Annexes A-E.
[9] Gbagbo Conduct of Proceedings Observations, para. 162.
[10] Blé Goudé Conduct of Proceedings Observations, paras. 2, 4.
[11] Second Conduct of Proceedings Order.
[12] Second Conduct of Proceedings Order, para. 8.

reference to the principles and procedure for NCTA motions from the *Ruto and Sang* case.[13] The Chamber authorised the Defence to "make concise and focused submissions on the specific factual issues for which, in their view, the evidence presented is insufficient to sustain a conviction and in respect of which, accordingly, a full or partial judgment of acquittal would be warranted".[14] The Chamber also decided to hold a public hearing for the Parties and participants to make any further submissions and to "respond to specific questions by the Judges".[15] The Chamber stated that these submissions would assist it "in determining whether the evidence presented by the Prosecutor suffices to warrant the continuation of the trial proceedings and hear evidence from the accused, or whether the Chamber should immediately make its final assessment in relation to all or parts of the charges."[16]

13. On 13 June 2018, Presiding Judge Tarfusser, acting as the Single Judge, rejected the Prosecution's request for clarification of the standard applicable to NCTA motions.[17] He held that the Prosecution's assumption that the Chamber would follow the precedent from the *Ruto and Sang* case "amount[ed] to a mischaracterisation of the procedural steps devised by this Chamber".[18] He also noted that "the *Ruto* and *Sang* case being the only precedent in the jurisprudence of this Court to this day, the Prosecutor's statement to the effect that the standards enunciated in it are representative of the jurisprudence at the Court sounds far-fetched".[19]

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[13] Second Conduct of Proceedings Order, para. 9 and fn. 10.
[14] Second Conduct of Proceedings Order, para. 10.
[15] Second Conduct of Proceedings Order, para. 12. *See also* p. 7.
[16] Second Conduct of Proceedings Order, para. 13.
[17] NCTA Clarification Decision.
[18] NCTA Clarification Decision, para. 11.
[19] NCTA Clarification Decision, para. 13.

14. On 23 July 2018, the Defence for both Mr Gbagbo[20] and Mr Blé Goudé[21] filed their motions seeking a judgment of acquittal on all charges, to which the Prosecution[22] and the LRV[23] responded on 10 September 2018.

15. The oral hearing before the Chamber commenced on 1 October 2018.[24] The Prosecution made oral submissions between 1 and 3 October 2018, followed by the LRV.[25] Upon request by the Defence, the Presiding Judge adjourned the hearing until 12 November 2018. The Defence made oral submissions between 12 and 22 November 2018.[26]

16. On 10 December 2018, the Majority *proprio motu* scheduled a hearing on the continued detention of the accused.[27] Relying on "the statutory duty and responsibility to ensure that the duration of the detention of the accused shall not be unreasonable",[28] the Majority asked for submissions from the Parties and participants, among other things, on the "appropriateness and modalities of interim release", including under conditions such as those listed in rule 119(1).[29] In her dissenting opinion, Judge Herrera Carbuccia held that "such a *proprio motu* procedure, at a critical juncture of the trial in which a motion of acquittal is pending, and deliberations are on-going, would risk predetermining (or at least appearing to predetermine) issues related to the two pending Defence [NCTA] requests".[30] The hearing took place on 13 December 2018.[31] Although the Majority justified the need to convene the hearing on short notice based

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[20] Gbagbo's NCTA Motion.
[21] Blé Goudé's NCTA Motion.
[22] Prosecution's NCTA Response Cover Filing.
[23] LRV Submissions.
[24] NCTA Hearing Decision; NCTA Hearing Day 1.
[25] NCTA Hearing Day 1; NCTA Hearing Day 2; NCTA Hearing Day 3.
[26] NCTA Hearing Day 4; NCTA Hearing Day 5; NCTA Hearing Day 6; NCTA Hearing Day 7; NCTA Hearing Day 8; NCTA Hearing Day 9; NCTA Hearing Day 10.
[27] Detention Hearing Order.
[28] Detention Hearing Order, para. 9.
[29] Detention Hearing Order, para. 11.
[30] Detention Hearing Judge Herrera Carbuccia's Dissenting Opinion, para. 4.
[31] Detention Hearing.

on the "imminence of the winter recess and the festive period",[32] it did not rule on the accused's interim release before or during this period.

17. On 15 January 2019, in an oral hearing, the Majority of the Chamber, Judge Herrera Carbuccia dissenting,[33] issued its verdict ("15 January 2019 Oral Acquittal Decision").[34] The Majority stated that "the Prosecutor ha[d] not satisfied the burden of proof in relation to several core constitutive elements of the crimes as charged".[35] "In particular", it found that the Prosecution had failed to demonstrate the following elements: the existence of a "common plan"; the existence of the "policy to attack the civilian population"; that the crimes charged "were committed pursuant to or in furtherance of a State or organisational policy to attack the civilian population"; and that "public speeches by Mr Gbagbo or Mr Blé Goudé constituted ordering, soliciting or inducing the alleged crimes or that either of the accused otherwise knowingly or intentionally contributed to the commission of such crimes."[36] As a result, the Majority "grant[ed] the Defence motions for acquittal from all charges against Mr Laurent Gbagbo and Mr Charles Blé Goudé"[37] and "order[ed] the immediate release of both accused pursuant to Article 81(3)(c) of the Statute, subject to any request by the Prosecutor under subparagraph (i) of this Article".[38] The Majority said that it "will provide its full and detailed reasoned decision as soon as possible".[39]

18. On 16 January 2019, the Majority of the Chamber, Judge Herrera Carbuccia Dissenting, orally rejected the Prosecution's request under article 81(3)(c)(i) to find that exceptional circumstances existed to maintain the detention of Mr Gbagbo and Mr Blé Goudé, and to release them subject to conditions, unless no State willing and

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[32] Detention Hearing Order, para. 12. *See also* Detention Hearing, p. 67 ("the Chamber has all the information to take a decision, the decision I hope also will be a swift decision" and tentatively adjourning the hearing of 13 December 2018 until the following day).
[33] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion.
[34] 15 January 2019 Oral Acquittal Decision.
[35] 15 January 2019 Oral Acquittal Decision, 3:3-4.
[36] 15 January 2019 Oral Acquittal Decision, 3:6-17.
[37] 15 January 2019 Oral Acquittal Decision, 4:17-18.
[38] 15 January 2019 Oral Acquittal Decision, 4:24-5:1.
[39] 15 January 2019 Oral Acquittal Decision, 3:18.

able to enforce such conditions could be found.[40] Judge Herrera Carbuccia opined that "without a full and reasoned statement the accused should remain in detention pending appeal pursuant to Article 81(3)(c)(i) of the Rome Statute".[41] The Majority also refused the Prosecution's request for a stay pending an appeal of this oral decision.[42] Following the oral decision, the Presiding Judge stated that "[t]his concludes the trial as far as this Chamber is concerned."[43]

19. Having granted (by Majority) the Prosecution's request for suspensive effect,[44] the Appeals Chamber on 1 February 2019 amended the 16 January 2019 Decision, and imposed specific conditions on the release of Mr Gbagbo and Mr Blé Goudé.[45] The Appeals Chamber rejected the Prosecution's request to instruct the Chamber to provide reasons as expeditiously as possible, and preferably within 30 days of the Appeals Chamber's decision, but underlined the "need for expeditious proceedings."[46]

20. On 16 July 2019, the Chamber issued the "[r]easons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion" ("Written Reasons").[47] These Written Reasons mainly quoted the dispositive part of the 15 January 2019 (oral) Decision as reflected in the court transcripts of that day.[48] Annexed to the Written Reasons were the "Opinion of Judge Cuno Tarfusser" ("Judge Tarfusser's Opinion"),[49] the "Reasons of Judge Geoffrey Henderson" ("Judge

[40] Prosecution's Release Request, para. 31; 16 January 2019 Decision, 6:9-14. Detention AD, para. 4.
[41] 16 January 2019 Decision, 6:15-17.
[42] 16 January 2019 Decision, 6:2-8.
[43] 16 January 2019 Decision, 6:20.
[44] Suspensive Effect Decision (rendered by Majority, Judge Morrison and Judge Hofmański dissenting, Suspensive Effect Dissenting Opinion).
[45] Detention AD.
[46] Detention AD, para. 65.
[47] Written Reasons.
[48] Written Reasons, para. 28, citing 15 January 2019 Oral Acquittal Decision.
[49] Judge Tarfusser's Opinion.

Henderson's Reasons"),[50] and Judge Herrera Carbuccia's "Dissenting Opinion" ("Judge Herrera Carbuccia's Dissenting Opinion").[51] According to the Written Reasons, the Majority's analysis of the evidence is contained in the "Reasons of Judge Geoffrey Henderson".[52] In this Brief, the Written Reasons, Judge Tarfusser's Opinion, Judge Henderson's Reasons and Judge Herrera Carbuccia's Dissenting Opinion are referred to collectively as the "16 July 2019 Reasons".

III.C. The mandatory requirements of article 74(5) are key features of justice

21. The legitimacy of a decision of conviction or acquittal issued by a Trial Chamber of the Court rests on the quality and legality of the underlying procedure. A decision delivered as a product of procedural irregularities and undefined standards, and which disregards mandatory legal provisions of the Statute, is not only null and void; it cannot be considered lawful in the eyes of the parties and participants, the victims of the crimes and the affected communities, and the public opinion at large.

22. When a Trial Chamber enters a decision to acquit, it dismisses the charges against an accused and orders his or her immediate release, subject to article 81(3)(c)(i). Thus, decisions on conviction or acquittal are the most important decisions. To lawfully trigger its effects, the decision must be formally entered under article 74 and comply with the specific requirements in article 74(5).[53]

23. Article 74(5) provides:

> "The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial

[50] Judge Henderson's Reasons.
[51] Judge Herrera Carbuccia's Dissenting Opinion.
[52] Written Reasons, para. 29.
[53] An exception to the principle that a decision on acquittal or conviction may be rendered only under article 74 applies to a decision based on an admission of guilt, pursuant to article 65 and rule 139. Such a decision has lesser formal requirements (*see* rule 139(2)). However, this situation is not applicable to the case at hand.

Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court."

24. The requirements in article 74(5) are not discretionary. They are: 1) the decision *shall* be in writing; 2) the decision *shall* contain a full and reasoned statement of the findings; 3) the decision or a summary of it *shall* be delivered in open court; and 4) the Trial Chamber *shall* issue one decision and, when there is no unanimity, the one decision *shall* contain the views of the majority and the minority.

25. These four requirements are not mere formalities. They are essential components of international human rights law[54] and key features of justice ensuring that a Trial Chamber's verdict is based on a solid legal, procedural and factual foundation. This ensures that the parties, the victims and the public can fully trust the outcome of the trial and the acquittal or conviction.[55] Acquittal or conviction decisions that fail to comply with these requirements are unlawful.

26. The requirements in article 74(5) of a *full and reasoned written* statement of a Trial Chamber's findings on the evidence and conclusions (requirements 1 and 2) ensure that a verdict is explained, rather than merely stated.[56] Written reasons justify a particular conclusion[57] and make it more accurate[58] in an effort to prevent arbitrary outcomes.[59] They lend legitimacy[60] to the verdict and ensure accountability.[61] Crucially, "the discipline of reasons requires the judge to expose to the litigants, and

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[54] *See*, for instance, article 10 of the UDHR; article 14(1) of the ICCPR; article 8(5) of the ACHR; article 6(1) of the ECHR.
[55] *See e.g*. Safferling, p. 523.
[56] *See e.g*. Safferling, p. 523.
[57] Coleman and Leiter, pp. 212, 236.
[58] *Cf. Guthrie et al.*, pp. 36-37 (footnotes omitted) ("Despite this cost [of time], writing opinions could induce deliberation that otherwise would not occur. Rather than serving merely to describe an allegedly deliberative process that has already occurred (as the formalists might argue) or to rationalize an intuitive decision already made (as the realists might argue), the discipline of opinion writing might enable well-meaning judges to overcome their intuitive, impressionistic reactions. The process of writing might challenge the judge to assess a decision more carefully, logically, and deductively."); Bingham (1998), p. 143 ("I cannot, I hope, be the only person who has sat down to write a judgment, having formed the view that A must win, only to find in the course of composition that there are no sustainable grounds for that conclusion and that on any rational analysis B must succeed").
[59] 15 January 2019 Herrera Carbuccia's Dissenting Opinion, para. 22; Cohen, p. 512.
[60] *See also* Cohen, p 500; Sharpe, p. 135.
[61] Cohen, pp. 506-7, 512; Sharpe, p. 137. *See also* Safferling, p. 523.

to the public, the path the judge has taken to arrive at a decision. Requiring reasons is the way our legal system enforces the obligation of judges to follow the law and not their personal opinions".[62] A full and reasoned statement—"identify[ing] which facts [the Chamber] found to be relevant in coming to its conclusions"[63]—ensures that the conclusions flow from a full assessment of the evidence and that the reasoning is not adjusted to conform to a previously reached uninformed conclusion.

27. The requirement in article 74(5) of *a public delivery of at least a summary* of the decision in open court (requirement 3) ensures the publicity of the proceedings[64] and that decisions are more accessible to the public and can be more effectively scrutinised.[65] The public delivery of judgments in open court protects litigants against "the administration of justice in secret with no public scrutiny".[66] It contributes towards maintaining public confidence in the courts.[67] The public communication of reasons also increases acceptance, since "popular opinion is increasingly sceptical of those who have and exercise authority".[68] For example, the judgment of the International Military Tribunal at Nuremberg was handed down with publicly communicated reasons as an "attempt […] to explain the judgment in order to be understood in Germany and elsewhere".[69]

28. *Written, reasoned* and *publically available* judgments also allow for the participation of a wider audience. This is particularly important in an institution such as the Court

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[62] Sharpe, p. 134.
[63] Lubanga First Redactions AD, para. 20; Lubanga Second Redactions AD, para. 30.
[64] *Werner v. Austria*, para 54: "The Court reiterates that the principles governing the holding of hearings in public […] also apply to the public delivery of judgments […] and have the same purpose, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention".
[65] Boas *et al.*, p. 378.
[66] *Fazliyski v. Bulgaria*, para. 64.
[67] *Szücs v. Austria*, para. 42. *See also* Neuberger, para. 13 ("Publicly pronounced judgments represent an important means through which public confidence in, and understanding of, the courts, and therefore in the rule of law, can be secured").
[68] Sharpe, p. 134. *See also* Schabas, p. 877.
[69] Safferling, p. 524.

where victim participation is a key feature, constituting a key bridge between the Court and the communities affected by the crimes.

29. Finally, the requirement in article 74(5) that a Trial Chamber issue *one decision* (requirement 4) means not only that a decision, if not unanimous, should contain both the views of the majority and the minority. It also means that for a decision to be legally valid, it must include both the verdict *and* the full written reasons leading to it.[70] Unity between the two ensures their consistency and that the verdict is *the result* of the reasons. As stated by a Canadian Appeals Court—quoted by Judge Herrera Carbuccia in her dissenting opinion of 15 January 2019—"[r]easons rendered long after a verdict, particularly where it is apparent that they were crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge engaged in result-driven reasoning."[71]

30. In fact, in the process of reasoning a decision, a judge may discover that he or she cannot find an appropriate legal justification, leading the judge to reconsider his or her initial ruling and make a more accurate determination.[72] As noted by Judge Patricia Wald, "[i]t is not so unusual to modulate, transfer, or even switch an originally intended rationale or result in midstream because 'it just won't write'".[73] Others have similarly observed that "[f]orced to reason his [or her] way step by step and set down these steps in black and white, [a judge] is compelled to put salt on the tail of his reasoning to keep it from fluttering away".[74] "In thinking about a case, a judge might come to a definite conclusion yet find the conclusion indefensible when he [or she]

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[70] Mistry, p. 713.
[71] The full quote reads: "Although not precluded from announcing a verdict with "reasons to follow", a trial judge in all cases should be mindful of the importance that justice not only be done but also that it appear to be done. Reasons rendered long after a verdict, particularly where it is apparent that they were crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge engaged in result-driven reasoning. The necessary link between the verdict and the reasons will not be broken, however, on every occasion where there is a delay in rendering reasons after the announcement of the verdict. [...] Without this requisite link, the written reasons provide no opportunity for meaningful appellate review of correctness of the decision", *R v. Teskey*. *See also*, Court of Appeal for Ontario, *R. v. Cunningham* (106 O.R. (3d) 641, 3 August 2011 (cited in 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 33).
[72] Cohen, p. 512.
[73] Wald, p. 1375.
[74] Lasky, p. 838.

tries to write an opinion explaining and justifying it. The reason is that we do not think entirely in words, and certainly not entirely in sentences and paragraphs".[75]

31. This is why some systems which allow judges to state the verdict, with full reasons to follow, require that at the time of the verdict, the judge must read out a summary of the essential content of the reasons.[76] As occurred in this case, failure to give such a summary when the verdict is announced makes it difficult for the parties, the participants and the public to assess whether the previously rendered verdict was indeed based on the reasons that were articulated in writing later.[77]

32. As a corollary to the requirement that a Trial Chamber issue "one decision", article 74(5) clarifies that when there is no unanimity among the judges, the decision shall include the views of the majority and the minority.

III.D. The Majority failed to comply with the mandatory requirements in article 74(5)

33. According to the Appeals Chamber, "[i]f a decision under article 74(5) of the Statute does not, or not completely, comply with [the requirements under that provision], this amounts to a procedural error".[78]

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[75] Posner, p. 1447.
[76] *See* for example, Germany Code of Criminal Procedure, *Strafprozessordnung*, § 268(II): "*Eröffnung der Urteilsgründe…geschieht durch Verlesung oder durch Mitteilung ihres wesentlichen Inhalts";* Austria Code of Criminal Procedure, § 268 (*wesentliche Gründe*).
[77] In Germany, any inconsistency between the summary provided at the time of the verdict and the subsequent written reasons constitutes a ground of appeal, see Kuhlmann, 15. Jahrgang.
[78] *Bemba et al.* AJ, para. 102; *Bemba* AJ, para. 49.

III.D.1. The Majority failed to enter a formal decision under article 74

34. A valid and lawful acquittal must be entered under article 74[79]—the statutory provision governing decisions of acquittal[80]—*and* it must comply with the requirements of that provision. The Statute and the Rules contain no other provision under which a Trial Chamber may acquit an accused. In fact, the admissibility of the present appeal proceedings under article 81 depends on accepting the premise that the 15 January 2019 Oral Acquittal Decision should have been an article 74 one. Pursuant to article 81(1), direct appeals under article 81 are only permissible against "[a] decision under article 74". Equally, the admissibility of the Prosecution's previous appeal under article 81(3)(c)(ii) against the Chamber's 15 January 2019 Oral Acquittal Decision to unconditionally release Mr Gbagbo and Mr Blé Goudé was predicated on the assumption that the underlying decision should be an article 74 one.[81] The Majority referred to article 81(3)(c) in the 15 January 2019 Oral Acquittal Decision when ordering the immediate release "pursuant to Article 81(3)(c) of the Statute, subject to any request by the Prosecutor under subparagraph (i)".[82]

35. This does not mean that every decision on a defence's NCTA motion must be entered under that provision.[83] However, NCTA proceedings must be conducted in

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[79] An exception to the principle that a decision on acquittal or conviction may be rendered only under article 74 applies to a decision based on an admission of guilt, pursuant to article 65 and rule 139. Such a decision has lesser formal requirements (*see* rule 139(2)). However, this situation is not applicable to the case at hand.

[80] *See also* article 81 (entitled "Appeal against decision of acquittal or conviction or against sentence") and paragraph 1 ("A decision under article 74 may be appealed"). *See further* *Bemba et al.* SAJ, para.79 ("this Court's functions are regulated by a comprehensive legal framework in which its powers have been deliberately spelt out by the drafters to a great degree of detail, thus leaving little room to the invocation of 'inherent powers').

[81] The Appeals Chamber entertained and granted the appeal (*see* Detention AD, paras. 1-2, 60; *see also* Suspensive Effect Decision, p. 3). The Appeals Chamber has also entertained and partially granted the Prosecutor's urgent request for extension of time limits under rule 150(1) and regulation 58(1) to file its notice of appeal in these appeal proceedings under article 81 (*see* Time Extension Decision, paras. 3, 9).

[82] 15 January 2019 Oral Acquittal Decision, 4:24-25.

[83] Trial Chamber V(A)'s Decision on Defence Application for Judgments of Acquittal in the *Ruto and Sang* case (*Ruto and Sang* NCTA Decision) does not constitute an exception to that rule. Although that decision was not entered under article 74(5) and does not comply with all the requirements of that provision, Trial Chamber V(A) did not acquit Mr Ruto and Mr Sang. Instead, it vacated the charges against Mr Ruto and Mr Sang "without prejudice to their prosecution afresh in the future" (*Ruto and Sang* NCTA Decision, p. 1). Accordingly, Judge Henderson's analogy in this case to the *Ruto and Sang* case is misplaced (*see* Judge Henderson's Reasons, fns. 14, 16).

conformity with the Statute.[84] Accordingly, if as a result of such a motion a Trial Chamber decides to acquit the accused, then the trial proceedings are terminated and the acquittal decision must be entered under article 74 and in accordance with its requirements.

36. On 15 January 2019, the Majority acquitted Mr Gbagbo and Mr Blé Goudé and ordered their release, but did not expressly rely on article 74. Rather, during the hearing of 16 January 2019, Judge Tarfusser clarified that the Majority strongly rejected Judge Herrera Carbuccia's view that the Chamber "had a duty to consider the relevance, probative value and the potential prejudice of each item of evidence for the purpose of this decision".[85] This was because such a duty only arose "when giving the Chamber's decision pursuant to article 74".[86] On this logic, in the Majority's view, the 15 January 2019 Oral Acquittal Decision was *not* a decision under article 74.

37. Six months later, the Trial Chamber issued its 16 July 2019 Reasons "having regard to Articles 64, 66, 67, 69 and 74",[87] suggesting that the Chamber regarded these provisions as the relevant basis for its decision. In his Reasons, Judge Henderson also recognised that article 74 "does not expressly indicate whether [it applies] only at the conclusion of the trial after having received all the evidence from the parties".[88] However, he eventually stated that "article 74 does not […] provide the appropriate basis to render [...] decisions on motions for 'no case to answer'"[89] because this is "not a formal judgement of acquittal on the basis of the application of the beyond reasonable doubt standard *in accordance* with article 74 of the Statute."[90] Judge Henderson therefore concluded that, at the NCTA stage, "[t]he legal basis for the

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[84] *Ntaganda* NCTA AD, para. 44: "[A] 'no case to answer' procedure is not inherently incompatible with the legal framework of the Court. […] A decision on whether or not to conduct a 'no case to answer' procedure is thus discretionary in nature and must be exercised on a case-by-case basis 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."
[85] 16 January 2019 Decision 4:17-19.
[86] 16 January 2019 Decision. 4:20-21.
[87] Written Reasons, p. 3.
[88] Judge Henderson's Reasons, para. 13.
[89] Judge Henderson's Reasons, para. 13.
[90] Judge Henderson's Reasons, para. 17 (emphasis added).

decision that the accused has no case to answer is […] article 66(2)”.[91] He nevertheless conceded that the decision had “an equivalent legal effect [to an article 74 decision] in that the accused is formally cleared of all charges and cannot be tried again for the same facts and circumstances”.[92]

38. In any event, irrespective of the provision under which an acquittal is entered, the key features and safeguards of article 74(5) apply to the ultimate decision of a trial chamber, whether at the NCTA stage or after the Defence has presented its evidence. Only a decision complying with the fundamental features safeguarded by article 74 can lead to a lawful acquittal.

39. As explained, in January 2019 the view of the Majority—composed by Judge Henderson and Judge Tarfusser—was that the 15 January 2019 Oral Acquittal Decision was *not* a decision under article 74. However, by 16 July 2019 Judge Tarfusser had shifted his position,[93] concluding that “[t]rial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81”.[94] While this position is correct in law, it conflicts with the Majority’s 15 January 2019 Oral Acquittal Decision through which the Majority acquitted and ordered the release of Mr Gbagbo and Mr Blé Goudé. The Majority’s erroneous understanding of the nature of its 15 January 2019 Oral Acquittal Decision led it to misapply the article 74(5) requirements.

III.D.2. The Majority violated article 74(5) by failing to provide a written decision (Requirement 1)

40. The 15 January 2019 Oral Acquittal Decision through which the Chamber, by Majority, acquitted and ordered the release of Mr Gbagbo and Mr Blé Goudé, was

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[91] Judge Henderson’s Reasons, para. 15; *see also* para. 12.
[92] Judge Henderson’s Reasons, para. 17.
[93] Before taking position on the nature of the decision, Judge Tarfusser observed that it was not “necessary, or wise, to engage […] on a debate as to the nature of the decision” (Judge Tarfusser’s Opinion, para. 2).
[94] Judge Tarfusser’s Opinion, para. 65.

rendered orally[95] in violation of article 74(5) which requires that "[t]he decision shall be in writing".[96] The written transcript of the court hearing held on 15 January 2019 cannot be considered a "written decision" since every oral hearing is recorded through court transcripts. If court transcripts were considered written decisions, article 74(5)'s requirement that the decision shall be *in writing* would be meaningless. Unless, of course, the Chamber had read its full and reasoned statement of its findings on the evidence and conclusions on the record.

41. Six months later, on 16 July 2019, the Chamber issued its succinct eight-page Written Reasons to which the Judges' opinions were annexed.[97] In these Written Reasons, the Chamber quoted the dispositive part of the 15 January 2019 (oral) Decision as reflected in the court transcripts of that day.[98] However, this belated written decision was not the trigger for the acquittals of Mr Gbagbo and Mr Blé Goudé, since these had been in effect since 15 January 2019. Nor did such a "written record" retroactively cure the Majority's violations of article 74(5).

III.D.3. The Majority violated article 74(5) by failing to provide a full and reasoned statement of the Chamber's findings on the evidence and conclusions (Requirement 2), and failing to deliver its decision or a summary in open court (Requirement 3)

42. According to article 74(5) "[t]he decision [...] shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions" and "shall be delivered in open court", at least in summary form.[99] The Majority violated these requirements.

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[95] 15 January 2019 Oral Acquittal Decision.
[96] *See* paras. 24-26, 28 above.
[97] Written Reasons.
[98] Written Reasons, para. 28, citing 15 January 2019 Oral Acquittal Decision.
[99] *See* paras. 24-28 above.

43. The 15 January 2019 Oral Acquittal Decision merely identified four "core constitutive elements of the crimes as charged", in particular for which, in the Majority's view, "the Prosecutor has not satisfied the burden of proof".[100] This is not sufficient and does not satisfy the requirement of a full reasoned decision. Under article 74(5), a Chamber must set out its full findings on the evidence and its conclusions. It must specify with sufficient clarity the factual and legal basis of its decision by explaining how it assessed the evidence and which facts it found to be relevant in coming to its conclusions.[101] A summary of these reasons must comply with the same principles, meaning that a trial chamber must at least set out the main factual and legal findings explaining its main conclusions. Although the degree of detail in a summary will depend on each case, it must include the key steps of a chamber's reasoning on *how* and *why* it reached its conclusions. Merely stating the ultimate conclusion and verdict, as the Majority did in its 15 January 2019 Oral Acquittal Decision, violated article 74(5) and is inconsistent with the Court's practice.[102]

44. The Majority incorrectly invoked rule 144 to justify its approach. In the 15 January 2019 Oral Acquittal Decision, the Majority stated that it was permissible to defer any reasoning of the decision because rule 144(2) allows the Chamber to "provide *copies* of its full decision [...] 'as soon as possible' after pronouncing its decision in a public hearing, and there is no specific [...] time limit in this regard".[103] However, rule 144(2) merely allows the Registry to delay the *dissemination of copies* of the written and reasoned decision for a limited period of time. It does not permit the Chamber to defer—for an unspecified period of time—the delivery of the full and reasoned

[100] 15 January 2019 Oral Acquittal Decision, 3:3-17.
[101] *Lubanga* First Redactions AD, para. 20; *Lubanga* Second Redactions AD, para. 30. *See also* Judge Henderson's Reasons, para. 3 (preliminary remarks) (in the context of written reasons) ("Seeing that the Chamber was not unanimous, I felt it was necessary to explain my decision with some precision. Indeed, it would have been much easier for me to simply say that the evidence is insufficient and give a few illustrative examples. This may be appropriate in other contexts, but I am of the view that in this case it is not. The parties, the victims, the public and other stakeholders have a right not just to know what we think of the evidence – namely that it is insufficient – they also have a right to know *why* we think this.").
[102] The Majority acknowledged that it departed from the Court's practice referring to the "novelty" of its approach (16 January 2019 Decision, 5:21-23).
[103] 15 January 2019 Oral Acquittal Decision, 3:19-23 (emphasis added).

statement of its findings on the evidence and conclusions, which *shall be contained in the decision*. As its heading makes clear, rule 144 concerns the purely procedural aspects of the "*[d]elivery* of the decisions of the Trial Chamber" and not the substantive "*[r]equirements* for the decision" which are immutably regulated under article 74. The Chamber's interpretation of rule 144(2) contradicts the meaning and rationale of article 74(5), and ultimately the principle that the rules must be read subject to the Statute.[104]

III.D.4. The Majority violated article 74(5) by failing to enter "one decision" (Requirement 4)

45. As noted above,[105] the requirement in article 74(5) that a Trial Chamber must issue *one decision* means not only that a decision, if not unanimous, should contain both the views of the majority and the minority. It also means that for a decision to be legally valid, it must include both the verdict *and* the full written reasons which led to it. The Majority violated this latter requirement in two ways. First, by separating the verdict from the reasons; and second, by failing to provide full and proper reasons for its decision.

III.D.4.i. The Majority failed to deliver its verdict and full reasons as "one decision"

46. The Majority failed to enter *one decision* as required under article 74(5) by having acquitted and released Mr Gbagbo and Mr Blé Goudé on 15 January 2019 with reasons to follow. By its own admission, the Majority failed to issue "the full decision", which it "recognise[d] […] would have been preferable".[106]

47. In addition to the temporal gap between the verdict and the reasons—which turned out to be a full six months—the unity of the decision was also breached because when the Majority rendered its verdict, it did not provide any date by which it would

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[104] Article 51(5): "In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail."
[105] *See* paras. 24-25, 29-32 above.
[106] *See* 15 January 2019 Oral Acquittal Decision, 3:18-4:9

render its reasons. Its open-ended and non-committal reference to provide its reasons "as soon as possible" was insufficient to maintain the unity of the decision.

48. Issuing "one decision" means that a decision to convict or acquit an accused must be complete and cannot be delivered in stages or instalments. The decision must include all constitutive parts, namely the verdict, and "a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions".[107] The Majority's approach clearly failed to comply with the terms of article 74(5) that the decision "*shall* contain" a full and reasoned statement of a Trial Chamber's findings on the evidence and conclusions.

49. The reference in article 74(5) to "one decision" does not allow a Chamber to announce its verdict with reasons to follow. Had the drafters of the Court's statutory instruments intended to allow for a final decision of conviction or acquittal to be delivered piecemeal or in stages—as was done in this case—this would have been stated expressly. For instance, a recent amendment to the Rules of Procedure and Evidence of the Special Tribunal for Lebanon ("STL") makes clear that if drafters of rules choose to require a single decision, and not to allow a verdict separated in time from the reasons, this must be articulated. Before its amendment, STL rule 168(B) required the judgment to "be accompanied *or followed as soon as possible* by a reasoned opinion".[108] Following its amendment on 10 April 2019, STL rule 168(B) now requires that the judgment "*shall be accompanied* by a reasoned opinion".[109]

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[107] Article 74(5). *See* also Triffterer, O. and Kiss, A., "Article 74: Requirements for the decision" in Triffterer and Ambos, p. 1851, mn, 69.
[108] Rule 168 (B), STL Rules of Procedure and Evidence.
[109] Amendment to rule 168 STL's Rules of Procedure and Evidence on 10 April 2019 (https://www.stl-tsl.org/sites/default/files/documents/legal-documents/RPE/RPE_April_2019_EN.pdf):
The previous version of rule 168(B) stated: "The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion, in writing, to which separate or dissenting opinions may be appended." (STL Rules of Procedure and Evidence (superseded)).
The current version of rule 168(B) states: "The judgement shall be rendered by a majority of the Judges. It shall be accompanied by a reasoned opinion, in writing, to which any separate or dissenting opinions shall be appended." (STL's Rules of Procedure and Evidence (current)).

50. Another indication that the "one decision" must include the "full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions" is found in the last sentence of article 74(5), which provides that "[t]he decision or a summary thereof shall be delivered in open court". If the decision merely consisted of the verdict—conviction or acquittal—there would be no need for a summary. In addition to the verdict, the reasons must also be given in open court either in full or summarised form.[110]

51. Finally, this appeal is limited to the application of the specific provisions under article 74(5) to a Trial Chamber's decisions of conviction or acquittal. It does not apply to other decisions, such as judgments of the Appeals Chamber, which are not governed by the same requirements.[111]

III.D.4.ii. The Majority failed to provide full and proper reasons for the Majority's decision

52. The Majority also failed to comply with the requirement that a Trial Chamber issue "one decision" in another respect. In this case the three judges of the Chamber issued their own opinions or reasons. Article 74(5) provides that "[w]hen there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority".

53. According to the Written Reasons to which the three judicial opinions or reasons were appended, "[t]he majority's analysis of the evidence [leading to the acquittals] is contained in Judge Henderson's reasons".[112] However, Judge Henderson stated that the Reasons represented *his own* reasons: "What follows are *my* written reasons for

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[110] If the last sentence of article 74(5) was restricted to the verdict being given in open court, it would not make sense to allow for a summary thereof to be delivered, as the verdict is already a short formula stating whether the accused is convicted or acquitted.

[111] The Appeals Chamber's judgments are subject to the requirements of article 83(4), which differ from article 74(5) requirements. While both articles provide that the Chamber's decision/judgement, if not unanimous, "shall contain the views of the majority and the minority", only article 74(5) requires that the Chamber "shall issue one decision".

[112] Written Reasons, para. 29: "The majority's analysis of the evidence is contained in Judge Henderson's reasons".

joining Judge Tarfusser in deciding to end the case […]".[113] The use of the first person pronoun appears consistently in Judge Henderson's Reasons,[114] with references to "the Majority"—meaning Judges Tarfusser and Henderson—largely contained in the section on preliminary remarks.[115]

54. Although Judge Henderson's Reasons were ultimately presented as "the Majority's analysis of the evidence",[116] there is no indication that Judge Tarfusser participated in such analysis, the reasoning process and in reaching the conclusions found therein. Indeed, nothing in Judge Henderson's Reasons—or in Judge Tarfusser's Opinion—allows the reader to conclude that the Majority Judges deliberated to reach any joint findings and conclusions. The "views of the majority" referred to under article 74(5) appear to be, in this case, the reasons of a single Judge, which the other Majority Judge then ascribed to.

55. In his Opinion, Judge Tarfusser stated that "[f]or the purposes of the Majority reasoning, […] [he] subscribe[d] to the factual and legal findings contained in the 'Reasons of Judge Henderson'".[117] However, even if Judge Tarfusser may have agreed with Judge Henderson's ultimate "factual and legal" *conclusions*, it is apparent that he did not agree with all of Judge Henderson's reasoning, including the legal threshold to reach those conclusions. In particular, Judge Tarfusser made different legal findings from Judge Henderson with respect to (1) the "nature" or legal basis for the decision acquitting Mr Gbagbo and Mr Blé Goudé;[118] and (2) the standard of proof applied in

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[113] *See* Judge Henderson's Reasons, para. 1 (emphasis added).
[114] *See* Judge Henderson's Reasons, paras. 1, 3, 7, 10 (preliminary remarks), 18, 21, 29, 31, 38, 39, 41, 43, 48; fns. 42, 348, 1828, 2149 (of confidential version). *But see* reference to "our": Judge Henderson's Reasons, fn. 1 (*remarques preliminaires*), paras. 1 (preliminary remarks), 1830, 1882, 1995, 2040.
[115] Judge Henderson's Reasons, paras. 1, 2, 8 (preliminary remarks). *Note* that the use of the plural ("we") is also found mostly in the section on preliminary remarks: *see* Judge Henderson's Reasons, paras. 2, 3, 4, 7, 10 (preliminary remarks), 6, 7 (nature of the decision and applicable standard), 30, 66, 2040.
[116] Written Reasons, para. 29.
[117] Judge Tarfusser's Opinion, para. 1.
[118] *Compare* Judge Tarfusser's Opinion, para. 65 (finding that "[t]rial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81" and that the concept of acquittal was mentioned in the 15 January 2019 oral decision) *with* Judge Henderson's Reasons, paras. 13, 15, 17 (finding that "article 74 does not appear to provide the appropriate basis" to render decisions resulting in acquittals on motions for no case to answer but that "[t]he legal basis for the decision that the accused has no case to answer is thus article 66(2)", although with an "equivalent legal effect" to an acquittal under article 74). *See also* Judge

acquitting Mr Gbagbo and Mr Blé Goudé.[119] In fact, Judge Tarfusser expressly pointed out "differences in approach within the bench, some of which [are] so deep as to have repeatedly fractured the Chamber".[120]

56. Judge Tarfusser nevertheless said he agreed with the ultimate outcome of Judge Henderson's Reasons,[121] and downplayed any divergence on these matters as limited to "labels and theoretical approaches".[122] However, the concrete differences between Judge Tarfusser and Judge Henderson affected the coherence of the Majority's views. It is difficult to discern how Judge Tarfusser and Judge Henderson "could not be more in agreement" regarding the "in-depth analysis of the evidence",[123] and how "[t]he majority's analysis of the evidence" can be "contained" in Judge Henderson's Reasons.[124] Moreover, in Judge Tarfusser's Opinion, he explained his view that the detailed analysis conducted by Judge Henderson is "unnecessary […] and obstructive to the accessibility and comprehensibility of international criminal justice".[125]

57. The 15 January 2019 Oral Acquittal Decision, read together with the 16 July 2019 Reasons, violated article 74(5) in that the Majority failed to provide a full and reasoned statement of *its* findings on the evidence and conclusions. Instead, Judge Henderson

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Tarfusser's Opinion, para. 2 (taking note of Judge Henderson's Reasons at paragraph 13, and expressing his agreement with Judge Henderson's view that the legal effect of the decision is equivalent to that of an article 74 decision in that the accused are acquitted and formally cleared of all charges and cannot be tried again, *see* Judge Henderson's Reasons, para. 17); para. 67 ("the exercise entertained by the Chamber […] was never meant to replicate the so-called 'Ruto and Sang model'").

[119] *Compare* Judge Tarfusser's Opinion, para. 65 (finding the only evidentiary standard is beyond reasonable doubt under article 66(3)) *with* Judge Henderson's Reasons, paras. 2, 8, 14-15, 17 (setting out the no case to answer standard and noting that under article 66(2) the Prosecution bears the onus). *See also* Judge Tarfusser's Opinion, para. 68 (finding that there is no evidence in respect of which the Majority's determination as to the need for a defence case would have changed depending on the standard applied").

[120] Judge Tarfusser's Opinion, para. 6; *see* in general paras. 6-38 under the heading "The differences in approach with my fellow Judges and well-established ICC practices"; paras. 65-74 under the heading "The evidence on the record and the 'applicable standard'".

[121] *See* Judge Tarfusser's Opinion, paras. 1 (agreeing with "the Majority outcome"), 2 (agreeing with and supporting the "equivalent outcome").

[122] Judge Tarfusser's Opinion, para. 67 (referring to the nature of the decision and standard to be applied). *See also* paras. 2 (finding that a determination of the nature of the decision was not "necessary, or wise" but rather "to a large extent a purely theoretical debate"), para. 68 (evidence in this case did not require discussing "the theoretical foundation or the practical application" of the no case to answer procedure).

[123] Judge Tarfusser's Opinion, para. 67.

[124] Written Reasons, para. 29.

[125] Judge Tarfusser's Opinion, paras.8-9.

provided *his own* full and reasoned statement and made *his own* findings on the evidence while Judge Tarfusser only agreed in part, and afterwards, with his findings. In other words, the "fractured" Majority failed to form and deliver a shared and consistent Majority's view.

58. While article 74(5) does not prevent a majority judge from issuing a separate opinion, such a separate opinion must be issued *in addition* to the joint majority opinion setting out the majority's findings on the evidence and conclusions with sufficient detail to amount to a fully reasoned opinion within the terms of article 74(5).[126]

59. The drafting history of article 74(5) confirms that it should be read in this way. The ILC Draft Statute for an International Criminal Court specified that the judgment must be the "*sole* judgement issued",[127] explicitly requiring that the judgment be unanimous and thereby precluding that "division of opinion among the judges [is] revealed".[128] This was eventually rejected in favour of separate and dissenting opinions, influenced by the common law tradition of judges speaking their own mind.[129] However, article 74(5) still requires a decision of conviction or acquittal to be rendered by a *majority*. Indeed, "[m]ere coincidence of verdicts between two judges does not make a judgment. Consensus and possible compromises will also need to cover the reasons controlling the majority decision".[130] In some common law jurisdictions, a judgment in which a majority of judges agree on the outcome but not on the reasoning is known as a *plurality judgment*, and these have been strongly

[126] Trial Chamber V(A)'s Decision on Defence Application for Judgments of Acquittal in the *Ruto and Sang* case does not constitute an exception to this rule. That decision was not entered under article 74(5) and Trial Chamber V(A) did not acquit Mr Ruto and Mr Sang. Instead, it vacated the charges against Mr Ruto and Mr Sang without prejudice to their prosecution afresh in the future" (*Ruto and Sang* NCTA Decision, p. 1).
[127] ILC Draft Statute, p. 59, *Art 45 Quorum and judgment*, para. 5 (emphasis added).
[128] Damrosch, pp 1380.
[129] Yet even common law jurisdictions will aim to avoid a divisive court in criminal cases: "In English criminal appeals, it has long been regarded as imperative that the discomfiture of the unsuccessful appellant should not be aggravated by an overt division of opinion among the judges." (Blom-Cooper and Drewry, p 81).
[130] Klamberg, p. 563 fn. 616.

criticised for their lack of clarity and authority.[131] This is opposed to majority judgments where a majority of judges must agree not only on the verdict, but also on the underlying reasons. Article 74(5) clearly requires the latter.

III.E. The 15 January 2019 Oral Acquittal Decision was not fully informed

60. In addition to, and as a result of the Majority's misinterpretation and misapplication of article 74(5) in this case, the 15 January 2019 Oral Acquittal Decision was not fully informed. When the Majority rendered its oral acquittal of Mr Gbagbo and Mr Blé Goudé on 15 January 2019, and despite its assertion to the contrary,[132] it apparently had not yet completed the necessary process of making all its findings on the evidence and reaching all its conclusions, *nor* completed the written articulation of its findings and conclusions. In other words, the Majority had not yet completed its fully informed reasoning. This is troubling: as noted by Judge Herrera Carbuccia in her dissenting opinion to the 15 January 2019 Oral Acquittal Decision,[133] "[r]easons rendered long after a verdict, particularly where it is apparent that they were crafted

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[131] Ginsburg, p. 148 ("More unsettling than the high incidence of dissent is the proliferation of separate opinions with no single opinion commanding a clear majority"); *see also* Davis and Reynolds, p. 59; Bingham (2006) ("[W]hatever the diversity of opinion *the judges should recognise a duty, not always observed, to try to ensure that there is a clear majority ratio. Without that, no one can know what the law is* until Parliament or a later case lays down a clear rule […]", emphasis added). *See also*, Lynch, p. 482 ("What the Americans call 'plurality decisions' are in fact all too common in the High Court of Australia. The lack of a clear majority is an accepted incidence of our judicial method - there are no rules employed to attribute or create consensus that is not actually there."); L'Heureux-Dubé (2000), p. 496 fn. 2 ("[…] It should also be noted that in Canada, as in England and the United States, there may be several individual opinions that are in mutual agreement or disagreement with one another. This may lead to a 'plurality' decision (the opinion supported by the greatest number of judges), accompanied by other opinions which may agree in the result, but not as to the method by which the result is reached. *In such cases, there are no majority reasons* per se. These type of decisions - now relatively rare in Canada - are a legitimate target for criticism, as they tend to detract from the clarity and authority of the decision", emphasis added). *See further*, L'Heureux-Dubé (1990), p. 586 ("On some matters, and usually in the most important cases, there are strong pressures on the Court to speak collectively, to send a strong message. […] In such cases, there may be some pressure for an unanimous judgment from the Court. Compromises are made for that purpose."); Harvard Law Review, p. 1127; Novak, p. 756.

[132] 15 January 2019 Oral Acquittal Decision, 4:7-8 ("[…] having already arrived at its decision upon the assessment of the evidence […])").

[133] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 33.

after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge engaged in result-driven reasoning."[134]

61. The conclusion that the 15 January 2019 Oral Acquittal Decision was not fully informed is demonstrated by the following:

III.E.1. The 15 January 2019 Oral Acquittal Decision was not accompanied by summary reasons or a precise timeline for issuing the reasons

62. As discussed above,[135] the Majority did not deliver a summary of the decision in open court as required under article 74(5). This shows that the decision was not fully informed: had the Majority completed the process of analysing the evidence—drawing all factual and legal conclusions—and developed its reasoning by 15 January 2019, it could have (and presumably would have) summarised its reasoning and publicly delivered it in Court as required under the Statute. This is so even if the Majority may have needed additional time to finalise the editorial process of its full written reasons.

63. The lack of a summary, coupled with the volume of Judge Henderson's Reasons (968 pages) and the length of time that elapsed between the Chamber's oral verdict and its reasons (182 days), further shows that the Majority's necessary reasoning process had not been completed by the 15 January 2019 Oral Acquittal Decision. This is supported by Judge Henderson's statements regarding the case's complexity, the large volume of evidence and the Parties' complex and detailed submissions.[136] It is also supported by Judge Henderson's statement that he did not have the resources to make any necessary admissibility determinations in an expeditious manner.[137]

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[134] Judge Herrera Carbuccia was quoting *R v. Teskey*. *See also*, *R v. Cunningham,* cited in 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 33.
[135] *See* paras. 42-43 above.
[136] Judge Henderson's Reasons, para. 4. *See also* para. 5.
[137] Judge Henderson's Reasons, para. 29.

64. In her Dissenting Opinion to the 15 January 2019 Oral Acquittal Decision, Judge Herrera Carbuccia rightly observed that "[i]f a judge has analysed all the facts and the evidence before him or her, the judge must be able to issue a fully reasoned decision or at least provide the parties with a strict time limit to issue its reasons".[138] In this case the Majority failed to issue a reasoned decision on 15 January 2019. Nor did it specify a time limit within which it would issue its reasons. Broadly stating that the reasons would be delivered "as soon as possible" further shows that the process of analysing the evidence and reaching all necessary conclusions had not been completed by the time of the oral decision on 15 January 2019. And further, that the Majority was not even in a position to foresee how long it would still take it to articulate its reasons.

III.E.2. The Majority had not completed its assessment of the evidence or reached all conclusions

65. On 15 January 2019, Judge Herrera Carbuccia also noted that despite the Majority's statement that they had already arrived at their decision *upon the assessment of the evidence*,[139] "it is not evident if they have complied with their duty to consider the relevance, probative value and potential prejudice to the accused of each item of evidence'".[140]

66. The next day, on 16 January 2019, Judge Tarfusser confirmed that the Majority had *not* made such an assessment of the evidence before acquitting Mr Gbagbo and Mr Blé Goudé. He said:

> "The majority also strongly reject[s] the suggestion in […] Judge Herrera's dissenting opinion that the majority had a duty to consider the relevance, probative value and potential prejudice of each item of evidence for the purpose of this decision. This only arises in the context of admissibility rulings when giving

[138] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 32.
[139] *See* 15 January 2019 Oral Acquittal Decision, 4:7-8.
[140] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 47.

the Chamber's decision pursuant to Article 74. This is not now relevant given the Chamber's direction to the parties and participants that for the purpose of this procedure, all evidence submitted is to be considered."[141]

67. That the Chamber in this case adopted the 'submission regime' as opposed to the 'admission regime' for assessing the evidence did not absolve it from its duty to make detailed assessments of the relevance, probative value and potential prejudice of each item of evidence before deciding to acquit. The Appeals Chamber has repeatedly upheld the following principle:

> "[Under articles 64(9)(a) and 69(4) of the Statute] the Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber […] and then determine the weight to be attached to the evidence at the end of the trial. In that case, an item will be admitted into evidence only if the Chamber rules that it is relevant and/or admissible in terms of article 69 (4), taking into account 'the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness'. Alternatively, the Chamber may defer its consideration of these criteria until the end of the proceedings, making it part of its assessment of the evidence when it is evaluating the guilt or innocence of the accused person. […] *[I]rrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings – when evidence is submitted, during the trial, or at the end of the trial.*"[142]

68. This does not mean that a Trial Chamber must always assess the relevance, probative value and potential prejudice of each item of evidence when deciding a NCTA motion. It can—and should—reject a NCTA motion without making ultimate and detailed findings on the evidence.[143] Similarly, if the Chamber finds that there is

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[141] 16 January 2019 Decision, 4:17-23.
[142] *Bemba* Evidence Admission Decision, para. 37 (emphasis added); *see also* Submission of Evidence AD, para. 45; *Bemba et al.* AJ, 8 March 2018, paras. 594, 597-598.
[143] *See generally* Ground 2.

simply *no* evidence supporting a given charge at the NCTA stage, then that Chamber is obviously relieved from making any further assessment. However, if such evidence was submitted, and a Trial Chamber still considers granting a NCTA motion and acquitting an accused, it must first make detailed findings on the relevance, probative value and potential prejudice of each item of evidence before reaching its ultimate conclusion. By acquitting an accused without considering the evidence in detail, a Trial Chamber contravenes the Appeals Chamber's case-law. NCTA proceedings are a tool for the Trial Chamber to ensure that the trial proceedings are fair and expeditious.[144] But they must conform to the Statute and the Rules.

69. The lack of a proper assessment of the relevance, probative value and potential prejudice of each item of evidence by the Majority before it acquitted Mr Gbagbo and Mr Blé Goudé demonstrates that its 15 January 2019 Oral Acquittal Decision was not fully informed. Even if the Majority completed an in-depth analysis of the evidence by 16 July 2019,[145] this does not remedy the fact that the Majority's actual decision acquitting Mr Gbagbo and Mr Blé Goudé on 15 January 2019 had not been fully informed.

70. On 16 January 2019, the Majority acknowledged that it would have been obliged to make detailed findings on the relevance, probative value and potential prejudice of each item of evidence, if the 15 January 2019 Oral Acquittal Decision had been a decision under article 74.[146] But, as noted above,[147] a conviction or acquittal decision must be made under article 74 and comply with its requirements. In January 2019, the

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[144] *Ntaganda* NCTA AD, para. 44 ("[…] a 'no case to answer' procedure is not inherently incompatible with the legal framework of the Court. […] A decision on whether or not to conduct a 'no case to answer' procedure is thus discretionary in nature and must be exercised on a case-by-case basis 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").
[145] *See*, Judge Tarfusser's Opinion, para. 67 ("[…] [t]he Majority's view is soundly and strongly rooted in an in-depth analysis of the evidence […] on which my fellow Judge Geoffrey Henderson and I could not be more in agreement". This appears at odds with Judge Henderson's approach that he had done a "full review of the evidence submitted", but had taken the Prosecution's case "at its highest/most compelling", and had not "systematically assessed the credibility and reliability of the Prosecutor's testimonial evidence" (Judge Henderson's Reasons, paras. 8, 30, 41).
[146] 16 January 2019 Decision, 4:17-23.
[147] *See* paras. 21-24 above.

Majority's view was that the 15 January 2019 Oral Acquittal Decision was *not* a decision under article 74. However, by 16 July 2019 Judge Tarfusser had shifted his position.[148] He concluded that "[t]rial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81".[149] Accordingly, at least he, as one of the Majority Judges, acquitted Mr Gbagbo and Mr Blé Goudé without having made the necessary evidentiary assessments required for a decision of acquittal under the provision he identified, namely article 74. This also demonstrates that the Majority's 15 January 2019 Oral Acquittal Decision was not fully informed.

71. Further, by looking at the procedural history of this case in hindsight, there are additional indications in the record showing that one of the Majority Judges—Judge Tarfusser—had not yet completed his assessment by the time he orally acquitted Mr Gbagbo and Mr Blé Goudé on 15 January 2019. These show that he appears to have reached his final conclusion even before he received the Defence's NCTA motions and the Prosecution's response, both filings which later informed his Opinion and Judge Henderson's Reasons.

72. On 4 June 2018, the Chamber issued its Second Order on the further conduct of proceedings, instructing the Defence to file "submissions addressing the issues for which, in their view, the evidence presented by the Prosecutor is not sufficient to sustain a conviction".[150] The Prosecution asked for clarification of the applicable NCTA standard that the Chamber would apply,[151] but Judge Tarfusser, as the Single Judge, rejected this on 13 June 2018 and refused to provide any clarification.[152] Later, on 16 July 2019 when discussing the applicable NCTA standard in his Opinion—specifically when discussing whether *a* NCTA standard exists—Judge Tarfusser recognised that the previous instructions to the Parties and participants on the matter

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[148] Before taking position on the nature of the decision, Judge Tarfusser observed that it was not "necessary, or wise, to engage […] on a debate as to the nature of the decision" (Judge Tarfusser's Opinion, para. 2).
[149] Judge Tarfusser's Opinion, para. 65.
[150] Second Conduct of Proceedings Order, p. 7.
[151] Prosecution's NCTA Clarification Request.
[152] NCTA Clarification Decision.

included "sometime[s] neutral if not ambiguous procedural formulas". In Judge Tarfusser's view, these "were necessary *en route* to make the trial progress towards its right conclusion".[153]

73. Since Judge Tarfusser believes that NCTA motions do not exist under the procedural framework of the Statute,[154] on his logic, he could not have made an interim determination on "whether the evidence presented by the Prosecutor suffices to warrant the continuation of the trial proceedings and hear evidence from the accused".[155] On his logic—having ordered the Parties and participants to make extensive written and oral submissions at the end of the Prosecution's case[156]—for him the only available procedural step would have been to enter a final decision under article 74.

74. Furthermore, when the Chamber issued its instructions to the Parties and participants about the procedure in June 2018—instructions which Judge Tarfusser called in his Opinion "necessary *en route* to make the trial progress towards its right conclusion"[157]—the Defence had not yet called any evidence, but had only indicated an intention to do so.[158] It is therefore unlikely that Judge Tarfusser at that stage could

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[153] Judge Tarfusser's Opinion, paras. 65, 67.
[154] According to Judge Tarfusser, "the notion [and] procedure of no case to answer is extraneous to the statutory texts of the Court" (NCTA Hearing Day 10, 22:11-12). In his separate opinion (para. 65), Judge Tarfusser wrote: "The nature of this standard [for NCTA motions] became […] the subject of speculative discussion […]. My views on the 'no case to answer' proceedings are well-known at this stage: they have no place in the statutory framework of the Court and are unnecessary as a tool to preserve the interests and rights they are meant to serve. There is only one evidentiary standard and there is only one way to terminate trial proceedings. The evidentiary standard is set forth in article 66, paragraph 3: '[i]n order to convict the accused, the Court must be convinced of the guilt of the accused *beyond reasonable doubt*'. Trial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81." (emphasis added), Judge Tarfusser's Opinion.
[155] Second Conduct of Proceedings Order, para. 13.
[156] *See* paras. 10-16 above. The Chamber had first ordered the Prosecution to file a "Trial Brief" no later than 30 days after the notification of the First Conduct of Proceedings Order, and then in the Second Conduct of Proceedings Order instructed the Defence to file NCTA motions by 20 July 2018, and permitted the Prosecution to file a response thereto by 27 August 2018, scheduling extensive hearings to discuss the Defences' NCTA motions to commence on 10 September 2018. These were the dates originally given in the First and Second Conduct of Proceedings Order some of which were varied by decisions on time extensions.
[157] Judge Tarfusser's Opinion, para. 67.
[158] By 18 July 2018, pursuant to the First Conduct of Proceedings Order, Mr Gbagbo and Mr Blé Goudé's Defence teams had indicated that, assuming that there was a case to answer, they would present evidence. *See* Gbagbo Conduct of Proceedings Observations, paras. 162-168 (as a first step Mr Gbgabo's Defence team must assess the Prosecution's evidence as a whole, then assess whether to present a NCTA motion, provided the case moves to the presentation of Defence evidence, the Prosecution must provide all rule 77 disclosure, then Defence team must

have been minded to convict Mr Gbagbo and Mr Blé Goudé since this would have violated their rights under article 67(1)(e) of the Statute to call their own evidence.[159] Accordingly, an inference is available that the "right" conclusion Judge Tarfusser was referring to was his (already formed) decision to terminate proceedings and acquit Mr Gbagbo and Mr Blé Goudé.

75. This supports the Prosecution's submission that Judge Tarfusser, as a Majority Judge, appears to have decided to acquit Mr Gbagbo and Mr Blé Goudé before he even received the Defence's NCTA motions and the Prosecution's response. The submissions of the Parties in these filings informed both Judge Henderson's Reasons[160]—which supposedly reflects the Majority's views on the evidence[161]—and

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conduct additional investigation on the basis of the Chamber's NCTA decision, only then will the Defence team be in a position to provide the Chamber with a list of evidence), para. 169 (asserting Defence team envisaged contesting all aspects of the Prosecution case on which the Chamber would decide to continue the case), para. 170 (will present evidence to challenge the existence of the common plan, the charged incidents, and the context), para. 172 (the Defence case will consider the existence of an armed conflict and the conduct of the FRCI); [REDACTED]. *See also* in this connection, First Conduct of Proceedings Order, paras. 8-9 referring to Gbagbo Response to Prosecution Request for Directions (acknowledging the indication by Mr Gbagbo's Defence team that it would require an additional six months from its decision on whether or not to file an NCTA motion, to investigate and be in a position to provide a list of witnesses, and observing that Mr Gbagbo's Defence team seemed "to rely on the assumption not only that all the Defence work on the case is yet to be done […] but also that the clock for this work has yet to start running", finding it grounded on a distorted perception of the expeditiousness of the proceedings and the overall notion of fair trial). *See further*, [REDACTED].

[159] *See e.g.* Judge Tarfusser's Opinion, para. 68 (recognising the circumstances under which it would have been necessary to proceed with the presentation of the evidence by the Defence).

[160] Judge Henderson's Reasons, paras. 31, 50, 78, 80, 81, 83, 84, 85, 86, 89, 92, 95, 97, 111, 115, 117, 135, 148, 152, 156, 167, 168, 169, 173, 193, 222, 225, 234, 238, 242, 243, 246, 256, 258, 260, 262, 264, 266, 269, 270, 276, 278, 280, 281, 286, 291, 293, 294, 296, 298, 302, 303, 306, 314, 315, 320, 324, 327, 332, 336, 337, 340, 342, 344, 347, 352, 354, 357, 362, 378, 399, 401, 405, 406, 408, 409, 410, 413, 414, 415, 416, 418, 419, 420, 421, 427, 436, 439, 460, 462, 463, 496, 505, 526, 536, 539, 542, 548, 549, 561, 562, 569, 571, 591, 595, 599, 608, 609, 610, 615, 642, 657, 662, 665, 671, 675, 677, 685, 710, 720, 754, 757, 759, 780, 804, 813, 827, 830, 840, 850, 866, 867, 868, 870, 872, 879, 893, 899, 900, 908, 932, 934, 954, 955, 958, 960, 962, 963, 967, 985, 1003, 1006, 1019, 1024, 1032, 1033, 1036, 1038, 1079, 1081, 1114, 1125, 1127, 1129, 1137, 1143, 1144, 1145, 1147, 1149, 1150, 1156, 1158, 1167, 1169, 1185, 1186, 1187, 1188, 1193, 1194, 1204, 1210, 1220, 1222, 1226, 1227, 1228, 1231, 1233, 1234, 1250, 1265, 1291, 1298, 1327, 1330, 1342, 1357, 1363, 1364, 1369, 1371, 1374, 1383, 1384, 1385, 1386, 1387, 1389, 1401, 1405, 1406, 1407, 1409, 1411, 1414, 1415, 1417, 1418, 1419, 1424, 1425, 1426, 1429, 1442, 1444, 1445, 1446, 1447, 1455, 1461, 1464, 1465, 1472, 1480, 1485, 1486, 1488, 1489, 1490, 1491, 1492, 1498, 1503, 1507, 1511, 1516, 1518, 1520, 1523, 1525, 1530, 1532, 1533, 1540, 1544, 1549, 1551, 1556, 1559, 1561, 1568, 1569, 1570, 1575, 1577, 1580, 1581, 1589, 1594, 1597, 1598, 1600, 1601, 1602, 1605, 1608, 1614, 1615, 1616, 1618, 1619, 1620, 1622, 1623, 1624, 1626, 1654, 1682, 1687, 1688, 1697, 1699, 1705, 1716, 1727, 1728, 1733, 1734, 1736, 1740, 1744, 1752, 1755, 1762, 1764, 1772, 1773, 1779, 1781, 1788, 1791, 1793, 1797, 1798, 1802, 1812, 1824, 1825, 1833, 1836, 1840, 1844, 1845, 1846, 1847, 1848, 1849, 1860, 1863, 1865, 1866, 1867, 1870, 1872, 1873, 1874, 1875, 1877, 1879, 1885, 1888, 1892, 1894, 1897, 1898, 1909, 1912, 1915, 1918, 1919, 1926, 1940, 1941, 1942, 1946, 1947, 1949, 1950, 1951, 1953, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1969, 1972, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1984, 1985, 1986, 1993, 1995, 1997, 2001, 2005, 2009, 2012, 2017, 2018, 2019, 2022, 2024, 2026 (referring to the Prosecution's NCTA Response); paras. 11, 276, 277, 408, 410, 411, 414, 416, 417, 423, 870, 897, 908 (referring to the defence NCTA motions).

[161] Written Reasons, para. 29.

Judge Tarfusser's Opinion.[162] Accordingly, it appears that many of the conclusions in Judge Henderson's Reasons and in Judge Tarfusser's Opinion were reached after Judge Tarfusser had already decided to acquit Mr Gbagbo and Mr Blé Goudé by June 2018 (and before receiving the Defences' NCTA motions and the Prosecution's response). This further shows that the Majority's 15 January 2019 Oral Acquittal Decision to acquit Mr Gbagbo and Mr Blé Goudé was not fully informed.

III.E.3. Substantive inconsistencies between the 15 January 2019 Oral Acquittal Decision and the 16 July 2019 Reasons demonstrate that the oral acquittal was not fully informed

76. Several substantive inconsistencies between the Majority's 15 January 2019 Oral Acquittal Decision and its 16 July 2019 Reasons also demonstrate that by 15 January 2019, the Majority Judges had not reached all necessary conclusions. Most significantly, by mid-January 2019, the Majority had not yet decided on the applicable standard of proof and the very nature of the decision. Instead, the Majority Judges apparently developed their conclusions on these matters only after acquitting Mr Gbagbo and Mr Blé Goudé. These inconsistencies show that the 15 January 2019 Oral Acquittal Decision was not fully informed.

III.E.3.i. <u>*Inconsistencies about the nature of the decision*</u>

77. As discussed above,[163] as of 16 January 2019[164] the two Majority Judges appeared to share the (incorrect) view that the 15 January 2019 Oral Acquittal Decision was *not* a decision of acquittal under article 74. Six months later Judge Henderson re-affirmed this position stating that the legal basis for the acquittal was not article 74, but article

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[162] Judge Tarfusser's Opinion, paras. 40, 44, 46, 67, 68, 71, 85 (referring to the Prosecution's NCTA Response), para. 67 (referring to Blé Goudé's NCTA Motion).
[163] See paras. 36-39 above.
[164] The 16 January 2019 Decision is evidence of what the Majority thought and understood on 15 January 2019.

66(2).[165] Judge Tarfusser, who stated in his Separate Opinion that he "subscribe[d]" to the factual and legal findings in Judge Henderson's Reasons,[166] disagreed with Judge Henderson on the legal basis governing such factual and legal findings and stated that "[t]rial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81".[167]

78. There is thus a clear contradiction, a non-reconciled disagreement, between the two Majority Judges as to the nature of the decision they had taken on 15 January 2019. This shows that the Majority, although proceeding to acquit and release Mr Gbagbo and Mr Blé Goudé, had not yet fully completed its reasoning and reached the necessary shared conclusions on significant matters.

III.E.3.ii. *Inconsistencies on the applicable standard of proof*

79. The applicable standard of proof to adjudicate the Defence's NCTA motions was the subject of intense litigation between the Parties during the trial. After the Chamber had ordered the Defence to "indicate whether or not they wish[ed] to make any submission of a *no case to answer motion*",[168] which they did, the Chamber issued its Second Order for the further conduct of those proceedings. It invited the Defence to explain "why there is insufficient evidence which could reasonably support a conviction".[169] On 13 June 2018, Judge Tarfusser, as the Single Judge, rejected the Prosecution's request for clarification of the standard governing the NCTA motions.[170]

80. When orally acquitting Mr Gbagbo and Mr Blé Goudé on 15 January 2019, the Majority held that "the Prosecutor has failed to satisfy the burden of proof *to the*

[165] Judge Henderson's Reasons, paras. 13, 15.
[166] Judge Tarfusser's Opinion, para.1.
[167] Judge Tarfusser's Opinion, paras. 2, 65.
[168] First Conduct of Proceedings Order, para. 14 (emphasis added).
[169] Second Conduct of Proceedings Order, para. 10.
[170] NCTA Clarification Decision. See paras. 11-13, where the Single Judge held that the Prosecution's assumption that the Chamber would follow the precedent from the *Ruto and Sang* case "amount[ed] to a mischaracterization of the procedural steps devised by this Chamber". He also noted that "the *Ruto* and *Sang* case being the only precedent in the jurisprudence of this Court to this day, the Prosecutor's statement to the effect that the standards enunciated in it are representative of the jurisprudence at the Court sounds far-fetched".

requisite standard as foreseen in Article 66 of the Rome Statute".[171] The only standard of proof in article 66 is that of proof "beyond reasonable doubt", referred to in article 66(3). The following day, when addressing Judge Herrera Carbuccia's Dissenting Opinion, Judge Tarfusser stated: "[i]t should be noted, in this regard, that the dissenting judge is mistaken in stating that the majority has acquitted Mr Gbagbo and Mr Blé Goudé by applying the beyond a reasonable doubt standard. The majority limited itself to assessing the evidence submitted and whether the Prosecutor has met the onus of proof to the extent necessary for warranting the Defence to respond. Adopting this standard, it is not appropriate for these proceedings to continue".[172] It appears from this that the two Majority Judges at this time were of the view that they had applied a standard of proof below that of "beyond reasonable doubt". However, the precise standard they applied was unclear.

81. Even if the two Majority Judges had agreed on the applicable evidentiary standard on 15 January 2015, by the time the 16 July 2019 Reasons were rendered, the two Majority Judges disagreed with each other on the standard. Judge Henderson clarified that he did not apply the beyond reasonable standard in article 66(3), but rather adopted the *Ruto and Sang* NCTA standard.[173] Judge Tarfusser, on the other hand, found that: "[t]here is only one evidentiary standard and there is only one way to terminate trial proceedings. The evidentiary standard is set forth in article 66, paragraph 3: '[i]n order to convict the accused, the Court must be convinced of the guilt of the accused *beyond reasonable doubt*' (emphasis added)."[174]

82. This shows that any discussions the Majority may have had on the applicable standard of proof were not finalised by mid-January 2019. While the two Majority Judges apparently agreed on this matter on 15 January 2019, by 16 July 2019, they had

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[171] http://www.legal-tools.org/doc/4fe93a/ 15 January 2019 Oral Acquittal Decision, 4:15-16 (emphasis added).
[172] 16 January 2019 Decision, 4:11-16.
[173] Judge Henderson's Reasons, para. 4.
[174] Judge Tarfusser's Opinion, para. 65, see also para. 47.

disagreed. This further shows that the 15 January 2019 Oral Acquittal Decision was not fully informed.

III.E.4. Inconsistencies in assessing the sufficiency of evidence at the NCTA stage within Judge Henderson's Reasons

83. In addition to the above inconsistencies on how the Majority Judges viewed the applicable standard of proof on 15 January 2019, and then on 16 July 2019, at times in his Reasons Judge Henderson inconsistently applied his approach to assessing the sufficiency of the evidence at the NCTA stage. This matter is addressed in detail under the second ground of appeal and is incorporated here.[175]

84. These additional inconsistencies further show that when Judge Henderson drafted portions of his Reasons, he had not yet clearly defined the relevant standard of proof and approaches to assessing the sufficiency of the evidence for himself, let alone in agreement with Judge Tarfusser. Any of Judge Henderson's factual findings and conclusions that he reached before having clearly set out the applicable standard and approaches must be considered not fully informed and thus disregarded. Certainly, an acquittal based, at least in part, on such factual findings and conclusions which were not fully informed cannot produce any legal effects under the Statute.

III.E.5. Conclusion

85. Had the Majority not violated but instead properly interpreted and applied article 74(5), it would have completed the process of making all its findings on the evidence and conclusions and developed fully informed and written reasons before acquitting Mr Gbagbo and Mr Blé Goudé. It would have been able to publicly deliver at least a summary of its reasons in open court when rendering its verdict. However, since the Majority violated article 74(5), the 15 January 2019 Oral Acquittal Decision to

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[175] *See* paras. 122-263 below.

acquit the Accused was premature and not fully informed. It is vitiated by fatal procedural flaws, and is therefore unlawful.

III.F. Interpreting article 74(5) in light of international human rights law does not legitimise the Majority's approach

86. Contrary to the Majority's view, interpreting article 74(5) in light of international human rights law pursuant to article 21(3) does not demand a more expansive approach to the provision or legitimise the Majority's approach. It thus cannot cure the Majority's invalid decision of acquittal.

87. Article 21(3) of the Statute "ordains the application and interpretation of every provision of the Statute in a manner consistent with internationally recognized human rights".[176] This does not allow a Chamber to deviate from article 74(5) just because an alternative approach is also consistent with internationally recognised human rights law. The question in this appeal is not whether the Majority's approach accords with internationally recognised human rights, but whether, in the circumstances of this case, the Majority was required to depart from the ordinary meaning of article 74(5) as it did,[177] to comply with internationally recognised human rights.

88. While in principle, a Chamber retains "[a] measure of flexibility in the management of proceedings […] to ensure that a trial is 'fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'",[178] this is not the case with respect to article 74(5). A conviction or acquittal decision must always comply with article 74(5).[179] Its requirements are not mere formalities. They are essential components of international

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[176] *Lubanga* Interim Release AD, Separate opinion of Judge Georghios M. Pikis, para. 16; *Katanga* Legal Characterisation AD, para. 86; *Lubanga* Jurisdiction AD, paras. 36-37; *Gbagbo* Judge Ušacka Dissenting Opinion, para. 11. *See also*, *DRC* Extraordinary Review Decision, para. 38.
[177] 15 January 2019 Oral Acquittal Decision, 3:18-4:9.
[178] *Ruto and Sang* Trial Presence AD, para. 50.
[179] *See* paras. 21-32 above.

human rights law[180] and key features of justice, ensuring that the ultimate conclusion of a trial is based on a solid legal, procedural and factual foundation. This allows the parties, the victims and the public to fully trust the outcome of the trial and to ensure the reliability of a conviction or acquittal. Interpreting article 74(5) in light of internationally recognised human rights does not require departing from these guarantees.

89. In its 15 January 2019 Oral Acquittal Decision, the Majority explained its decision to defer the provision of reasons until an unspecified future date after acquitting Mr Gbagbo and Mr Blé Goudé:

> "The Chamber will provide its full and detailed reasoned decision as soon as possible. The Chamber recognises that it would have been preferable to issue the full decision at this time. [...] The majority is of the view that the need to provide the full reasoning at the same time of the decision is outweighed by the Chamber's obligation to interpret and apply the Rome Statute in a manner consistent with internationally recognised human rights as required by Article 21(3) of the Statute. Indeed, an overly restrictive application of Rule 144(2) would require the Chamber to delay the pronouncement of the decision, pending completion of a full and reasoned written statement of its findings on the evidence and conclusions. But given the volume of evidence and the level of detail of the submissions of the parties and participants, the majority, having already arrived at its decision upon the assessment of the evidence, cannot justify maintaining the accused in detention during the period necessary to fully articulate its reasoning in writing."[181]

90. These arguments are misconceived for at least four reasons.

91. *First, the Majority cannot invoke internationally recognised human rights to justify its inability to provide a decision expeditiously*. In her dissenting opinion to the 15 January 2019 Oral Acquittal Decision, Judge Herrera Carbuccia emphasised that the

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[180] *See*, for instance, article 10 of the UDHR; article 14(1) of the ICCPR; article 8(5) of the ACHR; article 6(1) of the ECHR.
[181] 15 January 2019 Oral Acquittal Decision, 3:18-4:9.

Prosecution called the last witness in January 2018 and that the two Defence NCTA motions had been pending before the Chamber since July 2018.[182] Judge Herrera Carbuccia further opined that "if [the correct NCTA standard] would have applied and would have been clearly informed to the parties, the Chamber would have been able to render a reasoned decision in an expeditious manner and [with] respect to the rights of the accused and other parties in the proceedings".[183] She added, "[t]he absence of clarity as to the applicable standard and the resulting lengthy proceedings (amounting to 11 months and thousands of pages of litigation), have defeated the purpose of the [NCTA] proceedings, which the Chamber stated was to 'contribute to a shorter and more focused trial'".[184]

92. The Majority's inability to form and articulate its full findings and conclusions in writing within a shorter time cannot constitute good cause to depart from the guarantees in article 74. This is especially given Judge Tarfusser's acknowledgement of the "differences in approach within the bench, some of which [are] so deep as to have repeatedly fractured the Chamber".[185] Accordingly, a proper reading of article 74(5) consistent with internationally recognised human rights law would have been for the Majority Judges to have overcome their differences and fractures, to have clearly articulated the NCTA standard and assessed the evidence consistently, and to have otherwise ensured the expeditious conduct of the proceedings. In particular, the Majority Judges could have tried to form and properly articulate their findings and conclusions by the time they issued their verdict. Article 64(2) of the Statute and the

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[182] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 29. *See also* Detention Hearing Judge Herrera Carbuccia's Dissenting Opinion, paras. 3-4.
[183] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 40.
[184] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 43.
[185] Judge Tarfusser's Opinion, para. 6; *see also* paras. 6-38: "The differences in approach with my fellow Judge and well established ICC practices"; paras. 65-74: "the evidence on the record and the 'applicable standard'".

ICC's Code of Judicial Ethics mandate this.[186] In any event and as shown below,[187] the Majority could have addressed any concerns about Mr Gbagbo's and Mr Blé Goude's human rights by conditionally releasing them, while finalising the full written reasons.

93. *Second, the Majority's approach is inconsistent with the right to a reasoned decision.* As the Appeals Chamber has held, "the right to a reasoned decision is an element of the right to a fair trial [...]".[188] International human rights case-law confirms this.[189] Because the 15 January 2019 Oral Acquittal Decision was not accompanied by any reasons, not even a summary, the Parties, participants and the public could not know how the Majority had assessed the evidence and reached its conclusions to acquit Mr Gbagbo and Mr Blé Goudé. Yet, in its 15 January 2019 Oral Acquittal Decision, the Majority dismissed all charges. This decision, while violating article 74(5), *de facto* created a situation that was not based on full and proper reasoning and that lasted for six months. Throughout these six months, the Majority's verdict was merely stated but not, as required, explained[190] or justified.[191] As such, it could not dispel any suspicion that the verdict may have been arbitrary,[192] or that the Majority was unaccountable.[193] The absence of a reasoned decision also affected the victims' and the Prosecution's right to a fair trial, which does not belong only to the accused.[194] Overall, the Majority's

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[186] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para.32 and fn. 30. *See* also Code of Judicial Ethics, articles 7(3) and (4): 3. Judges shall perform all judicial duties properly and expeditiously. 4. Judges shall deliver their decisions and any other rulings without undue delay.
3. Judges shall perform all judicial duties properly and expeditiously.
4. Judges shall deliver their decisions and any other rulings without undue delay.
[187] *See* paras. 95-96 below.
[188] *Lubanga* First Redactions AD, para. 20; *Lubanga* Second Redactions AD, para. 30.
[189] *See*, 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, paras. 24-25; *Bemba* AJ, para. 50; *Hadjianastassiou v. Greece*, paras. 31, 36-37; *Van den Hurk v. Netherlands*, para. 61; *García Ruiz v. Spain*, para. 26 ("Although Article 6 §1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument"); *Perez v. France*, para. 81; *Gorou v. Greece*, para. 37; *Hirvisaari v. Finland*, para. 30 ("The Court reiterates that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based"); *Suominen v. Finland*, para. 37.
[190] *See e.g.* Safferling, p. 523.
[191] Coleman and Leiter, pp. 212, 236.
[192] Judge Herrera Carbuccia Dissenting Opinion 15 January 2019, para. 22; Cohen, p. 512.
[193] Cohen, p. 512, pp 506-7; Sharpe, p. 137. *See also* Safferling, p. 523.
[194] Judge Herrera Carbuccia's Dissenting Opinion, paras. 22-25, 35; *Aleksovski* Evidence Admissibility Decision, para. 25; *Karemera et al.* Severance Decision, para. 26; *Martić* Witness AD, para. 13; *Uganda* Victim Participation ALA Decision, para. 27; *Bemba* Judge Eboe-Osuji Concurring Separate Opinion, para. 51.

approach affected the legitimacy of the acquittals,[195] which is inconsistent with internationally recognised human rights.

94. *Third, the Majority's approach is inconsistent with the principle of publicity of proceedings.* The Appeals Chamber has repeatedly upheld the principle of publicity of proceedings under articles 64(7) and 67(1) of the Statute,[196] which is also recognised under internationally recognised human rights.[197] By acquitting Mr Gbagbo and Mr Blé Goudé without delivering the decision or a summary in open court, the Majority violated the critical function of ensuring the publicity of the proceedings.[198] It did not make its decision properly accessible to the public.[199] This shielded the Majority's decision from public scrutiny for a critical period of six months,[200] risking public confidence in the Court[201] and undermining the overall legitimacy of the acquittals. Nor was the lack of publicity of the acquittals remedied six months later by the 16 July 2019 Reasons. First, these reasons were delivered six months later, which cannot undo the prior period of uncertainty that existed. Second, the Chamber did not deliver the 16 July 2019 Reasons—or a summary—in open court.[202]

95. *Fourth, and in any event, the Majority knowingly departed from the requirements in article 74(5) for no legal or practical reason.* In particular, the Majority's approach was not strictly required to avoid "maintain[ing] the accused in detention" after the Majority decided to acquit them. The Chamber could have conditionally released Mr Gbagbo

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[195] *See also* Cohen, p. 500; Sharpe, p. 135.
[196] *Ngudjolo* PRV Filing Order, para. 8; *Ngudjolo* Notification AD, para. 6.
[197] *See*, for instance, article 10 of the UDHR; article 14(1) of the ICCPR; article 8(5) of the ACHR; article 6(1) of the ECHR.
[198] *Werner v. Austria*, para 54: "The Court reiterates that the principles governing the holding of hearings in public […] also apply to the public delivery of judgments […] and have the same purpose, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention".
[199] Boas *et al.*, p. 378.
[200] *See,* for instance, *Fazliyski v. Bulgaria*, para. 64; *Malmberg and Others v. Russia*, para. 57.
[201] *Szücs v. Austria*, para. 42; *Biryukov v. Russia*, para. 30.
[202] The 16 July 2019 Reasons were merely filed on the Court record and the Court issued a press release on the same date informing the public that "Trial Chamber I files the written reasons for the acquittal" (*see* 16 July 2019 Press Release).

and Mr Blé Goudé as part of its review of its previous detention decision under article 60(3).

96. The Majority appears to have contemplated doing exactly this, even though in the end it abandoned this course. On 10 December 2018, *proprio motu* it scheduled a hearing on the continued detention of the accused.[203] The Majority specifically noted its "statutory duty and responsibility to ensure that the duration of the detention of an accused shall not be unreasonable",[204] and asked for the Parties' and participants' submissions on the "appropriateness and modalities of interim release", including on interim release under conditions listed in rule 119(1).[205] At the hearing on 13 December 2018, while opposing interim release and warning of the risk of prejudging or appearing to prejudge the pending NCTA Motions,[206] the Prosecution made detailed submissions in the alternative on the conditions that should be imposed if the Chamber were to grant interim release to Mr Gbagbo and Mr Blé Goudé.[207] The Majority could have conditionally released them by finding either: (a) that any residual risks under article 58(1)(b) could be appropriately managed through specific conditions under rule 119(1); or (b) that in the circumstances of this case the duration of detention of Mr Gbagbo and Mr Blé Goudé was unreasonable.[208] Either way, after granting them interim release, the Chamber could have provided its fully reasoned decision under article 74(5) when it was ready to do so. Instead, the Chamber did not refer to the matter until 15 January 2019, when the Majority declared moot the pending

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[203] Detention Hearing Order.
[204] Detention Hearing Order, para. 9.
[205] Detention Hearing Order, para. 11.
[206] Detention Hearing, 4:21-6:8. *See also* Detention Hearing Judge Herrera Carbuccia's Dissenting Opinion, para. 4: "such a *proprio motu* procedure, at a critical juncture of the trial in which a motion of acquittal is pending, and deliberations are on-going, would risk predetermining (or at least appearing to predetermine) issues related to the two pending Defence [NCTA] requests".
[207] Detention Hearing, 11:21-22:1. The conditions advocated for by the Prosecution were almost identical to those ultimately ordered by the Appeals Chamber: Detention AD, para. 60.
[208] *See* *Lubanga* Release AD, para. 37: "[T]he Chamber must be vigilant that any continued detention would not be for an unreasonably long period of time, in breach of internationally recognised human rights. […]".

requests for provisional release, which Mr Gbagbo and Mr Blé Goudé had made in response to the Majority's *proprio motu* review on their continued detention.[209]

97. In sum, in this case neither the Majority's approach nor a more expansive approach to interpreting article 74(5) in light of internationally recognised human rights under article 21(3) was justified or required.

III.G. Violations of the mandatory article 74(5) requirements result in the nullity of the acquittals (first sub-ground)

98. This Court has a clear legal framework governing acquittal decisions, namely article 74(5). There is no *lacuna* in the Statute and the Rules.[210] Accordingly, reference to any other source of law is not required in the circumstances, or indeed permissible[211]—particularly since the ordinary meaning of article 74(5) does not raise any interpretative question. For the same reasons, a Chamber cannot "rely on purported 'inherent powers' to fill in non-existent gaps".[212]

99. The Appeals Chamber has previously held that "[i]f a decision under article 74(5) of the Statute does not, or not completely, comply with [the requirements under that provision], this amounts to a procedural error".[213] As a result of the legal and/or procedural errors described above, the Majority's 15 January 2019 Oral Acquittal Decision to acquit Mr Gbagbo and Mr Blé Goudé was not made under article 74, departed from a number of the mandatory requirements in article 74(5) and circumvented the guarantees of justice that article 74(5) upholds. The 15 January 2019

[209] 15 January 2019 Oral Acquittal Decision, 5:4.
[210] "The Appeals Chamber recalls that in order to determine whether the absence of a power constitutes a 'lacuna', it has previously considered whether '[a] gap is noticeable [in the primary sources of law] with regard to the power claimed in the sense of an objective not being given effect to by [their] provisions'" (*Bemba et al.* SAJ, para. 76 (citations omitted)).
[211] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 14. See also *Ruto and Sang* Witness Compulsion AD, para. 105; *Kenyatta* Counsel Appointment AD, para. 62.
[212] *Bemba et al.* SAJ, para. 76.
[213] *Bemba et al.* AJ, para. 102.

Oral Acquittal Decision was therefore entered outside the applicable law. It is *ultra vires* the Statute and has no legal effect.[214] In other words, the 15 January 2019 Oral Acquittal Decision is null and void.

100. Conviction and acquittal decisions are of the greatest importance. As such, they must be formally entered under article 74 and comply with article 74(5). As noted above,[215] non-compliant decisions are unlawful. Contrary to other procedural norms that empower a Chamber or the parties to take certain actions, the mandatory requirements under article 74(5) do not allow for judicial discretion. They establish legal duties that cannot be waived, and their violation invalidates the underlying decision.[216]

101. Nor were the defects of the 15 January 2019 Oral Acquittal Decision cured by the issuance, six months later, of the Written Reasons essentially re-stating the oral decision and annexing Judge Tarfusser's Opinion, Judge Henderson's Reasons and Judge Herrera Carbiccia's Dissenting Opinion. In fact, providing reasons six months after pronouncing the verdict of acquittal in itself violates the "one decision" requirement under article 74(5).[217] In addition,[218] even when the Majority Judges gave

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[214] *Bemba et al.* SAJ, paras. 76, 79-80; *Lubanga* Directions Decision, para. 8. *See* also 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 15.
[215] *See* paras. 24-32 above.
[216] *See e.g.* Guariglia, pp. 109-116. *See* also *People v. Patterson*, p. 295, stating that "[a] defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings proscribed by law." The same principle that "mode of proceeding errors" may invalidate the decision is routinely applied in the United States legal system (*See* for instance; *People v. Ahmed*, p. 310, where the decision was invalidated because the Court of Appeal found "that the absence of the trial judge, and the delegation of some of his duties to his law secretary during a part of the jury's deliberations, deprived the defendant of his right to a trial by jury, an integral component of which is the supervision of a judge"; *People v. Lumpkin*, p. 740, where the Court found that "[a]lthough we agree with the People that the Judge's action here related to a matter far more ministerial than the extreme, substantive delegation in *Ahmed*, a Judge's absence from the court room during the reading back of testimony, with or without consent, is improper, and we strongly disapprove of it. It does not comport with the Judge's supervisory role or with the established expectations and conventions that underlie the judicial function"; *People v. Bayes*, p. 551, where the Court concluded that "the Judge's failure to retain control of the jury deliberations, because of its impact on the constitutional guarantee of trial by jury, implicated the organization of the court or mode of proceedings prescribed by law, and therefore presented a question of law even absent timely objection. Nor did defense counsel's participation constitute a waiver."; *People v. Parker*, p. 49, where the Court of Appeals found that "because the record fails to establish that the trial court provided counsel with meaningful notice of the precise contents of two substantive jury notes in discharge of a core obligation under CPL 310.30, a mode of proceedings error occurred and a new trial must be ordered".
[217] *See* paras. 46-51 above.
[218] *See* paras. 52-59 above.

reasons, they did not provide a full and reasoned statement of their *joint* findings on the evidence and conclusions but rather two separate distinguishable opinions. Further, the 16 July 2019 Reasons rendered six months later cannot retroactively cure the unlawfulness of the acquittals because the Majority's misapplication of article 74(5) led the 15 January 2019 Oral Acquittal Decision to being less than fully informed.[219]

102. Finally, while a new decision complying with the requirements under article 74 would be required to legally acquit Mr Gbagbo and Mr Blé Goudé, Judge Henderson's Reasons cannot have the effect of such a "new" decision. This is because his Reasons also did not comply with article 74(5) insofar as they (or a summary) were not delivered in open court. Nor did they properly constitute the views of the Majority.[220] Furthermore, Judge Henderson said his Reasons were not provided under article 74, but under article 66.[221] A decision of acquittal must always be entered under article 74.[222]

III.H. Even if the Chamber had discretion under article 74(5), it abused its discretion (second sub-ground)

103. In the alternative, even if the Chamber had some discretion in how it complied with the requirements of article 74(5) of the Statute, it erred in law and/or procedurally in the exercise of its discretion.

104. For procedural errors relating to discretionary decisions, the Appeals Chamber has developed the following standard of review, which should guide the Appeals Chamber's analysis in this appeal:

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[219] *See* paras. 60-85 above.
[220] *See* paras. 52-59 above.
[221] *See* para. 37 above.
[222] *See* para. 22 above.

> "[The Appeals Chamber] will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision."[223]

105. With respect to a Trial Chamber's exercise of discretion based upon an alleged erroneous interpretation of the law or an alleged incorrect conclusion of fact, the Appeals Chamber will apply the standard of review with respect to errors of law and errors of fact.[224] Where a discretionary decision allegedly amounts to an abuse of discretion, the Appeals Chamber has stated:

> "Even if an error of law or of fact has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously". The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree

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[223] *Bemba et al.* AJ, para. 100. *See* also *Ngudjolo* AJ, para. 21; *Kony et al.* Admissibility AD, para. 80; *Ruto and Sang* Admissibility AD, paras. 89, 98, 110; *Kenyatta* Admissibility AD, paras. 87, 96, 108; *Ruto and Sang* Trial Presence AD, para. 60; *Ongwen* Disclosure AD, para. 35; *Banda* Arrest Warrant AD, para. 30.
[224] *Bemba et al.* AJ, para. 101.

of discretion afforded to a Chamber may depend upon the nature of the decision in question."[225]

106. Any discretion that a Trial Chamber may arguably have in complying with the requirements of article 74(5) would be limited and would need to be exercised with caution. The Majority interpreted the scope of any discretion it arguably may have had too broadly and thereby exceeded the limits of its discretionary power. In particular, it erred by orally acquitting Mr Gbagbo and Mr Blé Goudé in its 15 January 2019 Oral Acquittal Decision without entering a formal decision under article 74; by failing to provide a full and reasoned statement of the Majority's findings on the evidence and conclusions; by failing to provide a summary of the reasons in open court; by merely saying that the reasons would be provided "as soon as possible", but without fixing a precise date for providing the reasons; and by failing to issue "one decision". Nor was any error in the Majority's exercise of discretion cured by its later pronouncement of the 16 July 2019 Reasons.

107. The Majority exercised its discretion (such that it may have had) based on its erroneous interpretation of the law, namely article 74(5) and rule 144(2). The acquittals that resulted from this erroneous interpretation, and which violated the article 74(5) requirements, were so unfair and unreasonable as to constitute an abuse of discretion. This is shown by the following factors, individually and/or cumulatively:

(i) By failing to enter a formal decision under article 74, the acquittals of Mr Gbagbo and Mr Blé Goudé were not founded on a solid legal basis under the Statute. On this basis alone, the acquittals were unlawful.[226]

(ii) By issuing an oral decision without any accompanying full and reasoned statement of its findings on the evidence and conclusions, or at least by a substantive summary, the Majority merely stated its verdict, rather than

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[225] *Bemba et al.* AJ, para. 101; *Kenyatta* Non-Compliance AD, para. 25.
[226] *See* paras. 34-38 above.

explain it. For six months, the reasons behind the acquittals were incapable of scrutiny by the Parties, participants and the public, including the citizens of Côte d'Ivoire. This affected the trust in the outcome of the trial and the legitimacy of the Majority's decision to acquit Mr Gbagbo and Mr Blé Goudé. The reasons given six months later cannot fully remedy these shortcomings. This is especially so here because when the Majority acquitted Mr Gbagbo and Mr Blé Goudé, it appears that the Majority had not yet completed its reasoning.[227]

(iii) The Majority's failure to issue "one decision"—including by issuing a verdict with reasons to follow and by failing to issue a proper Majority decision within the meaning of article 74(5)—further affected the legitimacy of the acquittals. As a result, the acquittals rendered on 15 January 2019 were not fully informed.[228]

(iv) The Majority's approach was not in the interests of justice and was not required to ensure article 74(5)'s interpretation consistent with internationally recognised human rights. The Majority's approach was itself inconsistent with internationally recognised human rights, in that it risked delaying the proceedings, and violated the right to a reasoned decision and the principle of publicity of proceedings. In any event, the Majority's approach served no legal or practical purpose.[229]

108. When interpreting article 74(5), and any potential judicial discretion, recourse to general principles of law under article 21(1)(c) is unnecessary because there is no *lacuna* in the clear wording of article 74(5). Further, article 21(1)(c) permits the Court to apply "general principles of law" only under specific circumstances. It does not permit the court to apply national laws directly.[230] A general principle of law is not

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[227] *See* paras. 40-44 above.
[228] *See* paras. 45-59 above.
[229] *See* paras. 86-97 above.
[230] *Kenyatta* Oral Submissions Decision, para. 11.

established by the legal provisions of an individual country, but by the "principles underlying the laws of 'the legal systems of the world'".[231] To establish a general principle of law, "[t]here must be evidence that it is applied by a representative majority, including the world's principal legal systems".[232]

109. Even when the laws of other courts and tribunals are reviewed, the following three reasons demonstrate that the Majority's approach is not based on a general principle of law. To the contrary, the practice of national and international courts and tribunals examined below illustrates the limits of any judicial discretion in this context and demonstrates that the Majority exceeded those limits in this case.

110. *First*, in legal systems where a jury decision is unsupported by reasons, the issue of their consistency with the Majority's approach does not arise. In other legal systems, including in Côte d'Ivoire, a court is simply not allowed to separate the verdict from the reasons.[233] Accordingly, these legal systems tend to show that there is no general principle of law permitting a trier of fact to issue a decision of conviction or acquittal, with reasons to follow at an (unspecified) later date.

111. *Second*, even in those legal systems which allow verdicts with reasons to follow, they do so only subject to specific strict requirements that are distinct from the procedure adopted by the Majority.[234] In some legal systems, a court may defer

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[231] Triffterer and Ambos, pp. 942-943.
[232] Triffterer and Ambos, p. 944.
[233] *See e.g.* Côte d'Ivoire Code of Criminal Procedure: The obligation to reason all criminal judgments stems from article 627, which states that these judgments are declared void if the reasoning is absent or insufficient. Article 350 provides that the minutes of the judgement are signed by the President and the Clerk. Article 510 specifies that the minutes, signed and dated, must be deposited at the registry no later than three days after the delivery of the judgement. See also France Code of Criminal Procedure: according to articles 485-486, deferring the reasons supporting the verdict is not permissible: the judgment must include reasons and the disposition. The reasons form the basis of the decision. The judgment is read by the presiding judge. The original draft is dated, and after it is signed by the Presiding Judge and the registrar, it must be deposited with the court registry within three days. Note: the registration and not the reasoning can occur within three days. For the equivalent procedure before the *Cour d'assises*, see articles 353, 365-1, 379-1. India Code of Criminal Procedure, article 353 - The judgment in every trial in any Criminal Court or original jurisdiction shall be pronounced in open Court by the presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders. Article 354(1)(b) - The judgment "shall contain the point or points for determination, the decision thereon and the reasons for the decision". This means that in case the judgment is deferred, it is deferred in its entirety. The verdict cannot be split from the reasons.
[234] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 32.

providing full and detailed reasons for its decision, but on condition that when rendering the verdict, the court reads out a summary of the reasons, consisting of the essential content of the reasons.[235] The Majority gave no summary of its reasons when acquitting Mr Gbagbo and Mr Blé Goudé.[236] Other legal systems allow a court in complex cases to defer the reasoning, but only for a specific and relatively short period of time.[237] This contrasts with what the Majority did, when it acquitted Mr Gbagbo and Mr Blé Goudé and adjourned proceedings without setting any deadline within which it would provide reasons. Eventually, it rendered the 16 July 2019 Reasons six months (182 days) later. Even case-law from common law systems on the delayed publication of written reasons—due to formatting problems[238]—suggests that deferrals of the full reasons is acceptable only for a limited period of time and when it is clear that the reasons had been crafted *before* the verdict was announced.[239]

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[235] Germany Code of Criminal Procedure, *Strafprozessordnung*, §§ 268(II), 275(I): "*Eröffnung der Urteilsgründe…geschieht durch Verlesung oder durch Mitteilung ihres wesentlichen Inhalts";* Austria Code of Criminal Procedure, *Strafprozessordung*, §§ 268, 270 (*wesentliche Gründe*).

[236] Merely identifying "several core constitutive elements of the crimes as charged" for which "the Prosecutor has not satisfied the burden of proof" (15 January 2019 Oral Acquittal Decision, 3:3-4.) falls short of summarising the Majority's "findings on the evidence and conclusion". It does not identify with sufficient clarity the basis for the Majority's decision and the facts it found to be relevant in rendering its conclusion (*Lubanga* First Redactions AD, para. 20; *Lubanga* Second Redactions AD, para. 30; *Bemba* AJ, paras. 51-52). Neither does it set out—in summary form—"which of the relevant facts and legal arguments that were before the Pre-Trial Chamber were found to be persuasive for the determination it reached." (*Lubanga* Second Redactions AD, para. 33).

[237] *See* e.g. Poland Code of Criminal Procedure article 411 §1-2, 423 §1 (maximum of 7 days); Peru Code of Criminal Procedure, article 396 (8 days); Colombia Code of Criminal Procedure, article 447 (maximum of 15 days); Costa Rica Code of Criminal Procedure, article 364 (maximum of 5 days); Korea Code of Criminal Procedure, article 146 (maximum of 5 days); Italy Code of Criminal Procedure, articles 544-546 (maximum of 90 days).

[238] *R v. Wickers*, para. 1 ("It is plain on the face of the Judge's reasons that the judgment was substantially crafted prior to the verdict being announced. A delay of four days for the provision of reasons in this case could not have led to any miscarriage of justice"), para. 101 ("It is plain from the chronology set out earlier in these reasons, that the Judge had developed comprehensive reasons for verdict on the date when the verdict was announced. It was a formatting problem which prevented the publication of those reasons for four days. I note that two of those intervening days were over a weekend").

[239] *R v. Teskey*, *per* McLachlin CJ and Binnie, LeBel, Fish, Charron and Rothstein JJ: "Although not precluded from announcing a verdict with "reasons to follow", a trial judge in all cases should be mindful of the importance that justice not only be done but also that it appear to be done. Reasons rendered long after a verdict, particularly where it is apparent that they were crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge engaged in result-driven reasoning. The necessary link between the verdict and the reasons will not be broken, however, on every occasion where there is a delay in rendering reasons after the announcement of the verdict. [...] Without this requisite link, the written reasons provide no opportunity for meaningful appellate review of correctness of the decision". *See also*, *R v. Cunningham*; *see further*, 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 33.

112. *Third*, the few examples from other international criminal courts and tribunals where the full written reasons were deferred, do not support the Majority's approach. In *Bagosora,* before the ICTR, the Trial Chamber announced its verdict on 18 December 2008 and accompanied it with a detailed summary of its judgment, highlighting the main reasons.[240] The Chamber then rendered its full reasoning on 9 February 2009.[241] The Appeals Chamber rejected an appeal against the Trial Chamber's judgment, finding that "[t]he reasoned opinion which followed was simply a written version of the judgement. The Appeals Chamber considers it to be clear […] that the written reasoned opinion was complete at the time of the delivery of the judgement on 18 December 2008 and that what followed was merely the completion of the editorial process".[242] Similarly, the Trial Chamber of the ECCC delivered its verdict in the Case 002/02 on 16 November 2018. The verdict was accompanied by an extensive summary of the reasons.[243] The Trial Chamber then provided its full written reasons on 28 March 2019.[244]

113. From this, a number of procedural guarantees can be gleaned which limit a Trial Chamber's exercise of discretion when rendering a decision of conviction or acquittal.

(i) *First*, any decision of conviction or acquittal must be made under article 74(5).

(ii) *Second*, if a Trial Chamber convicts or acquits by merely orally stating its verdict, with full reasons to follow, it must at that time: (i) have reached all its findings on the evidence and conclusions—all that remains to finish is the editorial process of the written reasons; (ii) read out in open court a written substantive summary of the reasons, setting out its main findings on the evidence and conclusions and indicating with sufficient clarity the factual and

240 *Bagosora et al.* 18 December 2008 Transcript.
241 *Bagosora et al.* TJ.
242 *Bagosora et al.* AJ, paras. 23-25.
243 *Case 002/02* TJ Summary.
244 *Case 002/02* TJ; *Case 002/02* Case History.

legal basis of the decision;[245] and (iii) set out, and follow, a precise and reasonably short deadline to issue the written full and reasoned statement of its findings on the evidence and conclusions.

(iii) *Third*, a Trial Chamber must issue "one decision", with full consistency between the summary and the full reasons. Where there is no unanimity, the decision must form a proper majority and contain the views of the majority and the minority.

114. By exceeding these limits, the Majority erred in the exercise of its discretion.

III.I. The errors under the first ground of appeal materially affected the 15 January 2019 Oral Acquittal Decision, read together with the 16 July 2019 Reasons

115. The errors in the first ground of appeal materially affected the Majority's 15 January 2019 Oral Acquittal Decision to acquit Mr Gbagbo and Mr Blé Goudé, read together with the 16 July 2019 Reasons.

116. The requirements under article 74(5) are not mere formalities. They are essential components of international human rights law and key features of justice ensuring that the Trial Chamber's ultimate conclusions are based on a solid legal, procedural

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[245] *Bemba* AJ, paras. 51-54: "The extent of the reasoning will depend on the circumstances of the case, but it is essential that it indicates with sufficient clarity the basis of the decision. Such reasoning will not necessarily require reciting each and every factor that was before the […] Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion. […] The Appeals Chamber notes that a trial chamber thus has a degree of discretion as to what to address and what not to address in its reasoning. Not every actual or perceived shortcoming in the reasoning will amount to a breach of article 74 (5) of the Statute. It is also of note that, when determining whether there was a breach of article 74 (5) of the Statute, the Appeals Chamber will assess whether there was reasoning in support of a given factual finding; if particular items of evidence that are, on their face, relevant to the factual finding are not addressed in the reasoning, the Appeals Chamber will have to determine whether they were of such importance that they should have been addressed, lest it becomes impossible to determine – based on the reasoning provided and the evidence in question – how the trial chamber reached the conclusion it did." See also *Lubanga* First Redactions AD, para. 20; *Lubanga* Second Redactions AD, para. 30.

and factual foundation, so that the parties and participants, the victims and the public can fully trust the outcome of the trial and the conviction or acquittal decision. Decisions of acquittal or conviction that do not comply with these requirements are unlawful.

117. The Appeals Chamber has observed that "this Court's functions are regulated by a comprehensive legal framework in which its powers have been deliberately spelt out by the drafters to a great degree of detail".[246] The Majority's 15 January 2019 Oral Acquittal Decision to acquit Mr Gbagbo and Mr Blé Goudé was not entered under article 74, departed from a number of the mandatory requirements in article 74(5) and circumvented the guarantees of justice in article 74(5). The Majority's 15 January 2019 Oral Acquittal Decision was therefore entered outside the applicable law. It is *ultra vires* the Statute and has no legal effect.[247] The decision and the acquittals should be considered null and void.

118. Accordingly, the errors described in the first ground materially affected the 15 January 2019 Oral Acquittal Decision. They impacted not only the validity of the Majority's decision to acquit Mr Gbagbo and Mr Blé Goudé in its 15 January 2019 Oral Acquittal Decision, but also the most important effect of that decision—the dismissal of all charges. The subsequently issued the 16 July 2019 Reasons cannot retroactively give effect to a previous decision that is null and void and thus cannot undo or cure the impact that the errors had on the 15 January 2019 Oral Acquittal Decision.

119. Nor can the 16 July 2019 Reasons constitute a valid basis for acquitting Mr Gbagbo and Mr Blé Goudé. Providing reasons six months after the pronouncement of the verdict of acquittal in itself violates the "one decision" requirement under article 74(5).[248] In addition,[249] even when the Majority Judges gave their reasons, they did not

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[246] *Bemba et al.* SAJ, para.79.
[247] *Bemba et al.* SAJ, paras.76, 79-80; *Lubanga* Directions Decision, para. 8. *See* also 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 15.
[248] *See* paras. 46-51 above.
[249] *See* paras. 52-59 above.

provide a full and reasoned statement of their *joint* findings on the evidence and conclusions but rather issued two separate distinguishable opinions. Further, neither the 16 July 2019 Reasons nor a summary were delivered in open court.[250] Accordingly, the 16 July 2019 Reasons also violated article 74(5).

120. Further or in the alternative, the errors in the first ground materially affected the 15 January 2019 Oral Acquittal Decision, read together with the 16 July 2019 Reasons, because the Majority's decision to acquit was not fully informed. As shown above,[251] when the Majority orally acquitted Mr Gbagbo and Mr Blé Goudé on 15 January 2019, and despite its assertion to the contrary,[252] it had not yet completed the necessary process of making all its findings on the evidence and reaching all its conclusions, *nor* had it completed the written articulation of its findings and conclusions. Hence, the Majority had not yet completed its fully informed reasoning. This led to significant inconsistencies between the Majority's remarks on 15 and 16 January 2019 about its verdict and its 16 July 2019 Reasons.[253] It also led to inconsistencies in the application of the standard of proof and/or approach to assessing the sufficiency of evidence, even within Judge Henderson's Reasons.[254] In plain terms, the errors materially affected the 15 January 2019 Oral Acquittal Decision because a partially informed decision to acquit is substantially different from a fully informed decision to acquit.

121. For all the reasons above, the Prosecution respectfully requests the Appeals Chamber to grant the first ground of its appeal.

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[250] *See* para. 94 above.
[251] See paras. 60-85 above.
[252] 15 January 2019 Oral Acquittal Decision, 4:7-8: "having already arrived at its decision upon the assessment of the evidence".
[253] *See* paras. 76-82 above.
[254] *See* paras. 83-84 above, and the Prosecution's second ground of appeal below.

IV. Second ground of appeal: The Majority erred in law and/or procedure by acquitting Mr Gbagbo and Mr Blé Goudé without properly articulating and consistently applying a clearly defined standard of proof and/or approach to assessing the sufficiency of evidence

IV.A. Overview

122. Defining and properly articulating a standard of proof and approach towards assessing evidence is integral to a Trial Chamber's function of evaluating evidence. Yet, the *Gbagbo and Blé Goudé* Trial Chamber (in particular, the Majority Judges) failed to define or articulate a clear and consistent standard of proof or approach to assess the sufficiency of evidence in the NCTA proceedings in this case—before or during the proceedings; on 15 January 2019 when it acquitted Mr Gbagbo and Mr Blé Goudé; or when it issued its reasons at the end of the proceedings. In failing to do so, the Majority erred in law and in procedure.

123. By acquitting Mr Gbagbo and Mr Blé Goudé without first directing itself as to what standards it would apply to its factual and evidentiary assessments, the Majority erred in *law*, invalidating its factual determinations and the decision itself.[255] Although the two Judges in the Majority concurred on their overall conclusions,[256] they failed to define *what* legal and evidentiary standards they considered applicable to the proceedings *before* they assessed the evidence and acquitted Mr Gbagbo and Mr Blé Goudé. One Judge (Judge Henderson) set out the NCTA standard he considered to

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[255] *See e.g.*, *Ayyash et al.* AD, para. 41 ("We find that the Trial Chamber's failure to apply a standard of proof when making its factual determination regarding Mr Badreddine's death constitutes an error of law which invalidates the Trial Chamber's factual determination and thereby the Impugned Decision. Accordingly, we consider that the remaining grounds put forward in the Appeal are rendered moot."); *Ayyash et al.* Judge Nsereko's Dissenting Opinion, paras. 4-7 (agreeing that the Trial Chamber had erred in law, which invalidated the decision, but disagreeing on other aspects); and *Ayyash et al.* Judge Baragwanath's Dissenting Opinion, paras. 27-28 ("It is correct that, by referring simply to the 'requisite standard' in its Oral Decision, the Trial Chamber failed to state with clarity the standard it applied when reaching its factual determination. That was an error of law. […]"), paras. 30-35 (but finding in the particular circumstances of the case, that the error of law did not invalidate the decision).
[256] Judge Tarfusser's Opinion, para. 1. Although the Prosecution under Ground 2 refers to the term "Majority" in its submissions while referring to the analysis of evidence, this essentially refers to what is contained in Judge Henderson's Reasons. Judge Tarfusser's Opinion is relied on only when his specific findings are referred to.

apply, six months after the acquittals.[257] At that time, the other Judge (Judge Tarfusser) continued to consider NCTA proceedings as "unnecessary" and unjustified in the statutory framework of the Court.[258] The Majority's lack of clarity—and its failure to establish consensus—on its approach to evaluating evidence also led it to forego certain well-established practices in international criminal proceedings. Instead, it adopted an unreasonable and unrealistic approach to assessing aspects of the evidence. This is reflected in the examples below.

124. Further, and/or in the alternative, by failing to set out a clear procedure or approach to govern the proceedings before determining the NCTA motions, the Majority erred *procedurally*, materially affecting the decision.[259] The Chamber's lack of clarity and failure to establish consensus among the Judges—and to inform the Parties—as to what the NCTA process entailed and the applicable standards/approaches was itself a flaw. Further, this flaw led the Majority to make several unreasonable and inconsistent factual findings and/or incorrect evidentiary assessments, many relating to significant findings. More importantly, they are symptomatic of the Majority's broader failing to take a consistent approach to assessing evidence—unsuitable for the NCTA stage or any other for that matter.[260]

125. The Majority's failures to formulate and consistently apply an appropriate standard of proof and approach when assessing the sufficiency of the evidence—which are indispensable features of judicial review of evidence—were legal and/or

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[257] Judge Henderson's Reasons, paras. 1-17.
[258] Judge Tarfusser's Opinion, para. 65.
[259] *See Ngudjolo* AJ, para. 21 ("Regarding procedural errors, 'an allegation of a procedural error may be based on events which occurred during the pre-trial and trial proceedings. […] In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the decision would have been substantially different from the one rendered'"), paras. 284-285; *Ngudjolo* AJ Dissenting Opinion, para. 5 (finding that procedural errors fall within the scope of article 81(1)(a)(i), and further noting that those errors relating to the Trial Chamber's powers for the proper conduct of the proceedings fall within the scope of article 64(2) (right to fair trial) and affect the Chamber's core judicial duty to establish the truth); *Bemba et al.* AJ, paras. 99-108.
[260] *See by analogy* with respect to a failure to provide a reasoned opinion as a procedural error, *Bemba et al.* AJ, para. 105 (The presumption that a Trial Chamber has properly evaluated the evidence exists as long as there is no indication that it completely disregarded any particular piece of evidence. The presumption may be rebutted "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning").

procedural errors so fundamental that they ruptured the process and prejudiced the Parties and participants (the Prosecution, in particular).

IV.A.1. Preliminary Matters:

126. For this ground, the Prosecution does not allege that Judge Henderson erred in law when he defined the NCTA standard.[261] Indeed, the Prosecution itself had argued for a similar interpretation—relying on *Ruto and Sang* Decision No. 5.[262] As such, the legal correctness of the NCTA standard is immaterial to this appeal. What matters, however, to this appeal is the Majority's *ambiguous* and *unclear* approach to assessing the sufficiency of evidence at the NCTA stage, which led to several inconsistent and incorrect findings. One indication of this ambiguity is that the two Judges of the Majority could not agree on the NCTA standard (or even if these were NCTA proceedings at all)—although they concurred in their overall conclusions. Another is that the Majority made several erroneous and inconsistent assessments of the evidence—at times, even taking different views on how to assess the same or similar types of evidence in different sections of its reasons. The Prosecution acknowledges its case was a vast and complex one, which likely would have been a challenge for any judicial process or Trial Chamber. Regrettably, however, the Majority (as reflected in Judge Henderson's Reasons) erred in its approach to assessing evidence in this case.

127. Put simply, the rules of the trial process must be clear from the start to all participants. If not, each one is likely to play according to his or her own rules, and the proceedings will become chaotic and fractured. Likewise, the rules of the NCTA proceedings in this case were not clear to the Parties and participants. At the least, the Majority Judges themselves were equivocal on what evidentiary standards and approaches should apply, and in some instances, had contradictory views. In any

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[261] Judge Henderson's Reasons, paras. 1-3 (relying on *Ruto and Sang* Decision No. 5). *See also* Prosecution Notice of Appeal, para. 7.
[262] *See* Prosecution's Pre-Trial Observations, para. 6 (endorsing the approach set out in *Ruto and Sang* Decision No. 5); Prosecution's NCTA Clarification Request, paras. 13-27; Prosecution's NCTA Response, paras. 27-44.

event, those standards and approaches were never made clear to the Parties and the participating victims. The proceedings were ruptured and, with the acquittals rendered in these circumstances, the Prosecution was prejudiced and justice not properly served.

128. The Prosecution notes that the Appeals Chamber in *Ngudjolo* has previously considered errors alleged to challenge the assessment of evidence as factual errors.[263] Although—at first sight—the *Ngudjolo* appeal may appear similar to this appeal, the nature of the present ground of appeal is distinct, warranting a different approach. In *Ngudjolo,* the Prosecution had alleged that the Trial Chamber had misapplied the standard of proof (ground 1) and had failed to consider the totality of the evidence (ground 2), and gave several examples in support. However, the *overall* grounds of appeal in that case remained evidentiary in nature. Examining the errors through the lens of a factual review could therefore be justified. In this appeal, although the Prosecution refers to certain examples of the Majority's erroneous factual findings, these are merely identified to demonstrate the Majority's ambiguous approach. Assessing those examples requires only a relatively limited examination, without going beyond what is already clearly apparent in the 16 July 2019 Reasons and on the record. The Prosecution also relies on indicators other than the factual findings, such as the procedural history of this case, to demonstrate the Majority's unclear and erroneous judicial approach. Therefore, the overall ground of appeal is legal and/or procedural in nature.

129. In other words, the Appeals Chamber is asked to review some discrete examples (and related factual findings), and to find that *those* identified assessments are

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[263] *Ngudjolo* AJ, para. 44 (in relation to the Prosecution's first ground of appeal (alleged misapplication of the standard of proof), finding that "to the extent that the alleged errors are based on challenges to the Trial Chamber's factual findings, [the] arguments under the first ground of appeal must be assessed against the standard of review for alleged factual errors, since, in order to analyse the Prosecutor's arguments, the Appeals Chamber is required to review the Trial Chamber's factual findings, and it is therefore appropriate to apply the standard of review for alleged factual errors."); para. 129 (in relation to the Prosecution's second ground of appeal (alleged failure to consider the totality of the evidence), finding that "since the Prosecutor uses examples of alleged factual errors to demonstrate the alleged legal error, the Appeals Chamber will analyse these examples against the standard of review applicable to factual errors").

incorrect, inconsistent or unreasonable. But it is not asked to apply the factual standard of review overall and declare, on that basis, that the Majority's *overall* conclusions on the five charged incidents (and the chapeau elements for crimes against humanity) were unreasonable, such that it led to a miscarriage of justice warranting reversal of the acquittals.[264] Rather, the Appeals Chamber is asked to find that the Majority erred in law (by failing to direct itself on the relevant standards) and erred in procedure (by failing to set out a clear and consistent procedure)—invalidating the decision.

130. In the Prosecution's respectful submission, canvassing the factual examples (and the procedural history) to demonstrate the legal/procedural errors (even if not an exhaustive list) best illustrates the multiple and varied flaws in the Majority's decision to acquit. As set out below,[265] the history of this case reveals a continuum between the defective procedure and the defective findings: the Majority's unclear approach led to its inconsistent and incorrect findings. Those findings simultaneously demonstrate *both* the errors *and* also their consequence (*i.e.*, the impact of those errors). Notwithstanding, if the Appeals Chamber were, however, minded to view these errors as mixed errors of law, procedure and fact,[266] as the final arbiter, it certainly has the authority to do so and may reverse the decision on that basis.

IV.B. The Majority erred in law and in procedure

131. By failing to properly articulate and consistently apply a clearly defined standard of proof and/or approach to assessing the sufficiency of evidence at the NCTA stage,

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[264] *Contra* Ngudjolo AJ, para. 24 ("[…] However, the Appeals Chamber's intervention is required when 'an unreasonable assessment of the facts of the case' carried out by the Trial Chamber 'may have occasioned a miscarriage of justice', which constitutes a factual error.").

[265] *See* paras. 132-141.

[266] *See e.g.*, Bemba *et al.* AJ, para. 98 ("[…] when assessing the reasonableness of a factual finding, the Appeals Chamber will have regard not only to the relevant evidence, but also to the Trial Chamber's reasoning in analysing it. In particular if the supporting evidence is, on its face, weak, or if there is significant contradicting evidence, deficiencies in the Trial Chamber's reasoning as to why it found that evidence persuasive may lead the Appeals Chamber to conclude that the finding in question was such that no reasonable trier of fact could have reached. Nevertheless, the emphasis of the Appeals Chamber's assessment is on the substance: whether the evidence was such as to allow a reasonable Trial Chamber to reach the finding it did.").

the Majority erred in law and in procedure. These errors—in particular, the lack of clarity in the Majority's approach to and assessment of evidence—are demonstrated by *both* the procedural narrative[267] and examples of the Majority's unclear and unreasonable factual and evidentiary assessments.[268] These examples of the Majority's incorrect and inconsistent assessments, apparent in Judge Henderson's Reasons and Judge Tarfusser's Opinion, also demonstrate that the proceedings were ruptured to such an extent that the Majority's acquittals cannot be considered reliable. Additionally, since the Prosecution was denied clarity on how the evidence supporting its case would be considered at the crucial "half-time juncture," and what legal standards and approaches would apply, it was prejudiced.

IV.B.1. Relevant Procedural History: The Majority was unclear and inconsistent when it articulated and applied its approach to assessing evidence

132. The Majority was never clear as to what legal standards and approaches it would apply to determine if the Prosecution's evidence was sufficient to overcome the NCTA motions. It resisted opportunities to articulate those standards and approaches before the proceedings began. It offered no clarity or guidance on how it would assess the evidence during the proceedings, or even on how it had assessed the evidence when it acquitted Mr Gbagbo and Mr Blé Goudé.

133. One Judge (Judge Henderson) set out his approach for the first time on 16 July 2019 (six months after the acquittals). His stated position on the NCTA legal standard *per se* is not challenged in this appeal. However, his views given after the oral acquittal (in January 2019) do not cure the lack of clarity among the Judges when they acquitted Mr Gbagbo and Mr Blé Goudé. Moreover, Judge Henderson significantly departed

[267] *See* paras. 132-141.
[268] *See* paras. 162-252.

from existing international criminal law practice in at least one critical aspect of evidence evaluation (namely, corroboration), without prior notice to the Parties and participants. He adopted an inflexible and ultimately incorrect approach to corroboration—which led to several flawed findings.

134. In other instances, although Judge Henderson may have articulated the evidentiary principles correctly (for instance, hearsay, anonymous hearsay), he often applied them in an inconsistent manner. Likewise, despite acknowledging that evidence must be considered "holistically", Judge Henderson did not apply this principle consistently. The other Judge of the Majority (Presiding Judge Tarfusser) never accepted that the proceedings constituted NCTA proceedings, considering the latter unnecessary—much less, defined the standards and approaches applicable to this NCTA stage in a clear and consistent manner.

135. Judicial clarity is essential in all judicial proceedings. This clarity was a particular imperative in these proceedings—given its unique nature and the issues at stake in a factually complex case. Yet, such clarity was lacking.

136. In particular, despite having been expressly asked to enunciate a standard to govern the NCTA proceedings before their commencement,[269] Judge Tarfusser, acting as the Single Judge, declined to do so.[270] The Parties had diverging views on how the standard for NCTA proceedings should apply in this case.[271] Clarifying the evidentiary

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[269] *See* Prosecution's NCTA Clarification Request, para. 1 (seeking guidance on the applicable standard of a 'no case to answer' motion to assist the Parties in providing focused submissions and avoiding unnecessary analyses on matters inappropriate for a half-time submission), para. 3 ("[t]here is a need for the Trial Chamber to clarify the applicable standard for a 'no case to answer' submission given the diverging positions of the Parties"), paras. 5-27.

[270] *See* NCTA Clarification Decision, para. 11 ("[The assumption that the Chamber had decided to follow the steps taken by Trial Chamber V(a) in the *Ruto* and *Sang* case] amount[s] to a mischaracterisation of the procedural steps devised by this Chamber, which have been tailored to the specific circumstances of these proceedings."); paras. 12-13 ("[T]he Second Order was—and is—aimed at providing the Defence with an equally flexible opportunity to illustrate in detail their contention that such evidence is not suitable to sustain a conviction […] In light of the above, the Single Judge takes the view that it is not necessary to take a position either as to the standards adopted by Trial Chamber V(a) or to the application of those principles in the final decision in that case. […]").

[271] *See* Prosecution's Pre-Trial Observations, para. 6 (endorsing the approach set out in *Ruto and Sang* Decision No. 5); Blé Goudé's Pre-Trial Observations, para. 3 (not objecting to the Prosecution's proposal that a 'no case to answer' motion follow the same principles as outlined in *Ruto and Sang* Decision No. 5). *But see* Prosecution's Mid-Trial Brief Cover Filing, para. 9 (recalling *Ruto and Sang* Decision No. 5); Gbagbo Conduct of Proceedings Observations, paras. 18-33 (mentioning the *Ruto and Sang* approach, but arguing that the Chamber should not be

standard and approaches ahead of time would have assisted the Parties to make their submissions, and more significantly, the Chamber to exercise its judicial functions. But still the Single Judge rejected the Prosecution's request to clarify the standard applicable to an NCTA motion. In fact, that decision—issued by Presiding Judge Tarfusser as the Single Judge—left considerable doubt as to whether the Judge even considered the proceedings to be a NCTA procedure.[272] Notwithstanding, the Parties assumed that they were addressing the parameters of a NCTA proceeding.[273] They filed their NCTA submissions—but without any clarity from the Chamber as to the relevant standards for assessing the evidence at that stage. Although a hearing was called to hear the Parties' and participants' submissions, the ambiguity persisted.[274] At that hearing, the Chamber did not articulate relevant evidentiary standards or its approach to assessing the evidence. Judge Tarfusser continued to express reservations about whether a NCTA procedure was appropriate at this Court.[275] This was despite the Chamber having set out, as early as 9 February 2018, that it may consider NCTA motions in this case.[276]

137. Moreover, when the Chamber (by majority) issued its decision acquitting Mr Gbagbo and Mr Blé Goudé *three* months later (in January 2019), its approximately 13 minute long oral decision offered no further clarity.[277] In a dissenting opinion issued

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limited in its approach in this case); Blé Goudé Conduct of Proceedings Observations, paras. 18-19 (recalling that it had not previously opposed the Prosecution's proposal of following the *Ruto and Sang* Decision No. 5 approach, but submitting that the Chamber should also examine the quality of the evidence and that the Chamber should enter an acquittal "even if the Chamber could imagine the possibility of a different trier of fact coming to a different conclusion"); Prosecution's NCTA Clarification Request, para. 6 ("[…] While the Prosecution believes that this amounts to an implicit incorporation of the Ruto Principles in the present case, it cannot afford to assume this to be the case. For this reason, and to avoid uncertainty, the Prosecution seeks clarification that the range of principles elaborated in the *Ruto* case applies."), paras. 9-12 (noting the different approaches of the Parties).

[272] NCTA Clarification Decision, paras. 11, 12 ("[T]he Second Order was—and is—aimed at providing the Defence with an equally flexible opportunity to illustrate in detail their contention that such evidence is not suitable to sustain a conviction.").

[273] *See e.g.*, Blé Goudé's NCTA Motion and Prosecution's NCTA Response, paras. 27-44.

[274] *See e.g.* NCTA Hearing Day 1, 6:4-18:17 ("Prosecution's Submissions on NCTA") and NCTA Hearing Day 6, 39:10-81:25 ("Mr Blé Goudé's Submissions on NCTA").

[275] NCTA Hearing Day 1, 18: 7-18 (in particular, "PRESIDING JUDGE TARFUSSER: […] Where do you find in the structure of the Statute the no case, the procedure for a no case to answer motion for all what you said? MR STEWART: Well, you don't. PRESIDING JUDGE TARFUSSER: Okay, good. That's it. Thank you. […]")

[276] First Conduct of Proceedings Order, para. 14, issued on 9 February 2018.

[277] 15 January 2019 Oral Acquittal Decision, 1:15-5:7.

that day, Judge Herrera Carbuccia underscored that a clear approach to the standard in the proceedings was necessary, but that Judge Tarfusser had considered it unnecessary "to take a position in relation to the standard to be adopted for the analysis of evidence in these mid-trial proceedings."[278] Nor did Judge Tarfusser—speaking for the Majority—clearly articulate the standard when he commented on Judge Herrera Carbuccia's dissenting opinion of 15 January 2019 the following day. Of note, although he disputed the utility of the standard used by Judge Herrera Carbuccia,[279] he did not set out *what standard* the Majority had used to assess evidence.[280] Rather, he merely stated that the Majority had assessed "whether the Prosecutor [had] met the onus of proof to the extent necessary for warranting the Defence to respond" and stated that the Majority had conducted a "more thorough analysis" of the evidence.[281]

138. Detailed reasons for the acquittal were issued *six* months later. But those 1300-plus pages showed that the three Judges of the Chamber remained inconsistent in their approach.[282] What is clear from the 16 July 2019 Reasons is that the two Majority Judges, although they supported the same overall conclusions, understood the

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[278] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 40 ("[…] I consider that if this standard would have applied and would have been clearly informed to the parties, the Chamber would have been able to render a reasoned decision in an expeditious manner and in respect to the rights of the accused and other parties in the proceedings. *It is my view that the application of any other standard, and the lack of clarity as to the applicable standard in these proceedings, attempts against the purpose of such proceedings and ultimately against the rights of all the parties, including the accused*.") emphasis added.

[279] 16 January 2019 Decision, 4:24-5:13 ("The majority understands that Judge Herrera Carbuccia conducted a superficial *prima facie* review of the submitted evidence and that she is of the view that such a superficial review leaves open the possibility that the reasonable Trial Chamber might enter a conviction. Even so, it does not allow that a finding of sufficiency at this stage will necessary actually result in a conviction. […] In any event, we do not see how conducting a more thorough analysis of the evidence increases the likelihood that the acquittal of Mr Gbagbo and Blé Goudé will be overturned on appeal").

[280] 16 January 2019 Decision, 4:11-16 ("It should be noted, in this regard, that the dissenting judge is mistaken in stating that the majority has acquitted Mr Gbagbo and Mr Blé Goudé by applying the beyond a reasonable doubt standard. The majority limited itself to assessing the evidence submitted and whether the Prosecutor has met the onus of proof to the extent necessary for warranting the Defence to respond. Adopting this standard, it is not appropriate for these proceedings to continue.").

[281] 16 January 2019 Decision, 4:11-5:13.

[282] *See* Judge Henderson's Reasons (968 pages); Judge Tarfusser's Opinion (90 pages); Judge Herrera Carbuccia's Dissenting Opinion (307 pages).

relevant standards for the NCTA process differently.[283] While Judge Henderson described the NCTA standard in line with the *Ruto and Sang* Decision No. 5 approach,[284] Judge Tarfusser declined to define any such standard. Rather, as Judge Tarfusser's Opinion makes clear, and despite the Appeals Chamber's previously clear finding allowing NCTA procedures in principle at this Court,[285] Judge Tarfusser continued to believe that NCTA proceedings "have no place in the statutory framework of the Court and are unnecessary as a tool to preserve the interests and rights they are meant to serve."[286]

139. Consistent with his belief that the NCTA proceedings served no purpose, Judge Tarfusser insisted that there was "only one evidentiary standard" relevant to terminate proceedings, *i.e.*, "beyond reasonable doubt" in article 66(3) of the Statute.[287] He also stated that the Majority's view was "soundly and strongly rooted in an *in-depth* analysis of the evidence (and of its exceptional weakness)".[288] This appears at odds with Judge Henderson's approach that he had done a "full review of the evidence submitted", but had taken the Prosecution's case "at its highest/most compelling", and had not "systematically assessed the credibility and reliability of the Prosecutor's testimonial evidence".[289]

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[283] *See* Judge Tarfusser's Opinion, para. 1 ("I fully concur with the Majority outcome of this trial. […] For the purposes of the Majority reasoning, I confirm that I subscribe to the factual and legal findings contained in the 'Reasons of Judge Henderson' […].").
[284] Judge Henderson's Reasons, paras. 1-3 (in particular, noting that "the key question to be determined in these proceedings, with respect to each charge, is whether the Prosecutor has submitted sufficient evidence in support of that charge such that a reasonable evidence *could* convict" and referring in fn. 3 to *Ruto and Sang* Decision No. 5, para. 24). Although Judge Henderson noted Judges Fremr and Eboe-Osuji's views in *Ruto and Sang* that "it makes little sense to completely prevent trial judges from assessing the quality of the evidence at the no case to answer stage", he said he did not exclude or disregard evidence on the basis of the lack of trustworthiness of the witness *per se.* He did not "systematically" assess the credibility and reliability of witness testimony. (Judge Henderson's Reasons, paras. 3, 41).
[285] *Ntaganda* NCTA AD, para. 45 ("[T]he Appeals Chamber finds that while the Court's legal texts do not explicitly provide for a 'no case to answer' procedure in the trial proceedings before the Court, it nevertheless is permissible. […]"); para. 46 ("[…] The Appeals Chamber finds that the Trial Chamber was, in principle, correct in asserting that it had 'broad discretion' in deciding whether or not to conduct a 'no case to answer' procedure.").
[286] Judge Tarfusser's Opinion, para. 65.
[287] Judge Tarfusser's Opinion, para. 65.
[288] Judge Tarfusser's Opinion, para. 67.
[289] Judge Henderson's Reasons, paras. 8, 30, 41.

140. The "in-depth" review that Judge Tarfusser purportedly undertook—and considering his misgivings about the NCTA process itself—does not appear to accord with what was required at this stage—but was rather a higher standard that would be inappropriate at the half-time stage. Judge Tarfusser further expressly noted that despite "the Prosecutor's attempts to drag the trial down the route of the classic no-case to answer proceedings", the exercise he undertook "was never meant to replicate the so-called 'Ruto and Sang model'".[290] Significantly, he stated that the "procedural formula[e]" he considered necessary to conclude this case were "sometime[s] neutral" and "ambiguous".[291] But he did not elaborate any further on what these "formulae" governing the proceedings may have been. They remain ambiguous to this day.

141. The result of this obscure and erratic approach to the NCTA process could have only been a defective one: the Prosecution was denied clarity on how the evidence supporting its case would be assessed at this crucial "half-time" juncture. But more significantly, the Majority dismissed the Prosecution's case on the basis of its unclear approach to assessing the evidence. This was particularly prejudicial, since the Majority (in Judge Henderson's Reasons) applied its own approach to assessing evidence inconsistently, and had unexpectedly unreasonable and unrealistic views on some significant issues, such as corroboration and the assessment of evidence relating to crimes of sexual violence. Rather than producing a decision firmly rooted in a clear understanding of the NCTA process and its constituent elements, properly applied to the evidence at trial, the Majority delivered a set of incorrect and inconsistent findings on key components of the case. The Majority also infringed basic considerations on the proper assessment of evidence and the fair evaluation of witnesses. All of this further demonstrates that when the Majority orally acquitted Mr Gbagbo and Mr Blé Goudé, it had not yet completed its evidentiary assessment.

[290] Judge Tarfusser's Opinion, para. 67.
[291] Judge Tarfusser's Opinion, para. 67.

IV.B.2. The Majority erred in law

142. Before granting the NCTA motions and orally acquitting Mr Gbagbo and Mr Blé Goudé on 15 January 2019, the Majority had not set out the evidentiary standards it would be guided by, or its approach. It is unknown what legal and evidentiary framework guided the Majority when it assessed the evidence underlying this complex case. That Judge Henderson set out an evidentiary framework six months later cannot remedy this error. *First,* Judge Henderson's framework is inconsistent with his fellow Majority Judge. *Second,* issues such as standards of proof and other legal standards applying to evidence evaluation are core issues—not afterthoughts. Accordingly, the Majority erred in law, invalidating its decision. This error, in the Prosecution's respectful view, is sufficient to reverse the decision.[292]

143. *First,* the standard of proof in a judicial proceeding is one of its indispensable features. It is the lens through which the proceeding is viewed. Without a clear appropriate standard of proof, the view is necessarily blurred and distorted. Put simply, a trial chamber cannot properly determine whether a fact or a state of affairs exists without knowing and applying the relevant standard of proof to that determination.[293]

144. As has been said,

> "[A] standard of proof is an indispensable tool in the hands of the fact-finder. It guides the fact-finder as to the required degree or level of conviction in his or her mind as to the truthfulness of the assertions made before him or her. It serves to eliminate as much as possible arbitrariness in the fact-finding process and to infuse some degree of transparency and predictability into the process."[294]

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[292] *See below* Section IV. C.
[293] *See e.g., Ayyash et al.* AD, para. 38. *See also Ngudjolo* AJ Dissenting Opinion, para. 52 ("[…] the evaluation of the evidence is determinative for any trial chamber to make an accurate decision on the merits.").
[294] *Ayyash et al.* Judge Nsereko's Dissenting Opinion, para. 4.

Likewise, other evidentiary standards governing the fact-finding process must be defined properly and understood, for the process to be accurate and reliable. As recently as July 2019, the Appeals Chamber has held that parties must be on notice as to the standard of proof that will be applied so they are aware of the manner in which information will be assessed.[295]

145. *Second*, consistent with the indispensability of the relevant standard of proof and other evidentiary standards to the fact-finding process, the case law of this Court and of the *ad hoc* tribunals has underscored that a trial chamber must articulate and apply the standard of proof and other standards of evidence correctly and accurately. This duty is two-fold: "[a] Trial Chamber is required not only to *apply* the appropriate standard but also to *articulate* it correctly."[296] Regarding a Trial Chamber's obligation to correctly articulate evidentiary standards, the terminology used by Trial Chambers to articulate relevant standards matters.[297] The use of inaccurate or inconsistent language may reveal that the Trial Chamber misapplied relevant standards.[298] In this context, appellate chambers have cautioned against using "unnecessary", "misleading" and "confusing" language in setting out the relevant standards.[299] This Appeals Chamber has found—in the *Lubanga* reparations proceedings—that varying views expressed by Chambers and parties/participants can lead to uncertainty as to what was expected, thus leading to reversible error.[300] To avoid such uncertainty, in

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[295] *Lubanga* Second Reparations AD, para. 3.
[296] *D. Milošević* AJ, para. 22 (emphasis added).
[297] *See e.g.*, *Musema* AJ, para. 209 ("[i]n considering the manner in which the Trial Chamber applied the burden and standard of proof, the Appeals Chamber must start off by assuming that the words used in the Trial Judgement accurately describe the approach adopted by the Trial Chamber.").
[298] *Zigiranyirazo* AJ, para. 19 ("[…] The Appeals Chamber has recognized that language which suggests, *inter alia*, that an accused must 'negate' the Prosecution's evidence, 'exonerate' himself, or 'refute the possibility' that he participated in a crime indicates that the Trial Chamber misapplied the burden of proof") (citations omitted).
[299] *See e.g.*, *Ngudjolo* AJ, paras. 123-125 (finding that the Trial Chamber's overall elaboration of the standard of proof was correct, but noting that certain statements that the Trial Chamber made in that context were both "unnecessary and incorrect in law" and "potentially confusing"); *D. Milošević* AJ, paras. 21-22 (rejecting the submission that the Trial Chamber did not apply the proper standard of proof, but finding that the Chamber had in several instances used confusing language which could be viewed as shifting the burden of proof onto the Defence to disprove the Prosecution's case); *Martić* AJ, paras. 55-63 (rejecting submissions of a legal error, but finding that the Trial Chamber's interpretation of "beyond reasonable doubt" as a "high degree of probability" was "confusing and not in accordance with the standard of proof" and "unfortunate".).
[300] *Lubanga* Second Reparations AD, paras. 165-172 ("The Appeals Chamber accepts that the differences between these approaches and potential ambiguity created may have led to uncertainty as to what was required of potential

general, Chambers tend to guide the parties and participants on what is expected—especially when novel issues—supported by only limited or ambiguous case law—are at stake.[301]

146. Further, even if a chamber may have correctly articulated the necessary standards, trial verdicts have been reversed on appeal when those standards have been misapplied in *practice*. For instance, in *Zigiranyirazo*, the ICTR Appeals Chamber reversed Mr Zigiranyirazo's convictions for genocide and extermination as a crime against humanity, since, by "misstating" the principles of law governing the burden of proof on alibi and "seriously erring" in its handling of the evidence, the Trial Chamber had "violated the most basic and fundamental principles of justice".[302] As previously set out,[303] the Majority Judges in this case similarly violated the basic and fundamental principles of justice.

147. *Third*, in *Ayyash et al.*, the STL Appeals Chamber found that when the Trial Chamber failed to apply *a* standard of proof when making its factual determination, it erred in law.[304] Four of the five judges found that, based on the circumstances of the

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victims submitting requests. They may have also affected the manner in which the entities concerned interviewed potential victims and prepared their dossiers. […] the Appeals Chamber finds that the Trial Chamber's overall procedure for the eligibility assessment failed to ensure equal conditions for all victims and amounts to an error. This error materially affects the Impugned Decision […]").

[301] *See e.g.*, *Ruto and Sang* General Directions, para. 32; *Ruto and Sang* Decision No. 5, paras. 10-18, 22-32, 34-39. *See also* *Ruto and Sang* Decision No. 5 Judge Eboe-Osuji's Separate Opinion; *Gaddafi* Admissibility AD, paras. 199-206 (noting that the Pre-Trial Chamber had been attentive to difficulties that Libya might be facing in light of the relative novelty of the relevant issues and the existence of a limited body of case law and that it had gone to "considerable lengths" to detail relevant principles on the burden of proof in light of the specific features of the case). *See also* ECCC, *Case 002* JCE Notice Order, para. 10 (noting that the term "joint criminal enterprise" was not expressly mentioned in the Law or in the Agreement and finding that although the judges would not consider requests for declaratory relief, in the circumstances, they found it "necessary to respond […] for the purpose of providing sufficient notice relating to a mode of liability which is not expressly articulated in the Law or the Agreement. […]"); *Case 001* AJ, paras. 486, 493, 501 (noting, in relation to civil party admissibility issues, that there were fundamental differences in victim standing before comparable international criminal tribunals, that the "legal framework for deciding the admissibility of civil parties was patently obscure", that notwithstanding that the Trial Chamber did not err in law, the issue was "novel" and the lack of clarity possibly led to a "fundamental misunderstanding" between the Trial Chamber and the Civil Party Appellants on the relevant issues).

[302] *See* *Zigiranyirazo* AJ, para. 75, paras. 39-43 (finding that the Trial Chamber's approach to alibi evidence indicated that it placed a greater evidentiary burden on Mr Zigiranyirazo to establish an alibi than required under the Tribunal's jurisprudence, that it had not fully appreciated the nature of that burden, and that it had reversed the burden of proof in the assessment of his alibi), paras. 49, 51-52, 64, 73-74; *See also* *Nahimana et al.* AJ, paras. 428, 431, 473-474 (reversing a Trial Chamber finding that an alibi based on hearsay had not been established).

[303] *See* paras. 132-141.

[304] *Ayyash et al.* AD, para. 41; *Ayyash et al.* Judge Baragwanath's Dissenting Opinion, para. 28.

case, this error invalidated the decision.[305] All five Judges found that the standard of proof was critically important to the decision.[306] Even the Dissenting Judge (Judge Baragwanath) stated that the "standard of proof [was] of such importance to the [decision] that it may not be supplied simply by inference, but must be stated expressly".[307]

148. Similarly here, it cannot be discerned from the record *what* evidentiary standards and approaches guided the Majority Judges in this case when they assessed the evidence and made factual findings. Their failure was exacerbated given the importance and significance of the NCTA process. The decision made by the Majority Judges was not of minor procedural or legal import. Rather, the fate of the Prosecution's case—and the search for the objective truth regarding liability for crimes committed during the Côte d'Ivoire post-election violence—depended on a fair and forensic determination of the facts and evidence, properly informed and guided by unambiguous evidentiary standards.

149. Moreover, the NCTA procedure is itself relatively new at this Court. The Court's regulatory framework is silent on this procedure. Apart from the Appeals Chamber's general guidance that NCTA proceedings are allowed at an individual chamber's

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[305] *Ayyash et al.* AD, paras. 38-41 (finding that the Trial Chamber's failure to apply any standard in making its factual determination was evidenced in several ways: (i) the Trial Chamber sought submissions on what the standard might be *after* deciding the matter and delivering its Oral Decision, and that its subsequent conduct showed that such a standard was lacking in its "mind" when it made its determination; and (ii) the Trial Chamber's efforts to define the applicable standard of proof in the Written Reasons did not remedy its failure to apply a standard at the time it took its decision regarding Mr Badreddine's death); *Ayyash et al.* Judge Nsereko's Dissenting Opinion, paras. 1, 4-7 (noting that when the Trial Chamber sought submissions from the Parties on what the standard may be, "the decision regarding Mr Badreddine's death had already been taken". "While it is common practice for a trial chamber not to set out in full the standard of proof it applies, especially when delivering an oral decision, in this case, one cannot tell whether, at the time the Trial Chamber made the Oral Decision it was guided by any standard of proof, and if so, what standard. This was an error." "[…] the Trial Chamber did not have any standard in mind when making the relevant factual determination […] its subsequent efforts to define this standard in the Written Reasons cannot remedy this legal error. Thus, given the importance I attach to the standard of proof to the fact-finding process, I am constrained to hold that the error committed by the Trial Chamber was an error of law which invalidates the Impugned Decision"); *Ayyash et al.* Judge Baragwanath's Dissenting Opinion, paras. 28, 30-35.

[306] *Ayyash et al.* AD, paras. 37-41; *Ayyash et al.* Judge Nsereko's Dissenting Opinion, paras. 1, 7; *Ayyash et al.* Judge Baragwanath's Dissenting Opinion, paras. 27-28.

[307] *Ayyash et al.* Judge Baragwanath's Dissenting Opinion, para. 28.

discretion,[308] the only case to substantively deal with this issue was *Ruto and Sang*.[309] Even in that case, however, judicial views were divided.[310] Views on this matter also vary between various jurisdictions—both domestic and international.[311] The Parties in this case had also advanced different understandings.[312] In view of these unique overall circumstances, this was not a routine situation where parties disagreed with each other on interpretations of existing law and practice.[313] The circumstances demanded clarity on the law and the procedure. The Majority provided none.

150. *Fourth,* the circumstances demonstrating the absence of clarity in this case are far graver than those in *Ayyash et al.*

- *Firstly,* although the Majority of the *Ayyash et al.* Trial Chamber had at first only specified the standard governing how the death of an accused may be proved in terms of the "requisite standard",[314] it later clarified that its decision was an interim one: it had not *finally* decided whether the accused (Mr Badreddine) was dead or not.[315] The following day, the *Ayyash et al.* Chamber called for

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[308] *Ntaganda* NCTA AD, para. 45.

[309] In *Ntaganda* and *Ongwen,* NCTA was not dealt with in a substantive manner. *See* *Ntaganda* NCTA Decision, paras. 25-29; *Ongwen* NCTA Decision, paras. 7-16.

[310] *See for example* *Ruto and Sang* Decision No. 5, paras. 10-18 (legal basis and rationale for allowing a NCTA motion), paras. 22-32 (applicable legal standard and scope of an NCTA motion), paras. 34-39 (timing and procedure of NCTA motions); *Ruto and Sang* Decision No. 5 Judge Eboe-Osuji's Separate Opinion, paras. 3-11, 18-115 (noting different views on NCTA in domestic jurisdictions and the *ad hoc* tribunals); *Ruto and Sang* NCTA Decision (Reasons of Judge Fremr), paras. 17-24, 144-150; *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), paras. 1-4, 40-137; *Ruto and Sang* Judge Herrera Carbuccia's Dissenting Opinion, paras. 1-3, 14-21.

[311] *See e.g.*, *Kordić and Čerkez* rule 98*bis* Decision, para. 28; *Jelisić* AJ, paras. 30-40; *Jelisić* AJ, Judge Shahabuddeen's Dissenting Opinion, paras. 1-18; *Jelisić* AJ, Judge Pocar's Dissenting Opinion, paras. 1-7; *Milošević* rule 98*bis* Decision, para. 13; *Milošević* rule 98*bis* Decision, Judge Robinson's Separate Opinion, para. 11; *R v. Galbraith,* p. 1040; *R v. Shippey and Jedynak,* p. 767.

[312] *See* Prosecution's Pre-Trial Observations, para. 6; Blé Goudé's Pre-Trial Observations, para. 3.

[313] *Contra* *Gaddafi* Admissibility AD, para. 203 ("[…] The Appeals Chamber considers that the existence of a 'significant degree of disagreement' among the parties as regards the interpretation of legal texts is not an uncommon feature of judicial proceedings and that it is the responsibility of a Chamber to adopt the interpretation that it considers to be correct when adjudicating on the proceedings.").

[314] *Ayyash et al.* 1 June 2016 Interim Decision, 56: 5-11 ("The three Judges who constitute the Trial Chamber have made this decision by majority, with Judge Braidy dissenting. The Trial Chamber does not believe that sufficient evidence has yet been presented to convince it that the death of Mustafa Amine Badreddine has been proved to *the requisite standard*. The trial will therefore continue pending the receipt of further information we anticipate from the government of Lebanon." (emphasis added)); 56:18-57: 23 ("JUDGE BRAIDY: I must respectfully dissent with the views of my fellow Judges […] I am satisfied that sufficient evidence has been presented that Mr Mustafa Amine Badreddine has died and consequently the proceedings against the accused, Mustafa Amine Baddreddine, must be terminated and the Prosecutor required to amend the indictment.") .

[315] *Ayyash et al.*, Transcript, 2 June 2016, 27: 11-15 ("PRESIDING JUDGE RE: The decision the Chamber rendered yesterday was an interim one, an interlocutory one. It's not a final decision on whether Mr Badreddine is

submissions from the parties on "what the requisite standard might be", and fully engaged with them on the issue.[316] In its reasons, issued five days later, the Trial Chamber agreed with the Parties and the Legal Representative of Victims that a "high standard of proof" (although not to the same standard as proof beyond reasonable doubt) was required—but did not consider it necessary to precisely articulate this standard.[317] In contrast, the Majority in this case did not engage with the Parties and participants on what the relevant evidentiary standards and approaches may be in any substantive way. Only a brief discussion was had at the hearing, well after the Parties had filed their written submissions.[318]

- *Secondly*, the *Ayyash et al.* Trial Chamber clearly set out its position on the relevant standard in its written reasons (even though the Appeals Chamber later found that position to be erroneous). In this case, the Majority does not even appear to have had a unified position on the legal and evidentiary standards or approaches—not even in its written reasons.[319]

- *Thirdly*, any lack of clarity in the Trial Chamber's approach in *Ayyash et al.* was limited to *one* issue—namely, the standard governing proof of an accused's death. In this case, the Majority's persistent ambiguity and failure to articulate and clarify applicable standards—lasting approximately 17 months[320]—affected its entire approach to assessing the evidence. As the examples below show, the Majority's approach was flawed in several ways. It failed to define the crucial NCTA standard for this process. It also took an unreasonable,

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dead or not. We will make a decision when we've had a chance to receive further information or not to determine whether we are satisfied that it's been proved to the requisite standard.").

[316] *Ayyash et al.*, Transcript, 2 June 2016, 34: 5-19; 57:5-58:8. *See* *Ayyash et al.* Judge Baragwanath's Dissenting Opinion, para. 32 ("The Trial Chamber was engaged in a continuing search for the correct principle that, as it then appeared, had yet to be identified.").

[317] *Ayyash et al.* 7 June 2016 Reasons, paras. 31-35; *Ayyash et al.* 8 June 2016 Judge Braidy's Dissenting Opinion, paras. 3-4, 14.

[318] *See e.g.*, NCTA Hearing Day 1, 5:4-18:21.

[319] *Compare* Judge Henderson's Reasons, paras. 1-51 *with* Judge Tarfusser's Opinion, paras. 65-74.

[320] *See* First Conduct of Proceedings Order, para. 14, issued on 9 February 2018. The reasons for the acquittals were issued on 16 July 2019.

unrealistic and unjustified view of corroboration—a view that diverged from international criminal practice. It did not support its view of corroboration in law—thus further erring in law.[321] The Majority also applied other principles of evidence (for instance, hearsay, taking evidence as a whole) inconsistently and incorrectly. It made unreasonable findings on the record, and failed to draw natural, or even inevitable, conclusions when the record supported them.

151. For all the reasons above, the Majority erred in law, invalidating its decision.

IV.B.3. The Majority erred in procedure

152. By failing to set out a clear approach and understanding of how it would assess the evidence in this case *before* doing so, the Majority also erred in procedure. The Majority's failure to set out its approach in clear terms not only contrasts with the conduct of other NCTA proceedings at this Court, but contradicts its own statements as to the complexity of the case.[322]

153. As the Appeals Chamber has found, procedural errors committed in the proceedings leading up to a decision under article 74 may lead to reversal of the article 74 decision, provided those errors materially affected the decision.[323] On one judicial view at this Court, when an alleged error consists of a trial chamber's *failure* to adopt a course of action, a party's demonstration that the inaction was in itself erroneous would be sufficient to substantiate the ground of appeal.[324] In this case, the Majority's failure to articulate and apply its evidentiary approach is illustrated by the following:

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[321] *See* paras. 152-161 (procedural error) for more details.
[322] Judge Henderson's Reasons, Preliminary Remarks, paras. 4-5 ("Given the complexity of the Prosecutor's case and the large volume of evidence, this has inevitably resulted in a long and detailed opinion. […] When the parties bring us complex and detailed submissions, it is often not possible to address them appropriately with a few pithy comments. Nor should we aspire to do so, because it gives the false impression that things are simple and straightforward when they are not. Having said this, it is undeniably true that this case has suffered from being exceedingly complex. […]").
[323] Ngudjolo AJ, paras. 3. 284-285.
[324] Ngudjolo AJ Dissenting Opinion, para. 30.

(i) the procedural chronology of this case, which demonstrated a flawed process;[325] (ii) Judge Henderson's articulation and application of an overly rigid approach to corroboration—which is in itself a further error of law; and (iii) the Majority's incorrect and inconsistent assessment of several factual matters—as set out in the examples below.

154. *First*, the procedural history of this case—both overall[326] and in relation to the Majority's ambiguity on the evidentiary standards and approaches[327]—conflicts with the careful conduct expected of NCTA proceedings. For instance, in the only other case at this Court to adopt a NCTA procedure, *Ruto and Sang*, the Trial Chamber, before the start of trial, had set out that it would, in principle, allow the Defence to seek a no case to answer decision.[328] It informed the Parties that it would, in due course, give reasons as to why it had permitted the NCTA procedure in the case and would give further guidance on the procedure and applicable legal test.[329] When the time came, after hearing the parties and participants, the Chamber noted that it was necessary for it "to determine an appropriate legal standard, consistent with the statutory framework", especially since the Statute did not provide for it.[330] It then set out detailed guidance on (i) the legal basis and rationale for allowing a NCTA motion; (ii) the legal standard to be applied, including the scope of any such motions; and (iii) the timing and procedure to bring such motions in that case.[331] Yet, notwithstanding the significance of the proceedings, the Majority in the present case did not provide such guidance.

155. *Second*, the Majority's opaque evidentiary approach overall led Judge Henderson to adopt an inflexible and legally unsupported approach to corroboration that ignored

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[325] *See* paras. 132-141.
[326] *See* paras. 9-20.
[327] *See* paras. 132-141.
[328] *Ruto and Sang* General Directions, para. 32.
[329] *Ruto and Sang* General Directions, para. 32.
[330] *Ruto and Sang* Decision No. 5, para. 22.
[331] *Ruto and Sang* Decision No. 5, paras. 10-18, 22-32, 34-39. *See also* *Ruto and Sang* Decision No. 5 Judge Eboe-Osuji's Separate Opinion.

the realities of international trials. By adopting and applying this standard, he (and the Majority) erred in law. The Majority applied its approach to corroboration inconsistently in its analysis. In the circumstances, since the Parties were given no notice of such an overly strict approach (which likely affected how the Majority decided if evidence was sufficient or not), this was also unfair.

156. Corroboration is not required, as a matter of law, at this Court.[332] The *ad hoc* international courts and tribunals (ICTR, ICTY, SCSL, ECCC, STL) have, moreover, taken a flexible approach to corroboration and have recognised the fact-sensitive nature of this assessment, which must accommodate other relevant factors in deciding whether corroboration is needed and if so, what that constitutes.[333] While there may not be one rule to define corroboration in the abstract, these tribunals have been flexible in their search for corroboration. They have discouraged inflexible and rigid interpretations.

157. In particular, at the ICTR, the law on corroboration has been consistently expressed in the following terms:

> "Two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact

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[332] Rule 63(4), RPE: Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular,crimes of sexual violence. *See* *Ntaganda* TJ, para. 75-76; *Bemba* TJ, paras. 245-246; *Ngudjolo* AJ, para. 148 (noting that while corroboration is an element that a reasonable trier of fact may consider in assessing evidence, the question of whether or not to consider it forms part of the Trial Chamber's discretion).

[333] *See e.g.*, *Karadžić* AJ, paras. 363, 530; *Popović et al.* AJ, paras. 137, 1228; *Karemera et al.* AJ, paras. 179, 467-468; *Nizeyimana* AJ, para. 174; *Nzabonimana* AJ, para. 319; *Đorđević* AJ, paras. 395, 422, 797; *Ndahimana* AJ, para. 93; *Lukić et al.* AJ, paras. 135, 234; *Hategekimana* AJ, paras. 82, 190; *Munyakazi* AJ, paras. 51, 71, 103; *Setako* AJ, para. 31; *Renzaho* AJ, paras. 269, 355; *Kalimanzira* AJ, para. 105; *Rukundo* AJ, paras. 86, 207; *Haradinaj et al.* AJ, para. 129; *Muvunyi* AJ, para. 44; *Seromba* AJ, para. 116; *Simba* AJ, para. 103; *Muhimana* AJ, paras. 58, 135; *Kajelijeli* AJ, para. 96; *Kvočka et al.* AJ, para. 23; *Rutaganda* AJ, para. 443; *Bagilishema* AJ, para. 78; *Musema* AJ, para. 89; *Kupreškić et al.* AJ, para. 156; *Delalić et al.* AJ, paras. 497-498; *Taylor* AJ, paras. 75-78 (noting that there are no rules specifying the form or substance that such support/corroboration must take and agreeing with the ICTR Appeals Chamber that "corroboration is simply one of many potential factors in the Trial Chamber's assessment of a witness's credibility"); *Case 002/02* TJ, para. 53 ("[…] The Chamber further recalls that the credibility of testimony is assessed on a case-by-case basis, taking into consideration factors such as […] corroboration […]."); *Case 002/01* AJ, paras. 268, 302, 314, 424, 428 (evidence relating to instances of killings occurring under similar circumstances to those purported in other evidence could amount to corroboration).

or a sequence of linked facts. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way."[334]

158. Indeed, every witness presents what he or she has witnessed from his or her point of view at the time of the events, or according to how he or she understands the events recounted by others.[335] Accordingly, corroboration may exist "even when some details differ between testimonies" provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.[336] In general, thematic consistencies among testimonies are sufficient to amount to corroboration and mirror images of testimony are unnecessary and unrealistic.

159. Yet, notwithstanding that corroboration is not even legally required, the Majority proposed, and apparently adopted, exactly such an unrealistic, unreasonable and incorrect view of corroboration—for which it offered no legal support.[337] For instance, in setting out its understanding of "corroboration",

- the Majority expressly rejected that *similar* facts (even if *closely proximate*)—or put another way, a sequence of linked facts or facts occurring in a continuum—

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[334] *See e.g.*, *Gatete* AJ, para. 125; *Karemera et al.* AJ, para. 467; *Nzabonimana* AJ, paras. 184, 344; *Bizimungu et al.* AJ, paras. 241, 327; *Ndahimana* AJ, para. 93; *Kanyarukiga* AJ, paras. 177, 220; *Hategekimana* AJ, para. 82; *Ntabakuze* AJ, para. 150; *Ntawukulilyayo* AJ, paras. 24, 121; *Munyakazi* AJ, paras. 71, 103; *Setako* AJ, para. 31; *Rukundo* AJ, para. 201; *Bikindi* AJ, para. 81; *Karera* AJ, paras. 173, 192; *Nahimana et al.* AJ, para. 428. *See further* *New TV S.A.L. et al.* AJ, para. 56, fn. 167 ("The Appeals Panel recalls that two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts […]. However, corroboration is neither a condition for now a guarantee of the reliability of a single piece of evidence; it is merely an element that a reasonable trier of fact may consider in assessing the evidence […]. A judge therefore has the discretion to decide, in light of the circumstances of each case, whether corroboration is necessary and to rely on uncorroborated, but otherwise credible, witness testimony […]."), para. 130 ("[…] The Appeals Panel notes that the assessment of whether a piece of evidence requires corroboration, and whether other pieces of evidence provide sufficient corroboration, is within the Contempt Judge's wide discretion as the trier of fact […]."), fn. 377 ("[…] Consequently, a judge may accept, without the need for corroboration, the testimony of a single witness even as proof of a material fact […]. Therefore, an accused may be convicted on the basis of evidence from a single witness if the judge is convinced beyond reasonable doubt of the accused's guilt, although he must assess such evidence with appropriate caution […].").

[335] *Gatete* AJ, para. 205; *Ntawukulilyayo* AJ, para. 24 (citations omitted).

[336] *Gatete* AJ, para. 205; *Hategekimana* AJ, para. 82; *Nahimana et al.* AJ, para. 428; *Munyakazi* AJ, para. 71.

[337] *See* Judge Henderson's Reasons, paras. 46-50. Judge Henderson's statements on what he considers "corroboration" are not supported by any judicial decision of this Court or any other international court and tribunal.

could be considered as corroborative of one another. It stated that "corroboration *only* occurs when two pieces of evidence independently confirm the *same fact*".[338] It appeared to insist that facts should be identical or "mirror images", to be considered as corroborative of one another. In this enquiry, it disregarded "similar" facts because they are "different". Not only is such a view illogical (the terms "similar" and "different" cannot be equated),[339] it has drastic consequences for the question of whether evidence on critical issues was sufficient. For instance, as Judge Henderson set out, killings (or other crimes) were not considered to corroborate each other—even if they had occurred in "close proximity" of each other. That these killings occurred in "different" locations and at "different" times was sufficient to disregard them as corroborating—or worse, to consider them as "inconsistent".[340] Other than saying that "closely proximate" locations can also be considered "different", the Majority failed to specify further. Simply put, the Majority set the bar too high. It incorrectly and unfairly limited its assessment of corroboration to only those acts/crimes that occurred in the *exactly identical* locations and times as each other;

- the Majority also conflated two distinct evidentiary notions: that evidence should never be assessed in isolation, and that evidence may be considered

[338] Judge Henderson's Reasons, para. 47 and para. 48 ("[…] What connects different items of evidence is that they are relevant to the *same fact*. Furthermore, the fact that a witness's testimony may have been corroborated in relation to one particular aspect of their evidence does not necessarily mean that other parts are therefore also more reliable or credible.") (emphasis added).

[339] In normal parlance, the term "similar" cannot be equated to the word "different", they are necessarily contrary terms—the former means "like" while the latter means "unlike".
See OED Online: "Similar": Having a significant or notable resemblance or likeness, in appearance, form, character, quantity, etc, to something stated or implied (though generally without being identical); of a like nature or kind. Of two or more persons or things: resembling or like one another; a counterpart; the like or equivalent of something or someone.
"Different": Unlike in nature, form or quality; not of the same kind; dissimilar;

[340] Judge Henderson's Reasons, para. 47 ("[…] Corroboration only occurs when two pieces of evidence independently confirm the same fact. When exhibits relate to similar but different facts; for example, a number of killings that took place at different times and locations, even at close proximity, such evidence does not [necessarily] provide corroboration. It is equally not possible to argue in such a scenario that there is necessarily corroboration for a pattern of events, because the patterns do not exist independently from the individual instances that constitute it. This point is particularly relevant in relation to the contextual elements in this case.")

corroborated.[341] The former relates to the imperative to consider evidence in a holistic manner—an approach the Majority agrees with in principle.[342] Taking evidence in context—and avoiding a piecemeal analysis— is an obligation of process. It is also common sense. But evidence may still be considered as a whole and in context, but without triggering any consideration of corroboration. The question of whether evidence is corroborative arises where the same or similar facts or a sequence of linked facts are at issue. It therefore remains a separate question.

Therefore, the Majority's inflexible and unsupported approach to corroboration—without notice to the Parties—was in error.

160. *Third*, the Majority's absence of clarity and failure to establish consensus on their approach further manifested itself in distinct factual assessments they undertook, as set out below.

161. For all the reasons above, the Majority erred in procedure, which materially impacted the acquittals of Mr Gbagbo and Mr Blé Goudé.

IV.B.4. The Majority's errors are manifest in the following examples

162. The Majority's lack of clarity in its evidentiary approach in assessing the evidence at the NCTA stage is apparent in the examples set out below. Each example consists of multiple errors and/or inconsistencies that show that the Majority's approach was deeply flawed. For instance, despite stating in some sections of its analysis that it had taken the evidence as a whole, it is obvious in other areas that it had not considered

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[341] Judge Henderson's Reasons, para. 46 ("While there is no requirement for corroboration, it makes good sense that evidence should never be assessed in isolation. Corroboration or corroborative evidence is evidence which tends to confirm the truth or accuracy of certain other evidence by supporting it in some material particular. […]"). *But see* *Bemba* Judges Van den Wyngaert and Morrison Separate Opinion, paras. 64-67 (maintaining a distinction between assessing evidence holistically and corroboration).

[342] Judge Henderson's Reasons, para. 87 ("[…] A *holistic assessment of evidence* should not become an evidentiary black box […]") (emphasis added).

the evidence in its totality. Rather, the Majority conducted a piecemeal analysis, ultimately failing to draw the natural, even inevitable, inferences that the record easily allowed. Likewise, in some sections of its analysis, the Majority made positive findings on facts (reflecting witness testimony and other evidence), but failed to reflect those findings in its ultimate analysis.

163. As for the articulated evidentiary principles it set out, the Majority adopted an unrealistic and unreasonable view of corroboration, at odds with general judicial practice. And even where it set out evidentiary principles correctly, it often applied them inconsistently. For example, there are instances where the Majority mis-characterised evidence as "hearsay" or "anonymous hearsay", and disregarded it, at odds with its *own* stated rules as to how it intended to consider such evidence.

164. Likewise, the Majority took an unreasonable and unrealistic approach towards assessing eye-witness accounts. Judges require their evidentiary assessments to be accurate—and at times, even "clinical". But they should not disregard the broader circumstances surrounding eye-witness accounts, in particular the traumatic circumstances that witnesses face and the specific cultural and social context in which the events take place.[343] Here, the Majority was inconsistent in its approach to the relevance of the social-cultural context of Côte d'Ivoire. While it considered this a relevant factor in some parts of its analysis,[344] it often assessed eye-witness testimony without taking this important context into account. Moreover, that the Majority had

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[343] *See e.g., Musema* AJ, para. 63 (noting that "Trial Chambers normally take the impact of trauma into account in their assessment of evidence given by a witness."); *Rutaganda* AJ, para. 219 (considering the impact of trauma on witness evidence); paras. 222-232 (considering the impact of the specific social and cultural context); *Ntaganda* TJ, para. 80 ("[…]Witnesses tend to attach significant importance to details which were meaningful to them at the time of the relevant events, while their testimony on matters to which they attached minor significance at the time of the events may often contain inconsistencies, contradictions, and inaccuracies. It is possible for a witness to be accurate and truthful, or to provide reliable evidence, on some issues, and inaccurate and/or untruthful, or provide unreliable evidence, on other issues."), para. 88 (considering the cultural or communal stigmatisation, shame and fear, as well as general lack of trust of authorities, in assessing evidence of witnesses who are allegedly victims of sexual violence).

[344] *See e.g.,* Judge Henderson's Reasons, para. 1074 (regarding Mr Blé Goudé's speeches, "[…] It would also have been useful to have a better understanding of the rhetoric and tone used in public debate in Côte d'Ivoire more generally. Indeed, there is a risk that cultural outsiders, such as ourselves, attribute specific meaning or significance to use of certain language or the tone of the speaker, whereas to local listeners there would be nothing remarkable about this. Such information would have been highly relevant in a case like the present […]").

not properly formulated its approach to assessing evidence before doing so is apparent in how it assessed the evidence of sexual violence crimes. It unfairly subjected this evidence to an unjustifiably heightened level of scrutiny, inconsistent with international criminal practice. Similarly, in seeking to set an empirical benchmark to assess overall patterns of criminality, the Majority speculated on numbers and estimates that were clearly beyond the case record.

165. The Majority's approach to assessing evidence at the critical half-time stage was unsuitable for that stage, or indeed, for any later stage. A judicial approach exhibiting the range of errors identified below results in an unreliable analysis and outcome.

IV.B.4.i. *The Majority erred in assessing the evidence as to the attribution of gunfire to the FDS convoy for the 3 March 2011 incident (Abobo I, 3rd Charged Incident)—Example 1*

166. The Majority found that "it [was] not possible to determine" that the soldiers in the BTR 80 or in any of the other vehicles in the FDS convoy caused the deaths and injuries of the 13 victims of the 3 March 2011 women's march in Abobo.[345] According to the Majority, "[t]here [was] simply too much that remains unclear about this incident to allow a reasonable trial chamber to come to any firm conclusions".[346] To the contrary—as Judge Herrera Carbuccia found[347]—there was sufficient evidence upon which a reasonable trier of fact could find that the soldiers of the FDS convoy had caused the deaths and injuries at issue.

167. The Majority's failure to attribute the deaths and injuries of the 13 victims to the shots fired from the FDS convoy is a stark example of its opaque, inconsistent and unreasonable assessment of evidence at the NCTA stage. Symptomatic of this approach, the Majority (i) failed to take the evidence as a whole, despite setting out in

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[345] Judge Henderson's Reasons, paras. 1773-1777, 1787; Judge Tarfusser's Opinion, para. 84 (where he does not address the germane question of who fired the shots, but rather why the convoy opened fire).
[346] Judge Henderson's Reasons, para. 1787.
[347] Judge Herrera Carbuccia's Dissenting Opinion, paras. 97-113.

other sections of its reasons that it did so;[348] (ii) failed to appreciate that the overwhelming body of evidence was consistent and applied an inflexible understanding of when evidence is considered consistent and corroborated.

IV.B.4.i.a. The Majority failed to assess the evidence in its totality

168. In failing to find that soldiers in the FDS convoy shot and killed or injured the women in the march, the Majority failed to properly appreciate *four* distinct categories of evidence and to consider them as a whole. At trial, the evidence led to establish that the use of heavy and lighter calibre weapons by the FDS convoy caused the deaths of seven women and injuries to six others included eye-witness testimony, video footage of the incident, expert testimony and autopsy reports.[349] Yet, several obvious deficiencies in the Majority's assessment show that it failed to consider the evidence in its totality.

169. *First,* to determine the question of attribution, the Majority gave no apparent regard to the evidence of the five eye-witnesses who were participants in or observers of the march. Indeed, the three paragraphs of Judge Henderson's Reasons concerning attribution[350] do not refer to the eye-witness testimony, except on one limited point of "a large bullet" found in the body bag containing one of the victim's remains.[351] The Majority relied only on the video footage of the incident, the expert ballistics examination of that video and the reports respecting three autopsied victims.[352] Judge

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[348] *See e.g.*, Judge Henderson's Reasons, para. 861 ("Having regard to the conclusion reached in respect of the different elements and considering the evidence as a whole […]"); paras. 961-962 (outlining the Chamber's methodology in assessing the pro-Gbagbo speeches and statements in their entirety both individually and taken together); para. 1119 (assessing the circumstances of the alleged blockade of the Golf Hotel, stating, "taking into account the circumstances as a whole, and in particular General Mangou's speech dated 12 and 13 December 2010 to army units in Abidjan, it has not been demonstrated that the purported blockade was linked to the commission of crimes during the RTI march").
[349] *See* Prosecution's NCTA Response, para. 661; *see also* Prosecution's Mid-Trial Brief, paras. 464-466.
[350] Judge Henderson's Reasons, paras. 1775-1777.
[351] Judge Henderson's Reasons, para. 1776, fn. 3969 (of confidential version).
[352] Judge Henderson's Reasons, paras. 1775-1777.

Tarfusser, in his Opinion, did not independently address the question of who shot the victims.[353]

170. Disregarding the eye-witness testimony on this question shows the Majority's erroneous approach. The eye-witness testimony was particularly relevant to the question of who shot and killed or injured the women. These witnesses testified that the march, which was mostly attended by women, was peaceful, that no one in the march was armed, that the victims were unarmed, and that it was the convoy that was firing as it passed through the march.[354] That none of the witnesses observed any armed demonstrators at the march is significant and allows the reasonable inference that there was no other source of gunfire apart from the FDS convoy. Of note, given that the Majority acknowledged that one or more vehicles in the FDS convoy opened fire[355]—the eye-witness testimony should have been examined in this context to determine whether it supported the inference that it was the FDS gunfire that killed and injured the 13 victims. Yet, the Majority ignored such testimony on the question of *who* shot the victims, and considered it only on the question of *why* the convoy opened fire. In this manner, the Majority artificially, and contrary to the approach in other cases,[356] separated the eye-witness testimony from the rest of the evidence.

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[353] Judge Tarfusser's Opinion, para. 84.
[354] P-0580: T-186-Red2-ENG, 72:4-6 ("Q: Mr Witness, when you left your home, did you see any armed individuals? A: No."), 78:9-10 ("Q: […] Did you see any armed men? A: No."); P-0582: T-187-Red2-ENG, 55:23-56:8 ("[…] They were not armed. They only had whistles and empty containers of tomatoes that they were beating together. They did not have guns or any types of weapons. They simply were asked to go to the march. They didn't even have a needle."), 76:1-4 ("What I saw, and as regards the young people, well those young people were not armed, nor were the women, apart from the djembés, and the drums and the whistles […]."); P-0184: T-215-Red-ENG, 34:19-21 ("Apart from the tank that I saw and the truck, I did not see any other uniformed officers. I did not see any other armed persons […]."); [REDACTED]; P-0190: T-21-Red3-ENG, 85:3-7 ("Q: And as you were hiding there, did you immediately see the tanks, or were you afraid and you didn't know exactly what was going on for a moment or two? A: I took refuge under the table, and I saw the vehicles heading towards Adjamé. Q: And what were those vehicles doing as they went by? A: They were shooting as they went along.").
[355] Judge Henderson's Reasons, para. 1777 ("Although there is evidence that other shots were fired from within the BTR 80 and possibly from other vehicles in the convoy, there is no evidence to link any of these shots to the deaths and injuries of the 13 victims").
[356] *See e.g.*, *Simba* AJ, para. 103 (where the Appeals Chamber confirmed the general, though not absolute, preference for live witness testimony, and the Trial Chamber's responsibility to resolve inconsistencies that arise within/amongst that testimony); *Limaj et al.* AJ, para. 86 (where the Appeals Chamber stated that the Trial Chamber must not disregard witness testimony, and that "[s]uch disregard is shown 'when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning'"); *Rutaganda* AJ, para. 29

171. *Second,* even as the Majority artificially limited the pool of evidence available (by excluding the eye-witness testimony), it erred in assessing some of the other aspects of the evidence. For instance, it inaccurately assessed the video footage and speculated on the evidence, disregarding expert testimony and reports.

172. Regarding the video-footage, the Majority misconstrued the timeline of the incidents which prevented it from drawing the reasonable inference regarding the cause of the women's death/injuries. The video footage of the incident shows the FDS convoy passing through the women's march, when there is an initial burst of gunfire heard on the video at minute 03:39 to 03:46.[357] The Majority rightly found that this could likely be attributed to the heavy calibre weapons mounted on the turret of the BTR-80 armoured vehicle in the FDS convoy.[358] Subsequent gun fire of 17 shots can be heard at various intervals until minute 05:15.[359] The Majority then attempted to relate the timing of shots heard on the video to its own observations of the video footage to ascertain when and how the women were struck by gunfire. Specifically, after the initial burst of three shots, the Majority considered that because the video camera swung around violently, it was *impossible* to establish the source of the subsequent noises or blasts that can be heard on the video.[360] The Majority also found that the first show of bodies on the video footage occurs at roughly *one minute* after the first burst of gunfire, during which time other bursts of gunfire can be heard on the video.[361] The Majority's assessment of the timing is incorrect—the footage, as confirmed in the expert examination of the video,[362] shows the bodies of women lying on the ground with the convoy passing right next to them at minute 04:07, i.e. *28 seconds* after the first

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(where the Appeals Chamber confirmed the duty on the Trial Chamber to examine divergent witness testimony in relation to a material fact and to decide which evidence it deems to be more probative, and to choose which of the divergent versions it may admit); *Ntaganda* TJ, para. 80 ("Inconsistencies, contradictions, and inaccuracies do not automatically render a witness's account unreliable in its entirety, as witnesses, depending on their personal circumstances, may experience, and therefore remember, past events in different ways.[…]")

[357] CIV-OTP-0082-0357.

[358] Judge Henderson's Reasons, para. 1775.

[359] CIV-OTP-0089-1030 (Forensic Expert Report Examination of a Video), at 1058, p. 29.

[360] Judge Henderson's Reasons, para. 1775.

[361] Judge Henderson's Reasons, para. 1776.

[362] CIV-OTP-0089-1030 (Forensic Expert Report Examination of a Video), at 1044-1047, pp. 15-18.

shot is heard. Had the Majority properly appreciated the video footage and its expert examination, which showed the women's bodies on the ground *much closer in time* to the first burst of gunfire than the Majority believed, it could have (and indeed should have) drawn the reasonable inference that the FDS convoy shot at the women.

173. Further, although the Majority was pre-occupied in its assessment by its need to link the "shots" and the "bodies", it disregarded *other* common-sensical indicators of the larger context showing that the FDS convoy was responsible. For instance: the visibly panicked reaction of other people in the crowd immediately following the first burst of gunfire; that after the convoy had cleared the crowd, the people point and run towards the location where the women had fallen on the ground; and that by the time the person holding the camera reached the women's bodies, some of them had already been covered up by leaves or cloth to hide their most graphic injuries. All these factors indicate that the crowd was fearful of, and reacting to, the actions of the FDS convoy. Again, if all aspects of the video footage had been considered, the Majority could have (and indeed should have) concluded differently.

174. *Third*, in suggesting alternative unsupported hypotheses as to *who* may have shot the women, the Majority disregarded expert pathology and ballistics evidence—without any apparent justification. Counter-intuitively, the Majority supplanted its view for those of the experts on the record. In particular, in two sentences, the Majority conveyed its view that the women could have died and been injured by "ricocheting bullets", without any basis in the record. It stated:

> "It is, of course, possible that at least some of the women were struck by some of the bullets that were fired from the convoy. However, even if this was the case, it would still have to be determined whether the injuries were caused by direct fire or whether they resulted from ricocheting bullets".[363]

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[363] Judge Henderson's Reasons, para. 1777.

175. It is not apparent why the Majority's concern that the injuries were either caused by "direct fire" or "ricocheting bullets" would matter to the question of attribution, as long as the bullets—whether "direct" or "ricocheting"—emanated from the FDS convoy.

176. In any event, this reference to "ricocheting bullets" is entirely speculative. *First*, there was no evidence on the record about bullets ricocheting during the incident, nor were witnesses even questioned about the possibility of ricocheting bullets. Nor does the Majority explain what objects such bullets could have ricocheted off, such that it was relevant to its analysis. *Second*, the notion of ricocheting bullets is inconsistent with the expert pathology evidence on the record which confirmed that the autopsied victims and photographed victims from the scene were all shot in a similar manner, thus indicating a pattern.[364] By contrast to a pattern, ricocheting bullets strike objects at unpredictable angles, speeds and locations.

IV.B.4.i.b. The Majority failed to appreciate that the evidence was consistent and corroborated

177. Not only did the Majority fail to consider the evidence as a whole, it failed to appreciate that the evidence was consistent and corroborated—as Judge Herrera Carbuccia did.[365] Yet, in part due to its inflexible understanding of "corroboration" and "consistency" of evidence, the Majority rejected a wealth of consistent evidence (eye-witness, video, expert, autopsy reports) showing that the FDS shot the women. Instead it relied on the partial testimony of one witness ([REDACTED]), and who, as

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[364] P-0585: T-189-ENG, 29:20-30:5 ("[…] All the injuries on all three bodies are at about the same level, the neck and the shoulder area. They all appear to be injuries with bullets coming from left to right. So there is a pattern within them. There was no bullet injuries save for lower down on the chest or in the legs, in the pelvis, arm. Everything was around about the neck and shoulder level. I've seen photographs of the scene where the death is, and there are other bodies there with clearly damage to the head. So again, again, all around about the same, same level").

[365] Judge Herrera Carbuccia's Dissenting Opinion, para. 109 ("[…] All the evidence—[REDACTED]—supports the fact that the shots were fired towards the crowd and not "*au bleu*". As stated above, there is no evidence that there were any rebels or armed persons present at the march.").

Judge Herrera Carbuccia found,[366] [REDACTED]. The presence of one possible "counter-view" ([REDACTED]) is not sufficient reason to reject the swathes of credible and reliable evidence consistently demonstrating the opposite view.

178. Moreover, some aspects of the "counter view" ([REDACTED]) were consistent with the other evidence on the record such as the video footage, eye-witness testimonies and the ballistics expert evidence on several details. Like the other witnesses, [REDACTED] that there was an FDS convoy and that the FDS convoy fired first.[367] In any event, however, [REDACTED] was not reason enough to reject all other relevant and probative evidence on the record. Yet—quite inexplicably—the Majority preferred [REDACTED] to the eyewitness accounts of the three other witnesses, the video evidence, the autopsy reports and the expert ballistics evidence.

179. In particular, the Majority erroneously relied on the evidence [REDACTED] to discard the probative value of all other evidence. Yet the Majority did not expressly acknowledge that [REDACTED]. [REDACTED],[368] [REDACTED].[369] The Majority preferred [REDACTED] and set aside all other eye-witnesses. It discounted P-0184 mainly because "she fell twice and lost consciousness for a few seconds or minutes'". It discounted P-0580 who "heard the gun shots" and confirmed that the bodies of the victims were lying in relatively close proximity to each other, mainly because he "mentioned two vehicles, rather than five" in the convoy. And it discounted the evidence of P-0114, who saw the tanks, mainly because he had previously said that "the 'tank' fired only once".[370] By doing so, the Majority failed to recognise that

[366] Judge Herrera Carbuccia's Dissenting Opinion, para. 105 ("[…] [REDACTED].
[367] [REDACTED].
[368] [REDACTED].
[369] [REDACTED].
[370] Judge Henderson's Reasons, paras. 1781-1783.

witnesses need not be consistent in all details to be relied upon.[371] The Majority also failed to recognise the chaotic circumstances in which they witnessed events.

180. Regarding the video-footage, although the Majority accepted the Prosecution's submission that the video did not confirm [REDACTED], it rejected the value of the video-footage since it showed only a "limited aspect of the entire incident" and was of "poor quality".[372] This is contradictory—either the video can be relied on as showing the events (as the Majority appeared to accept when it agreed with the Prosecution), *or* the video is overall of "poor quality" such that it adds no value.

181. Further, in preferring [REDACTED] over all else, the Majority also incorrectly rejected the autopsy reports of the three autopsied victims, and the expert pathology evidence given in relation to those reports. That evidence confirmed that all autopsied victims, and the victims whose bodies were visible in photographs taken from the scene, died from gunshot injuries sustained from left to right and above shoulder level, indicating a pattern.[373] The height of the injuries was thus consistent with gunfire coming from sources positioned at the same height (*i.e.*, the BTR-80). The Majority also

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[371] Judge Herrera Carbuccia's Dissenting Opinion, para. 126 ("Where the witnesses were able to recall the essence of the events in acceptable detail, minor discrepancies among witnesses are not a bar to their reliability"); *Nahimana et al.* AJ, para. 428 ("[…] [T]he Appeals Chamber is of the view that two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or sequence of linked facts. It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of events, or according to how he understood the events recounted by others. It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony"); *Rutaganda* AJ, para. 29 (stating that there is no obligation that witness testimony be corroborated in order to be relied upon, and that "[w]here testimonies are divergent, it is the duty of the Trial Chamber, which has heard the witnesses, to decide which evidence it deems to be more probative, and to choose which of the two divergent versions of the same event it may admit"); *see also* *Rukundo* AJ, para. 76; *Ntawukulilyayo* AJ, para. 24.

[372] Judge Henderson's Reasons, para. 1780 ("The Prosecutor is right in saying that the video does not confirm [REDACTED] that the convoy was fired upon. […]").

[373] P-0585: T-189-ENG, 29:20-30:5 ("[…] All the injuries on all three bodies are at about the same level, the neck and the shoulder area. They all appear to be injuries with bullets coming from left to right. So there is a pattern within them. There was no bullet injuries save for lower down on the chest or in the legs, in the pelvis, arm. Everything was around about the neck and shoulder level. I've seen photographs of the scene where the death is, and there are other bodies there with clearly damage to the head. So again, again, all around about the same, same level"); CIV-OTP-0081-0518 (Autopsy Report of Malon Sylla), at 0520, p. 3; CIV-OTP-0081-0523 (Autopsy Report of Gnon Rokia Ouattara), at 0525, p. 3; CIV-OTP-0081-0528 (Autopsy Report of Moyamou Kone), at 0530, p. 3.

disregarded further consistent evidence from the report of the ballistics expert which confirmed that, based on the sounds of heavy-calibre gunfire that can be heard in the video, it is possible that they were fired from the same heavy calibre weapon.[374] Critically, there was no evidence on record, [REDACTED], that anyone apart from the FDS was using heavy calibre weapons at the women's march.[375]

182. In sum, the Majority's overall approach to assessing evidence at the NCTA stage was ambiguous, inconsistent and incorrect. Its approach was inappropriate for any stage of the proceedings, let alone the NCTA stage.

IV.B.4.ii. *<u>The Majority erred in assessing the evidence as to the attribution of the shelling to the FDS/BASA for the 17 March 2011 incident (Abobo II, 4th Charged Incident)— Example 2</u>*

183. As with the 3 March 2011 incident, the Majority found that "it is not possible to attribute responsibility" for the shelling of locations in Abobo on 17 March 2011.[376] In its view, it would be "impossible" for a reasonable trial chamber to determine with "sufficient confidence" who caused the explosions that took place on 17 March 2011 in Abobo and by what means.[377] On their face, the terms "impossible" and "sufficient confidence" taken together signal that the Majority may have assessed evidence at a standard higher than that set out in Judge Henderson's Reasons. By contrast, Judge Herrera Carbuccia found that "there is already sufficient evidence upon which a reasonable trier of fact could be satisfied that civilians were killed and injured as a result of mortar shells fired by the FDS from Camp Commando [...]".[378] The Majority's failure to attribute the shelling of Abobo on 17 March 2011 to the FDS/BASA at Camp

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[374] CIV-OTP-0089-1030 (Forensic Expert Report Examination of a Video), at 1061-1062, paras. 65, 69.
[375] [REDACTED].
[376] Judge Henderson's Reasons, para. 1820. *See also* Judge Tarfusser's Opinion, para. 85.
[377] Judge Henderson's Reasons, para. 1820.
[378] Judge Herrera Carbuccia's Dissenting Opinion, para. 141.

Commando (Abobo) was another example (and consequence) of its ambiguous approach to assessing evidence at this stage.

184. The error in the Majority's approach is displayed in that it (i) failed to draw reasonable inferences from the evidence; (ii) failed to assess expert testimony in a consistent and predictable manner; and (iii) failed to properly consider the evidence in its totality and as consistent and corroborated.

IV.B.4.ii.a. The Majority failed to draw reasonable inferences from the evidence

185. Based on the evidence before it, the Majority failed to draw the eminently reasonable inference that Abobo market was struck by 120mm mortars, that the mortars originated at Camp Commando, and that their firing could be attributed to BASA members.[379]

186. As Judge Herrera Carbuccia found,[380] several insider witnesses confirmed that the FDS was stationed at Camp Commando at the time, and that mortars had been positioned towards specific areas in Abobo. Several witnesses (for instance, P-0330, P-0238, P-0009) testified that BASA had 120mm mortar shells, including in Camp Commando in the days and weeks leading up to the incident.[381] In addition, P-0226, who was at Camp Akouédo on the day Abobo market was shelled, heard mortar shells being launched into the middle of the city. He also saw FDS officers involved in the shelling, "being received as heroes" and was told by a colleague that the shells had originated from Camp Commando.[382] P-0239, a BASA officer during the post-election violence, saw 120 mm mortar shells fired from Camp Commando at areas in Abobo.[383] P-0164, also a BASA officer, testified that 120mm mortars (at Camp Commando) were

[379] Judge Henderson's Reasons, paras. 1820, 1839.
[380] Judge Herrera Carbuccia's Dissenting Opinion, para. 124.
[381] P-0238: T-80-Red2-ENG, 69:2-11, 69:21-22; T-81-Red3-ENG, 13:1-7; T-82-Red3-ENG, 17:24-18:4, 19; P-0330: T-69-CONF-ENG, 2:21-9:14 (5:7-20 in private session); T-68-Red2-ENG, 80:4-82:13; P-0009: T-193-ENG, 71:19-22.
[382] P-0226: T-166-CONF-ENG, 30:10-35:11 (34:25-35:11 in private session).
[383] P-0239: T-167-ENG, 54:25-55:10, 56:16-20, 57:22-58:3, 58:19-59:7, 60:9-25.

aimed towards Abobo. P-0164 testified that a relative of his—living in SOS village—had called him to say that mortar shells hit the area, and that he (P-0164) confronted those who had fired the shells.[384] P-0226 confirmed this, referring to P-0164's reaction to the shelling, as a relative of P-0164's had almost been killed.[385] One of the individuals that P-0239 witnessed firing the shells is the same individual that P-0164 confronted.[386] Further, the expert witness stated that the impact sites were "most likely" struck by a 120mm mortar variant, and that such a mortar variant was capable of being fired from Camp Commando and striking the impact sites.[387]

187. Despite this evidence, the Majority was only able to positively find that on 17 March 2011 at least four and possibly more explosions struck at least two different locations in Abobo.[388] The Majority considered that P-0239's testimony was inconsistent with the other evidence relating to the shelling on 17 March 2011.[389] Despite earlier concluding that at least four explosions occurred across the day,[390] and acknowledging that it is possible that P-0239 witnessed only part of the shelling,[391] the Majority failed to reasonably infer that this was indeed what occurred. In the circumstances, the Majority's approach was overly restrictive and unnecessary.

IV.B.4.ii.b. The Majority assessed expert evidence (witness P-0411) inconsistently and unreasonably

188. The two Judges of the Majority took different—and inconsistent—approaches to the expert testimony about the 17 March 2011 incident. Judge Henderson stated that while expert witness P-0411's evidence demonstrated that the physical evidence "is

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[384] P-0164: T-164-Red2-ENG, 58:4-14, 72:18-73:12.
[385] P-0226: T-166-CONF-ENG, 34:2-35:11 (34:25-35:11 in private session).
[386] P-0239: T-167-ENG, 54:25-55:10, 56:16-20, 57:22-58:3, 58:19-23, 60:9-16, 67:22-68:1; T-168-Red2-ENG, 54:19-23.
[387] P-0411: T-169-Red2-ENG, 15:15-17:22; CIV-OTP-0049-0048, at 0049-0050; CIV-OTP-0049-0056; CIV-OTP-0049-0076, at 0049-0077, para. 8.
[388] Judge Henderson's Reasons, para. 1803.
[389] Judge Henderson's Reasons, para. 1814.
[390] Judge Henderson's Reasons, para. 1803.
[391] Judge Henderson's Reasons, para. 1814.

consistent" with the Prosecutor's submissions that Russian 120mm mortar shells were responsible for the 17 March 2011 explosions, "it does not prove it."[392] Judge Tarfusser concluded that P-0411's report was "inconclusive" regarding the identification of the author(s) of the shots fired, and the underlying motives.[393] Judge Tarfusser then characterised the evidence of P-0411, among other expert witnesses, as being "of little, if any, significance to the charges", and a waste of trial time.[394]

189. P-0411's report found that it was "highly likely" that the impact sites were subject to attack by a heavy cased high explosive ammunition that was "most likely" a 120mm mortar system variant.[395] The expert also concluded that it was possible to deploy mortar systems from Camp Commando and that the areas of SOS Village and Siaka Koné market were within the range parameters of 120mm mortar systems.[396]

190. As Judge Henderson noted,[397] this is consistent with the Prosecutor's theory. There is no requirement, nor should it be reasonably expected, that at the NCTA stage, or indeed even at the conclusion of the trial, that expert evidence support with *complete certainty* the Prosecutor's allegations. The role of expert evidence is to supply specialised knowledge that may assist a chamber in understanding the evidence before it.[398]

191. Judge Tarfusser unreasonably diminished the importance of the expert evidence. Despite the fact that the report makes findings of high probability ("most likely", "highly likely"), Judge Tarfusser found that that it suffered from "[i]ntrinsic inconclusiveness."[399] Judge Tarfusser's approach was less than clear. On the one hand, his approach appears to acknowledge the specialised expertise, noting that it did not

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[392] Judge Henderson's Reasons, para. 1806.
[393] Judge Tarfusser's Opinion, paras. 29, 85.
[394] Judge Tarfusser's Opinion, para. 35.
[395] CIV-OTP-0049-0048, at 0049-0050.
[396] P-0411: T-169-Red2-ENG, 15:15-17:22; CIV-OTP-0049-0056; CIV-OTP-0049-0076, at 0049-0077, para. 8.
[397] Judge Henderson's Reasons, para. 1806.
[398] *Popović et al* AJ, para. 375; *Nahimana et al.* AJ, para. 198; *D. Milošević* AJ, para. 117.
[399] Judge Tarfusser's Opinion, para. 85.

prove the motives of any mortar shots fired—which the expert testimony did not purport to address. On the other hand, however, he dismissed the evidence for being "intrinsically inconclusive", despite its utility in assisting the chamber to understand, in the context of the other evidence on the record, whether the mortars fired were 120mm mortars, and whether they could have originated from Camp Commando.[400] Judge Tarfusser's approach also contradicted Judge Henderson's assessment.

192. Judge Carbuccia correctly approached P-0411's evidence in the context of the other evidence on the record, firstly concluding that most of P-0411's findings are corroborated by evidence on the record, and, notably, not dismissing the evidence simply because, on its own, it is insufficient to make certain factual findings.[401]

193. The approaches in Judge Henderson's Reasons and in Judge Tarfusser's Opinion are unreasonable in that they evince a higher level of review for expert evidence than is required at the no case to answer stage, or at any other. They also demonstrate that the Majority adopted, between themselves, divergent approaches to the assessment of expert evidence.

IV.B.4.ii.c. The Majority failed to appreciate that the evidence was consistent and corroborated

194. The Prosecutor submitted that the evidence of witnesses P-0239, P-0330, P-0164, P-0226, P-0238, and P-0411 generally corroborated each other as to the delivery, installation, and launch of 120mm mortars from Camp Commando on 17 March 2011.[402] The Majority's approach in relation to certain witness accounts was, however, to require that they corroborate *each other's* accounts.[403] In requiring that corroboration only followed when witnesses testified to the same or identical fact, the Majority

[400] P-0411: T-169-Red2-ENG, 15:15-17:23; CIV-OTP-0049-0056; CIV-OTP-0049-0076, at 0049-0077, para. 8.
[401] Judge Herrera Carbuccia's Dissenting Opinion, paras. 115-116.
[402] Prosecution's NCTA Response, paras. 812, 822.
[403] Judge Henderson's Reasons, paras. 1806-1811.

unreasonably failed to recognise that similar facts and/or a sequence of separate but linked facts can also constitute corroboration.

195. For instance, witnesses P-0226 and P-0239 both testified that two 120mm mortars were brought to Camp Commando by a unit under the same named officer, and that mortars were located at Camp Commando around early March 2011.[404] Judge Henderson's Reasons, however, focused on the extent to which their accounts diverged regarding the specifics of the incidents in which they witnessed the mortars at Camp Commando, to conclude that they did not corroborate each other.[405] The Majority's unreasonable assessment precludes the reasonable finding that, the accounts being *prima facie* credible and compatible,[406] *both* are correct, even if they likely referred to different events.

196. While this is the most striking example of the Majority's unreasonable approach to *prima facie* compatible witness accounts, the following example is also instructive. The accounts of P-0164 and P-0226 are *prima facie* compatible: the witnesses testified about the presence of 120mm mortars on 3 March 2011 (P-0164), and some days prior to the women's march (which occurred on 3 March 2011) (P-0226).[407] That they may have differed on the precise date when the mortars were set up "into battery" does not render their accounts incompatible *per se,* such that they should both be discarded, as Judge Henderson concluded.[408]

197. By stating that "[i]t is impossible to decide which one is accurate", the Majority summed up its own erroneous approach.[409] Had the Majority not approached the testimony in such a manner, it might reasonably have found, and as Judge Herrera

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[404] P-0226: T-166-CONF-ENG, 53:16-55:22 (55:8-22 in private session); P-0239: T-167-ENG, 46:18-49:13, 54:2-7.
[405] Judge Henderson's Reasons, paras. 1807-1808, 1815.
[406] P-0226: T-166-CONF-ENG, 53:16-55:22 (55:8-22 in private session); P-0239: T-167-ENG, 46:18-49:13, 54:2-7.
[407] P-0164: T-164-Red2-ENG, 50:8-12, 54:21-58:9; P-0226: T-166-CONF-ENG, 53:16-55:22 (55:8-22 in private session).
[408] Judge Henderson's Reasons, paras. 1809, 1811
[409] Judge Henderson's Reasons, para. 1811.

Carbuccia concluded[410]—that several of the testimonies are true, and prove the same or similar facts or a sequence of linked facts.

198. Therefore, the Majority's approach to assessing evidence at the NCTA stage was unclear, inconsistent and incorrect. It illustrates a flawed approach to the assessing of evidence at any stage of the proceedings, let alone the NCTA stage.

IV.B.4.iii. *The Majority erred in assessing the evidence in relation to Mr Gbagbo's involvement in the shelling in Abobo (late February 2011 and 17 March 2011)—Example 3*

199. The Majority found that a reasonable trial chamber "might" conclude that Mr Gbagbo was informed about the use of mortars during operations in Abobo in late February 2011—but that there was no "reliable information" on "what exactly he was told".[411] In a different section of its analysis, regarding the 17 March 2011 shelling of Abobo, the Majority found that "it would not be possible for a reasonable trial chamber to […] conclude that, if 120 mm mortar shells were fired from Camp Commando on 17 March 2011, this must have been pursuant to an order from or with the authorisation of Mr Gbagbo, directly or indirectly."[412] But as Judge Herrera Carbuccia found,[413] there was sufficient evidence, both direct and circumstantial, such

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[410] Judge Herrera Carbuccia's Dissenting Opinion, para. 124.
[411] Judge Henderson's Reasons, para. 1359 ("[…] there is no reliable information about what exactly he was told. In particular, it is entirely unclear whether Mr Gbagbo was apprised of the purpose behind the use of these weapons and/or the effect they had on the ground, particularly on the civilian population.").
[412] Judge Henderson's Reasons, para. 1838.
[413] Judge Herrera Carbuccia's Dissenting Opinion, para. 136 ("[…] There is enough direct and circumstantial evidence capable of persuading a reasonable Trial Chamber that Mr Gbagbo ordered the offensive in Abobo that led to the shelling of 17 March 2011. […]"); *see also* paras. 133-134 (finding that Mr Gbagbo had been informed about the shelling of late February 2011 and had given precautionary instructions to General Mangou: "Make sure that not too many people die") and para. 136 ("In the case at hand, Mr Gbagbo's order to start military operations in Abobo, a densely populated area, knowing that heavy weaponry would be used (and was indeed used in compliance with his orders), together with the above precaution to 'try to avoid too many deaths', could lead a reasonable Trial Chamber to infer that Mr Gbagbo had the intent to use heavy weaponry in Abobo as of 24 February 2011 and was aware of the consequences those military operations under his command would have on the civilian population of Abobo").

that a reasonable trial chamber could find that Mr Gbagbo ordered the offensive in Abobo that led to the 17 March 2011 shelling.

200. The Majority's analysis of Mr Gbagbo's involvement in the shelling in Abobo in late February and on 17 March 2011[414] failed to consider the totality of the evidence and draw reasonable inferences available from the record. The testimony of numerous FDS witnesses at trial gave a reasonable chamber sufficient basis to find that (i) Mr Gbagbo knew of the use of 120mm mortars in Abobo in February and March 2011; and (ii) Mr Gbagbo authorised the use of the mortars in Abobo on those occasions. Yet, the Majority erroneously concluded that there was *no evidence*, or that the evidence was *manifestly inadequate* to support a finding that Mr Gbagbo ordered or specifically authorised the use of heavy weapons in Abobo in late February 2011, and on 17 March 2011.[415] The Majority's failure to consider evidence in relation to the late February 2011 *and* 17 March 2011 incidents as a whole, when the incidents were only a few weeks apart, contradicts the Majority' approach in other parts of its analysis. Likewise, in disregarding hearsay evidence in this part of the analysis, the Majority again contradicted its stated approach. In his separate Opinion, Judge Tarfusser did not independently engage substantively with this analysis.[416]

IV.B.4.iii.a. The Majority failed to assess the evidence as a whole, contradicting its stated approach

201. The Majority could have reasonably inferred, taking the evidence about the late February 2011 and the 17 March shelling incidents, both individually and cumulatively, that Mr Gbagbo could be linked to those shelling incidents. However, the Majority only mentioned the evidence in relation to the late February 2011 shelling incident briefly in the context of the later shelling of 17 March 2011, but apparently

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[414] Judge Henderson's Reasons, paras. 1345, 1355-1359, 1832-1839; *see also* Judge Tarfusser's Opinion, paras. 85, 113(v) and (vii).
[415] Judge Henderson's Reasons, paras. 1355-1356, 1839.
[416] *See e.g.*, Judge Tarfusser's Opinion, paras. 85, 113(v) and (vii).

failed to appreciate its evidentiary value in the broader context and for an incident that occurred only a few weeks later.[417]

202. In general, the evidence showed that, even if there was no evidence that Mr Gbagbo gave a direct order to use the mortars: Mr Gbagbo's practice was to give general, and not operational orders; Mr Gbagbo knew the military and its weaponry well and thus would have known of the likely impact and damage that the mortars would have caused; Mr Gbagbo had ordered the FDS to "hold Abobo" even after having been informed of the presence of civilians in the area where mortars were fired; Mr Gbagbo was always briefed following military operations; and Mr Gbagbo had requisitioned the armed forces by February 2011 such that an order to use particular weapons was not required in any event. A reasonable trial chamber could have made conclusions naturally available on the record to link Mr Gbagbo to the shelling incidents, taking the evidence on the late February 2011 and 17 March 2011 incidents together and at their highest. On any view of the evidence, it is clear that in the context of FDS operations in Abobo in late February and March 2011, and the reporting to Mr Gbagbo of those activities, it would be implausible, that Mr Gbagbo, as commander in chief, did not know of the 17 March 2011 shelling, or had not authorised it in general or through specific instructions regarding the Abobo offensive.

203. *First*, there was evidence that the use of 120mm mortars had to be authorised by written order from the President because of the destruction they cause. Witness P-0239, who served in BASA at the relevant time, was taught this information in his

[417] Judge Henderson's Reasons, para. 1833.

military training.[418] While this may not be sufficient in itself,[419] the Majority failed to assess this evidence *together* with other witness testimony that would have allowed it to reasonably infer that Mr Gbagbo had authorised the use of the mortars.

204. *Second*, there was specific evidence, consistent with the evidence of the general practice, that the Presidency issued orders to use the 120mm mortars in late February 2011. Witness P-0330 observed a unit attempting to install 120mm mortars in Camp Commando in Abobo on or around 28 February 2011.[420] The witness observed and heard parts of a conversation between Captain Zadi and Colonel Doumbia. When Colonel Doumbia asked Captain Zadi from where he received authorisation to use the 120mm mortars, the witness heard Captain Zadi use the word "presidency" in his reply. Colonel Doumbia later confirmed to the witness that Captain Zadi had told him that he had received the orders from the presidency.[421] The Majority disregarded this evidence primarily because it constitutes hearsay.[422] While the evidence is indeed hearsay—in that it only constitutes evidence of what Captain Zadi said, and not the truth of its contents—it is neither anonymous nor "hearsay without adequate information about the reliability and credibility of the source".[423] P-0330 directly heard

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[418] P-0239: T-167-ENG, 50:12-15 ("In artillery we are very specific. Before using the artillery, we need a written order. Before even using the weaponry, the artillery, it is the President—the President must give an order in writing, because if there is a problem tomorrow, you have to assume responsibility. You are responsible, because these are weapons of war. That is always how it works in the artillery"), 50:21-51:17 ("A. […] [M]ost of the time, in training we were told that before carrying out orders, the president himself needs to give his agreement, because tomorrow he would have to account for his actions as well, because these are weapons of war that countries use against each other. Q. If I understood you correctly, you said the president himself has to give his agreement? A. Yes. Q. Are you talking about the president of the republic? A. The president of the republic, of course. Q. Very well. And the fact that such an order has to come from the president of the republic, where does this principle come from? A. It is the principle that is followed in the artillery"); *see also*, T-168-Red2-ENG, 53:8-18 (confirming again that he received this information in his military training).
[419] Judge Henderson's Reasons, para. 1355.
[420] T-69-Red2-ENG, 3:1-10.
[421] P-0330: T-69-Red2-ENG, 6:7-12, T-73-Red2-ENG, 27:7-25.
[422] Judge Henderson's Reasons, para. 414.
[423] Judge Henderson's Reasons, para. 45 ("Accordingly, when the only evidence in relation to a particular proposition is based primarily on anonymous hearsay or hearsay without adequate information about the reliability and credibility of the source, the Chamber must conclude that such a proposition is unsupported").

Captain Zadi say this to Colonel Doumbia. In excluding this probative evidence arbitrarily, the Majority contradicted its own stated approach to hearsay.[424]

205. Moreover, while the witness heard Captain Zadi referring to "the Presidency" giving orders, rather than "the President", this too was no reason to discard the evidence.[425] Obviously, the term "Presidency" could include the "President" himself. These minutiae should not have prevented the Majority from properly considering this evidence at this stage.

206. Further, while the Majority found that P-0330 "did not even perfectly hear what Captain Zadi had said, such that he had to rely on Colonel Doumbia's rendition of the events",[426] the parts of the discussion that the witness did personally hear, which included reference to "the Presidency" in connection with the question of who ordered the use of the 120mm mortar, were nonetheless consistent with what Colonel Doumbia later told the witness.[427]

207. *Third,* witness P-0239 confirmed that he had been told by Colonel Dadi, his commanding officer at BASA,[428] that he was receiving orders directly from Mr Gbagbo.[429]

208. *Fourth*, regardless of whether Mr Gbagbo did, or did not provide *specific* authorisation to use 120mm mortars in Abobo in late February 2011, his specific authorisation was, in any event, not required. Witness P-0009, then Chief of Staff of the FDS, testified that he had issued the specific orders to fire the 120mm mortars.[430]

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[424] Judge Henderson's Reasons, para. 43 ("I accept that, in appropriate cases, hearsay evidence may have considerable probative value. […]").
[425] Judge Henderson's Reasons, para. 415 ("[I]t should be noted that even though P-0330 independently heard Captain Zadi refer to 'the presidency', it is clear from P-0238's testimony […] that such a term does not necessarily refer to the President himself".).
[426] Judge Henderson's Reasons, para. 414. *But see* P-0330: T-73-Red2-ENG, 26:20-23 (where P-0330 states that he did not hear the entire conversation).
[427] P-0330: T-73-Red2-ENG, 26:8-28:2.
[428] P-0239: T-167-ENG, 27:17-19.
[429] P-0239: T-167-ENG, 43:12-20.
[430] P-0009: T-196-Red2-ENG, 40:8-13, 58:6-8, 58:18-25, 59:18-19.

He confirmed that Mr Gbagbo had already requisitioned the armed forces by this stage, and that the authorisation to use such heavy weaponry was implied within the framework of that requisition.[431] There was accordingly no need for a specific delegation by Mr Gbagbo for the use of specific weapons.[432] This evidence would be equally relevant to the late February 2011 and 17 March 2011 shelling incidents. In fact, it appears that the Majority implicitly concurred with the logic that Mr Gbagbo did not need to specifically delegate his authority for the use of specific weapons, when it referred to P-0009 and P-0226 on this point.[433]

209. *Fifth*, the evidence from FDS generals showed that Mr Gbagbo had been kept informed of the activities of the armed forces in late February 2011 and gave general, rather than specific or operational instructions. Specifically, in relation to the offensive in Abobo, Mr Gbagbo instructed his generals as follows: "I would like you to hold the ground. I don't want to lose Abobo. I don't want you to lose Abobo. Hold Abobo".[434] Moreover, after the first shelling in February 2011, witness P-0009 reported to Mr Gbagbo, other military generals, the Minister of Defence and the Minister for the Interior, regarding the difficulties encountered during the mission. The witness showed Mr Gbagbo the positions of the army and the enemy on the map and confirmed the presence of the population in the relevant area, to which Mr Gbagbo stated, "Make sure that not too many people die".[435] Witness P-0009 also confirmed that he had informed the President that shells had been used during the missions in late February 2011.[436] The Majority appears to have accepted this evidence.[437] Yet, it ignored it on the broader issue of whether Mr Gbagbo ordered the shelling.

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[431] P-0009: T-193-ENG, 71:23-72:6; T-194-ENG, 78:11-13; T-198-ENG, 12:21-13:5.
[432] P-0009: T-198-ENG, 13:6-9.
[433] Judge Henderson's Reasons, para. 1834 ("[…] [I]t is difficult to see how any armed force would be able to engage in sustained and complex military operations if every time there was a need to use heavy artillery there would be a need to first get prior approval from the head of state or government."), referring to P-0009 and P-0226.
[434] P-0010: T-141-Red2-ENG, 19:21-20:1, 20:5-13.
[435] P-0009: T-194-ENG, 57:12-21.
[436] P-0009: T-196-Red2-ENG, 43:7-11, 43:18-44:10, 45:21-23.
[437] Judge Henderson's Reasons, para. 1359.

210. *Sixth,* the Majority's failure to reach conclusions naturally available on the record is also apparent when testimony on the scope of Mr Gbagbo's *own* knowledge of military affairs is considered. Witness P-0010, the former head of the *Centre de Commandement des Opérations de Sécurité* ("CECOS"), stated that, of all the Presidents he knew, Mr Gbagbo was the only one who had been in the army, did his military service "brilliantly" and "knew the army perfectly".[438] The witness stated: "[Mr Gbagbo] knew about weapons. He knew about the weight of weapons. But he never delved into any details about the military operations".[439]

211. *Seventh,* while the Majority repeated its findings regarding Mr Gbagbo's involvement in the use of mortars in February 2011 in its findings on the 17 March 2011 incident,[440] it appeared to disregard the evidence discussed in relation to the February 2011 incidents concerning the general practice on the use of mortars by the FDS and Mr Gbagbo's issuance of military orders. This was erroneous as this evidence was just as relevant for the 17 March 2011 incident.

212. *Eighth,* in general, the Majority's finding in relation to the 17 March 2011 incident was overshadowed by its overemphasis on the credibility of the evidence of witness P-0164.[441] Likewise, for the late February incident, it appears to unreasonably require direct evidence, when the circumstantial evidence was already strong.[442] Yet, even if the Majority's concerns on these aspects are considered, there was already sufficient other evidence on the record.

213. Therefore, as with the preceding examples, this example also illustrates the Majority's inconsistent and erroneous approach to assessing evidence at the NCTA

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[438] P-0010: T-141-Red2-ENG, 20:20.
[439] P-0010: T-141-Red2-ENG, 20:9-22.
[440] Judge Henderson's Reasons, para. 1833, fn. 4093 (of confidential version).
[441] Judge Henderson's Reasons, paras. 1836-1837.
[442] Judge Henderson's Reasons, paras. 1357-1358, 1381, 1836-1387.

stage. This approach was inappropriate at any stage of the proceedings, let alone the NCTA stage.

IV.B.4.iv. *The Majority erred in assessing the evidence in relation to the clashes on the Boulevard Principal (25 February 2011, Yopougon I, 2nd Charged Incident)—Example 4*

214. In disregarding crucial evidence on the clashes that took place between the youths of Yao Séhi (pro-Gbagbo) and the Doukouré inhabitants (pro-Ouattara), the Majority found as follows:

> "[…] while the accounts of P-0436, P-0442 and P-0109 are *plausible when seen in isolation*, they are *incompatible* in relation to a number of significant aspects of the narratives they provide. Since their respective accounts cannot all be entirely true at the same time, this raises serious questions about their truthfulness altogether. Considering that *only one of the three testimonies can be truthful in its entirety* and there is *no possibility* to determine which one this is, it would be difficult for a reasonable trial chamber to reach any conclusion based on this evidence."[443]

215. This paragraph sums up the Majority's uncertain and incorrect approach to assessing evidence. It erred in a number of ways: (i) It failed to appreciate that if multiple testimonies on a single event are available, it is not necessary to ascertain which one is "true" in its "entirety" to rely on any or all of them. Indeed, every witness testifies from his or her own vantage point. That witnesses may testify "differently" does not make their accounts untrue; (ii) It also failed to appreciate that testimonies were, in fact, corroborated. It incorrectly disregarded the wealth of consistent evidence, because it—again—incorrectly considered minor variations in testimonial evidence as insurmountable "contradictions". Ultimately, because of this

[443] Judge Henderson's Reasons, para. 1666 (emphasis added).

unreasonably atomistic and legally incorrect approach,[444] the Majority failed to consider the evidence in its totality, departing from its declared approach in other sections of its analysis.

IV.B.4.iv.a. The evidence relating to the Boulevard Principal clashes

216. Five witnesses testified that they witnessed the clashes between the pro-Gbagbo group and the Doukouré residents at the *Boulevard Principal*. The circumstances were necessarily chaotic; each of the witness's testimony reflected *that* witness's individual experience. But the picture that emerged from the cumulative experience of all five witnesses (notwithstanding their different vantage points) was clear and consistent.

217. Witness P-0442 testified[445] that at some point after 8 a.m. people came down the main road, and, when they started throwing stones, people from the Doukouré neighbourhood came out and forced them back to the 16th *arrondissement* police station.[446] Later, a group of about 10 police officers (who were wearing "camo, kaki-coloured clothes" and helmets) emerged from the station, in front of the group, who, from behind the police, again started throwing stones.[447] When the witness's group threw stones back, the police shot tear gas, grenades, and live bullets.[448] The witness also saw a BAE tank in front of the 16th *arrondissement* police station at around 10 a.m.[449] He was thrown and injured by what he was told was a grenade, and at that point was taken to a house in the neighbourhood.[450]

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[444] Judge Henderson's Reasons, paras. 1636-1674, 1764-1771.
[445] Judge Henderson's Reasons, paras. 1646-1651.
[446] P-0442: T-19-CONF-ENG, 68:1-9, 68:18-19 (closed session), 80:6-25; T-20-CONF-ENG, 4:10-16 (closed session), 6:1-21; T-21-Red3-ENG, 2:24-3:3, 21:2-16.
[447] P-0442: T-19-Red2-ENG, 81:4-19; T-20-CONF-ENG, 7:21-8:9, 77:15-20 (closed session); T-21-Red3-ENG, 26:24-25.
[448] P-0442: T-19-Red2-ENG, 81:5-19; T-20-Red2-ENG, 9:12-21; T-21-Red3-ENG, 23:1-11.
[449] P-0442: T-20-Red2-ENG, 15:17-21; T-21-Red3-ENG, 2:3-10
[450] P-0442: T-20-Red2-ENG, 9:12-21, 15:2-10; T-21-Red3-ENG, 6:8-14.

218. Witness P-0436 testified[451] that between 9 and 10.30 a.m. people started gathering on the main road, near the police station.[452] When the call to prayers went out, around midday, the crowd moved towards the Doukouré neighbourhood, and started to throw stones.[453] The Doukouré residents fought back, forcing the group back, until the police came out and told them to leave.[454] Later, the group started ransacking shops, at which point the Doukouré residents again forced them back, to the police station, where police (three or four of them, in green uniforms) emerged and threw tear gas, in addition to grenades.[455] Witness P-0436 saw P-0442 being felled by a grenade, and states that lethal weapons were used at around 4 p.m.[456]

219. Witness P-0109 testified[457] that between 9 and 11 a.m., youths from the Yao Séhi neighbourhood started throwing stones, and as those people started entering the Doukouré neighbourhood, people from that neighbourhood came out, including the witness, and forced them back.[458] Back and forth stone-throwing continued for about two hours, before a group of "militia" (some of whom wore military camouflage trousers, while the others were in civilian clothing) arrived and threw grenades.[459] At this point, the witness fled into the neighbourhood, where he hid until about 2 p.m.[460] He then returned home, before he went to Lem Mosque in the early evening, where at 5 p.m. people started running again, shouting "they're coming, they're coming."[461]

220. Witness P-0433 testified[462] that during the morning, near the Lem Mosque, for a short period youths were stopping vehicles, searching them, and taking mobile phones, following which young people from Yao Séhi and Doukouré started throwing

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[451] Judge Henderson's Reasons, paras. 1637, 1640-1645.
[452] P-0436: T-148-ENG, 17:20-18:11; T-149-Red2-ENG, 2:15-3:9, 7:15-21, 46 :25-47: 12.
[453] P-0436: T-148-ENG, 19:1-20.
[454] P-0436: T-148-ENG, 20:1-16; T-149-Red2-ENG, 9:15-18.
[455] P-0436: T-148-ENG, 22:2, 22:15-23:7, 25:4-15; T-149-Red2-ENG, 9:15-18, 11:6-12:16.
[456] P-0436: T-148-ENG, 23:23-24:22, 25:17-26:5.
[457] Judge Henderson's Reasons, paras. 1637, 1652-1653.
[458] P-0109: T-154-Red2-ENG, 29:4-30:11, 30:20-31:3, 35:3-9, 83:19-21; T-155-Red2-ENG, 4:5-17.
[459] P-0109: T-154-Red2-ENG, 34:14-22, 36:3-5, 36:14-20, 38:8-15, 39:3-17.
[460] P-0109: T-154-Red2-ENG, 39:3-17, 40:1-5, 40:12-18, 42:7-10.
[461] P-0109: T-155-Red2-ENG, 10:4-7, 12:13-14:5, 14:22-15:1.
[462] Judge Henderson's Reasons, para. 1638.

stones at each other until the police intervened to separate them (although he does not explain how he knows about the police intervention).[463] He then returned home and described seeing 15 or 20 militiamen in Doukouré neighbourhood, who were wearing civilian clothing and had guns.[464] In the evening, he returned to the mosque to see the damage that had been caused.[465]

221. Witness P-0441 testified[466] that at around 9 a.m., people were marching on the road near the Mosque. At around 12 pm, he heard people singing "to each one his [Dioula]". He testified that stones were thrown in its vicinity.[467]

222. The consistent picture that emerges from these testimonies, recognised to a degree by the Majority,[468] is that in the morning of 25 February 2011, groups from the Yao Séhi and Doukouré neighbourhoods clashed and threw stones at each other. The Doukouré group resisted advances into their neighbourhood and forced their adversaries back to the 16th *arrondissement* police station. This led to the police intervening, using tear gas and grenades to do so. This assessment is reasonable and correct, notwithstanding that some witnesses gave different precise timings, based on their individual experiences, for when they thought the clashes began and ended.

IV.B.4.iv.b. The Majority unreasonably required witnesses to provide identical accounts for it to consider them as "true"

223. A chamber may seek to establish the "objective truth".[469] However, this does not require that every witness provide identical accounts for each to be considered "true". Variations in testimony are natural; they follow from the human condition. It is for a

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[463] P-0433: T-147-Red2-ENG, 16:23-17:6, 18:7-10, 18:18, 20:9-16.
[464] P-0433: T-147-Red2-ENG, 27:14-28:14, 28:19-23.
[465] P-0433: T-147-Red2-ENG, 31:20-32:7.
[466] Judge Henderson's Reasons, para. 1638.
[467] P-0441: T-35-CONF-ENG, 44:14-23, 51:2-19; T-36-Red2-ENG, 50:2-53:1.
[468] Judge Henderson's Reasons, para. 1636 ("It appears from the evidence that the confrontation which started with two groups of youths throwing stones at each other escalated to the point of lethal force being used against civilians. […]").
[469] *See by analogy,* article 69(3), Statute.

chamber to resolve these variations in a reasonable and fair manner.[470] The Majority failed to do so. Rather, it conducted an unreasonably atomistic assessment of the evidence, claiming that testimony "contradicted" each other, when the witnesses only differed in minor details based on what each witness personally saw and experienced.

224. The Majority's insistence that "only one of the three testimonies can be truthful in its entirety" and that "there is no possibility to determine which one this is" was incorrect, unreasonable and unfair.[471] Its overwhelmingly unfair focus on establishing "with certainty" the "clear timeline" of the "duration of clashes", including its "starting time" detracted from the overall consistencies in the testimonies.[472] It is unclear why the Majority felt compelled to determine the "*precise*" timings with "*certainty*". Establishing "approximate" timings is generally sufficient and considered to be accurate enough estimations in international criminal practice. Further, although establishing the starting time of the clashes was relevant to assess the separate question of whether Mr Blé Goudé was responsible for this incident, it was unnecessary to determine if the witnesses were generally consistent about the clashes themselves. It is well-known that, for a variety of reasons, including the passage of time, and traumatisation, witnesses' recollection of the precise details of incidents, including dates and times, are not infallible; but this in itself should not prevent a chamber from relying on those witnesses.[473]

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[470] *Ntaganda* TJ, para. 80 (noting that a witness may be accurate/truthful/reliable on some issues, while being inaccurate/untruthful/unreliable on other issues, and that a chamber may rely only on part of a witness's account).
[471] Judge Henderson's Reasons, para. 1666.
[472] Judge Henderson's Reasons, para. 1636 ("[…] However, it is difficult to construe a clear timeline of the events that supposedly took place on the *Boulevard Principal* on 25 February 2011."); para. 1639 ("The analysis of the evidence thus far demonstrates that the starting time and duration of the clashes cannot be established *with certainty*. […]") (emphasis added).
[473] *Ntaganda* TJ, paras. 79-80; *Bemba et al.* TJ, , paras. 203-204; *Bemba* TJ, paras. 230-231; *Ngudjolo* TJ, para. 49; *Katanga* TJ, para. 83. *See also* *Rutaganda* AJ, para. 219 (endorsing the principle that "[a] witness may forget or mix up small details is often as a result of trauma suffered and does not necessarily impugn his [or her] in relation to the central facts of the crimes".); *Kunarac et al.* AJ, para. 324 ("[…] However, there is no recognised rule of evidence that traumatic circumstances necessarily render a witness's evidence unreliable. It must be demonstrated *in concreto* why "the traumatic context" renders a given witness unreliable. It is the duty of the Trial Chamber to provide a reasoned opinion adequately balancing the relevant factors. […]").

225. In particular, the Majority found it "difficult to reconcile" P-0109 and P-0436's accounts because P-0109 stated that the shooting calmed down around 2 p.m., while P-0436 stated that lethal weapons were used around 4 p.m.[474] However, this disregarded, or at least minimised, the ample consistencies between their testimonies (and others), as set out above. Further, P-0109 fled the Lem Mosque area around 5 p.m. when people were shouting "'they're coming'", indicating that clashes may have continued into the evening.[475] The Majority noted this in a footnote,[476] but did not appear to accommodate this in its analysis.

226. The Majority then focused on P-0433's testimony, concluding that it "contradicted" the other testimonial evidence because he provided that at some point between 9 and 10 a.m. the stone throwing started, whereas P-0411 said that it commenced at 12 p.m.[477] However, viewed holistically, as set out above, the evidence establishes that clashes commenced in the morning, and thereafter escalated at some point during the day. Again, it appears that the consistencies in the evidence were relegated, while the inconsistencies were elevated.

227. The Majority's dismissal of testimonies, based on a single sentence in a footnote, on the use by witnesses of the call to prayer (issued by Mosques) as a reference point to ascertaining the timings further underscores its unreasonable approach. The Majority correctly identified that these references lend "more credence to the time estimates provided", yet, nevertheless concluded in a single footnote, *without explanation*, that this makes discrepancies *more problematic*.[478]

[474] Judge Henderson's Reasons, para. 1637.
[475] Judge Henderson's Reasons, fn. 3704 (of confidential version).
[476] Judge Henderson's Reasons, fn. 3704 (of confidential version).
[477] Judge Henderson's Reasons, para. 1638.
[478] Judge Henderson's Reasons, para. 1639, fn. 3711 (of confidential version)

IV.B.4.iv.c. The Majority failed to recognise that testimonies were consistent and corroborated

228. Notwithstanding the similarities and *prima facie* compatibility of the accounts of P-0109, P-0436, and P-0442,[479] the Majority incorrectly found that they "differ significantly" from one another.[480] In so doing, the Majority's findings were internally inconsistent: it also found that P-0436 and P-0442 referred to the "same clashes", that P-0442 mentioned that he had been injured by a grenade, a fact that P-0436 reiterated, and that both P-0436 and P-0442 mentioned, with precision, that Siaka Bakayoko had been hit by a grenade and died as a result.[481] The Majority also recognised the consistency in P-0109 and P-0436 having both identified one of the victims.[482] Given how consistent these highly specific accounts were, and according to the Majority's own findings, these accounts cannot be said to "differ significantly" in the overall.

229. Rather than properly taking into account the consistencies in the various accounts, the Majority unfairly focused on what P-0109 *did not* see (the intervention of the police as described by P-0442 and P-0436). This was notwithstanding that P-0109 testified that he fled back into his neighbourhood as soon as grenades were thrown and did not return until the early evening,[483] and that P-0442 and P-0436 testified to seeing only a small group of police (ten and three or four, respectively).[484]

230. The Majority failed to recognise when accounts may be considered to properly corroborate one another (and incorrectly insisted that every witness should mention the "same facts"). Moreover, it unreasonably escalated an apparent "absence of

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[479] Judge Henderson's Reasons, paras. 1640-1653.
[480] Judge Henderson's Reasons, para. 1654.
[481] Judge Henderson's Reasons, para. 1659.
[482] Judge Henderson's Reasons, para. 1660 ("[…] Yet the possibility that the witnesses were referring to two different events is improbable given that both P-0109 and P-0436 named the same person as one of the victims of the incidents they described.")
[483] Judge Henderson's Reasons, para. 1661. P-0109: T-154-Red2-ENG, 39:2-17, 39:25-40:5, 12-18, 42:3-10; T-155-Red2-ENG, 10:6-7, 12:13-14:5.
[484] P-0442: T-21-Red3-ENG, 26:21-27:3; P-0436: T-148-ENG, 25:5-6, 13-15.

corroboration" into a full-fledged and insurmountable contradiction or conflict between witness accounts:

> "The accounts provided by P-0436 and P-0442 also conflict with one another. As the above description of their testimonies shows, *each mentioned facts that the other did not mention*."[485]

231. For instance, the Majority found it "surprising" or "not very plausible" that P-0442 did not mention seeing three events referred to by P-0436.[486] To the contrary, this was hardly surprising considering that P-0442 was himself hit by a grenade, and thereafter taken to a neighbourhood house.[487] He was therefore not in a position to witness the events that P-0436 did.

232. As another example where the Majority incorrectly classified minor variations as "contradictions", it unreasonably characterised as "substantially different" the accounts of P-0436 and P-0442 regarding how the clashes unfolded. The Majority only focused, however, on the precise description of the location of the police, as given by the two witnesses, speculating on what it thought the "line of fire" was and failing to recognise that situations of conflict are not static, with every participant remaining in the same position at all times.[488] In doing so, the Majority lost sight of the largely consistent accounts in the two descriptions. As set out in greater detail above, both testified that after pushing the group back to the police station, a small number of police emerged and proceeded to fire tear gas and grenades.[489] The Majority's focus on exactly where the police were *vis-a-vis* the two groups, while a potentially relevant

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[485] Judge Henderson's Reasons, para. 1663 (emphasis added), *see also* para. 1666.
[486] Judge Henderson's Reasons, para. 1663.
[487] P-0442: T-20-Red2-ENG, 9:12-21, 15:3-10; T-21-Red3-ENG, 6:8-14.
[488] Judge Henderson's Reasons, paras. 1664-1665 (" […] Moreover, if the inhabitants of Doukouré had had the Police in front of them and one of the two groups of pro-Gbagbo youth behind (as P-0436 described it), the Police shooting, which P-0442 claimed was directed at Doukouré inhabitants, would have been likely to hit the pro-Gbagbo youth behind them as well, as the latter would have found themselves in the same line of fire").
[489] P-0436: T-148-ENG, 19:1-2, 19:8-20, 22:2, 22:15-24:22; T-149-Red2-ENG, 9:15-18, 11:11-12:16; P-0442: T-19-Red2-ENG, 80:6-25, 81:5-19.

consideration regarding the intention of the police, should not have come at the cost of finding that the witnesses themselves could not be relied upon.[490]

233. For all the reasons above, this example illustrates that the Majority's overall approach to assessing evidence at the NCTA stage was deficient and incorrect. This approach was inappropriate at any stage of the proceedings, let alone the NCTA stage.

IV.B.4.v. *The Majority erred in assessing the evidence in relation to the rapes committed in connection with the RTI march (16-19 December 2010, 1st Charged Incident) and Yopougon II (12 April 2011, 5th Charged Incident)—Example 5*

234. Regarding the allegations of rape (in connection with the content of the alleged common plan), the Majority found that it could not agree with the Prosecution that rape was "characteristic" of the attack by "pro-Gbagbo forces".[491] Equally, while agreeing that "foreseeability" was the "correct parameter" to assess allegations of rape committed in the context of (para-)military operations that were allegedly part of the common plan, the Majority found that it could not "stretch this concept, lest it becomes meaningless".[492] Further, the Majority did not accept the Prosecution's argument that "crimes of sexual violence should not be treated differently from other violent crimes charged in this case [...]", but insisted on a "strong evidential foundation" or a "cogent

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[490] Judge Henderson's Reasons, paras. 1664-1666.
[491] Judge Henderson's Reasons, para. 1919. *See also* para. 1918 ("This relates to another problematic aspect of the Prosecutor's case under article 25(3)(a) and (d), which is the inclusion of rape charges. First, the Prosecutor asks the Chamber to infer the criminal content of the alleged common plan from the alleged crimes (both charged and uncharged). However, even if the Prosecutor's allegations, which are in considerable part based on anonymous hearsay, are accepted at face value, there would still only be a relatively small proportion of the alleged incidents that involved rape or other forms of sexual violence. Second, like many of the other crimes alleged in this case, it is not immediately obvious how committing rape and sexual violence could in any way contribute to the goal of keeping Mr Gbagbo in power. The Prosecutor has not proffered a convincing explanation in this regard").
[492] Judge Henderson's Reasons, para. 1920 ("[...] Any project or plan involving large numbers of individuals who are operating relatively autonomously involves a certain risk that some of these individuals may engage in criminal behaviour. The larger the group of people involved and the longer the operation lasts, the greater the risk becomes that at least one individual may commit a crime. However, the mere awareness of the statistical possibility that one or more of their subordinates may engage in criminal activity at some undefined moment or place is not enough to impute criminal intent to persons in leadership position. For this to be the case, the scale of the foreseen criminal activity and the likelihood of its occurrence must be significantly greater. [...]").

evidentiary argument", without specifying what that may be.[493] The Majority's approach affected how it assessed the allegations of rape, in particular, as they related to the RTI march and the 12 April 2011 incident. For instance, in relation to the RTI march, the Majority noted the Prosecution's caution that "crimes of sexual violence should not be regarded as opportunistic acts", but found that there was "no obvious connection" between the rapes by FDS members and youths and the operation to repress the RTI march.[494] Likewise, in relation to assessing rape, among other crimes, in the context of the 12 April 2011 incident, the Majority found that "it is conceivable that some of the crimes committed […] were opportunistic in nature".[495]

235. The Majority's flawed methodology to assess evidence is apparent in having assessed the allegations of rape differently from other crimes—without justification. The Majority's uncertain overall approach to assessing such evidence is demonstrated by the following: (i) As is apparent from its findings, the Majority subjected the allegations of, and evidence on, rapes to an additional and unnecessary level of scrutiny, inconsistent with legal precedent. It gave no explanation for doing so; (ii) It failed to correlate its various findings on this set of allegations in different sections of its reasons, thus remaining inconsistent in its findings; (iii) As with the other examples provided, it continued to assess types of evidence differently from its stated approach (for instance, hearsay) and to maintain an inflexible view with respect to corroboration, inappropriate at any stage of the proceedings, including the NCTA stage.

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[493] Judge Henderson's Reasons, paras. 1217, 1918-1919.

[494] Judge Henderson's Reasons, para. 1217 ("[…] there is no obvious connection with the operation to repress the RTI march. This applies, for example, to the instances of rape by FDS members and youths. The Chamber is aware that the Prosecutor cautioned that crimes of sexual violence should not be regarded as opportunistic acts and that rape was a characteristic of the attack by pro-Gbagbo forces against civilians perceived to support Ouattara. However, the evidence she submitted is incapable of supporting this proposition and indeed the Prosecutor makes no serious effort to develop a cogent evidentiary argument in this regard."), paras. 1608-1613 (conclusions on the RTI march).

[495] Judge Henderson's Reasons, para. 1859.

IV.B.4.v.a. The Majority incorrectly subjected the allegations of rape to an additional unreasonable and unjustified scrutiny

236. By rejecting the Prosecution's argument that the significance of crimes of rape to the case should not be obscured by regarding them solely as "opportunistic" crimes, the Majority's approach contrasts with the careful and reasonable approach to such crimes set out in the Court's legal framework[496] *and* that taken by other Chambers at this Court and elsewhere to assessing evidence of sexual violence.[497] Crimes of rape and other forms of sexual violence must not be subjected to heightened evidentiary requirements. Yet, seemingly unaware that there was a danger that sexual violence allegations can be too easily seen out of context/divorced from such context (foreshadowed by the Prosecution's caution on "opportunistic crimes"),[498] the

[496] *See by analogy,* rule 63(4), Rules of Procedure and Evidence, particularly emphasising that corroboration should not be required for sexual violence crimes.

[497] *See e.g., Ntaganda* TJ, para. 805 ("*Regarding acts of sexual violence*, the Chamber notes that the unfolding of the operations shows that these acts were, *like the acts of killings and other acts of physical violence*, a tool used by UPC/FPLC soldiers and commanders alike to achieve their objective to destroy the Lendu community […]" (emphasis added)), para. 806; ICTY: *Đorđević* AJ, para. 852 (agreeing "with the *Milutinović et al.* Trial Chamber that 'it would be inappropriate to place emphasis on the sexual gratification of the perpetrator […]. In the context of an armed conflict, the sexual humiliation and degradation of the victim is a more pertinent factor than the gratification of the perpetrator' […] any form of coercion, including […] generally oppressive circumstances, may constitute proof of lack of consent and usually is an indication thereof. […]"), paras. 876-878 (noting that "if out of a group of persons selected on the basis of racial, religious, or political grounds, only certain persons are singled out and subjected to mistreatment, a reasonable trier of fact may infer that this mistreatment was carried out on discriminatory grounds" and finding that the Trial Chamber had legally erred in requiring *specific evidence* on discriminatory intent for persecution through sexual assault and in considering that the limited number of incidents and "the ethnicity of the two women [who had been sexually assaulted] *alone*" was not a sufficient basis to infer discriminatory intent), para. 887 ("The Appeals Chamber further recalls that personal motive does not preclude a perpetrator from also having the requisite specific intent. The Appeals Chamber emphasises that the same applies to sexual crimes, which in this regard must not be treated differently from other violent acts simply because of their sexual component. Thus, a perpetrator may be motivated by sexual desire but at the same time also possess the intent to discriminate against his or her victim on political, racial, or religious grounds. […]"), paras. 892-893, 895, 897-898 (finding that the sexual assaults of five women were carried out with discriminatory intent, and that whether the perpetrators also acted out of sexual desire did not alter that conclusion); *Sainović et al.* AJ, para. 580 ("[…] In these circumstances, the Appeals Chamber considers that the Trial Chamber failed to properly consider the context in which the rapes occurred and erred in finding that there was *no evidence* from which the discriminatory intent of the perpetrators could be inferred. […]" (emphasis added)); ICTR: *Karemera et al.* AJ, paras. 624-626 (upholding that the rapes and sexual assaults were a foreseeable consequence of the joint criminal enterprise, including the Trial Chamber's finding that during a war there was a "heightened risk" that combatants would commit rapes), paras. 627-633 (recalling that an individual's high-ranking position, coupled with the open and notorious manner in which criminal acts unfold, can provide a sufficient basis for inferring knowledge of the crimes (in this case, the rapes and sexual violence)).

[498] *See e.g.,* Judge Henderson's Reasons, para. 1217. *But see* Judge Herrera Carbuccia's Dissenting Opinion, para. 75 (finding that the evidence underlying all acts, including rape, was sufficient to demonstrate the course of conduct under article 7(1) of the Statute), paras. 213, 217-218 (including the evidence on the rapes to find that the civilian population was the primary, not incidental, target of the attack and that the acts of violence were not

Majority set too high a threshold to considering these allegations as part of such context—as evidence of the policy to commit the attack or the common plan to do so. And, even as it overly-scrutinised these allegations in practice, it failed to articulate or set out in theory that it would subject evidence of sexual crimes to a higher level of scrutiny, as part of its evidentiary approach overall. The Majority erred in law by assessing the sexual violence crimes differently from other violent crimes purely *because* of their sexual component. More so, this error of law only further magnified the fact that the Majority had failed to formulate its evidentiary approach before it actually assessed the evidence.

237. The Majority's inconsistent approach in assessing the evidence of rapes *vis-à-vis* other crimes is evident in the following.

- *First,* in discussing the allegation that Simone Gbagbo had issued instructions to rape women taking part in the RTI march, the Majority dismissed the evidence stating that no reasonable trial chamber could conclude on this basis that "there was an instruction, agreement and/policy to rape female pro-Ouattara demonstrators".[499] Yet, the Prosecution had not pled—and the Chamber was not called upon to find—that there was a separate "policy to *rape* female pro-Ouattara demonstrators".[500] The Chamber was asked to find whether there was a policy *to commit an attack directed against the civilian population*—whether such an attack may have involved rape or other crimes such as murder, other inhumane acts and/or persecution.

- *Second,* the Majority additionally and unreasonably required the Prosecution to establish whether the identification of victims as pro-Ouattara supporters was

isolated or not in self-defence), paras. 335-336 (regarding the policy to attack the civilian population, finding that the rapes were unjustifiable), para. 438 ("Sexual violence is not only motivated by sexual desire. It is also a strategy for asserting social control and for humiliating, retaliating against or intimidating victims.").

[499] Judge Henderson's Reasons, para. 1883.

[500] *See* Prosecution's Mid-Trial Brief, paras. 13, 172-173; Prosecution's NCTA Response, paras. 387-392.

the *reason* for the perpetrators to rape their victims or "whether this served merely as a pretext".[501] *First*, the Majority's discussion on whether identifying the ethnicity of the victims served as a "pretext" for sexual violence crimes or as its "driving influence" was irrelevant and did not reflect the evidentiary record.[502] *Second*, the Majority failed to recognise that personal motives are largely irrelevant to the commission of crimes, in particular crimes against humanity.[503] *Finally*, the Majority failed to consider that rapes as part of a policy to attack a civilian population could co-exist with personal motives also associated with those crimes such as vengeance[504] or a "pretext".[505] As case law demonstrates, a personal or sexual motive does not preclude findings that there was intent to commit a crime or a policy to attack civilians.[506] The Majority's parsimonious approach to the evidence of the rapes was unfair and unreasonable in the circumstances.

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[501] Judge Henderson's Reasons, para. 1882.

[502] *See* Judge Henderson's Reasons, para. 1860 ("[…] However, for the purposes of this decision, it will be assumed that ethnicity was a factor in the victimisation of all 70 victims, whether as a driving influence or as a pretext for other motives. […]").

[503] *See e.g.*, *Tadić* AJ, paras. 268-269 (motive is generally irrelevant in criminal law except for sentencing), para. 270 ("'purely personal motives' do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated"), para. 272 ("the requirement that an act must not have been carried out for the purely personal motives of the perpetrator does not form part of the prerequisites necessary for [crimes against humanity] […]"); *Đorđević* AJ, para. 887, fn. 2611, citing *Kvočka et al.* AJ, para. 370 ("where the Appeals Chamber considered that the Trial Chamber reasonably conclude[d] that Radić acted with the required discriminatory intent when he committed rape and sexual violence against non-Serb women 'notwithstanding his personal motives for committing these acts'").

[504] Judge Henderson's Reasons, para. 1861 ("There is no indication that perpetrators were acting pursuant to or in furtherance of any sort of policy. […] it appears that the crimes committed in Yopougon on 12 April 2011 were mainly driven by vengeance.").

[505] Judge Henderson's Reasons, para. 1882.

[506] *See e.g., Đorđević* AJ, para. 887, fn. 2611, citing *Kvočka et al.* AJ, para. 370; *Kunarac et al.* AJ, para. 153 (where the Appeals Chamber held that even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture); *Jelešić* AJ, para. 49 (where the Appeals Chamber held that a perpetrator of the crime of genocide may act to obtain personal economic benefits, or political advantage or some form of power, but this does not preclude him or her from also having the specific intent to commit genocide); *see also Ruto and Sang* Confirmation Decision, para. 213 ("[…] However, the Statute does not envisage any requirement of motive or purpose to prove that a policy to commit an attack against the civilian population exists").

IV.B.4.v.b. The Majority made inconsistent findings in different sections of its reasons and failed to draw reasonable inferences.

238. Not only did the Majority adopt an unnecessarily heightened approach in principle to seeing the crimes of rape in context, it speculated that, in relation to the rapes that followed identification checks, the victims may have been identified as pro-Ouattara supporters merely as a "pretext" to rape them, and not as the "reason" or "driving influence" for those crimes.[507] Yet, by considering whether the rapes had occurred for any reason other than the victims being identified as pro-Ouattara supporters, the Majority went beyond the record of this case in search of an alternative and speculative inference. The evidence in this case underscored that the victims were raped for the reason that they had been identified as pro-Ouattara supporters, based on the specific evidence and its broader context. Even if any additional personal/sexual motive had existed, this would not detract from this reason. Despite the record, the Majority failed to resolve its findings made in different sections of its analysis and to draw reasonable, even inevitable, conclusions.

239. For instance, in relation to the RTI march, the Prosecution [REDACTED]. [REDACTED].[508] [REDACTED].[509] [REDACTED]. [REDACTED].[510] [REDACTED].[511] [REDACTED]. [REDACTED].[512] [REDACTED]:

> [REDACTED][513]

[507] Judge Henderson's Reasons, paras. 1859-1860, 1882.
[508] [REDACTED].
[509] [REDACTED].
[510] [REDACTED].
[511] [REDACTED].
[512] [REDACTED].
[513] [REDACTED].

240. Similarly, in relation to the RTI march, the Prosecution had alleged that [REDACTED]. Again, as the Majority noted, [REDACTED].[514] [REDACTED]. [REDACTED].[515]

241. [REDACTED]. [REDACTED].[516] [REDACTED]. [REDACTED].[517] [REDACTED].[518]

242. Yet, despite this clear evidence and its *own* findings, the Majority—quite inexplicably—stated, in separate sections of its analysis, that the rapes had no "obvious connection with the operation to *repress* the RTI march",[519] and that the identification may have "served merely as a pretext."[520] The Majority's failure to reflect its own findings (themselves demonstrating that the women were raped because they were considered political opponents) in its analysis demonstrates its unreasonable and ambivalent approach when it assessed the evidence.[521]

243. As another example, in relation to the 12 April 2011 incident, the Majority found that "direct testimonial evidence", in a number of cases, confirmed that pro-Gbagbo individuals killed, raped or injured the victims *because* their ethnicity was associated with the pro-Ouattara camp.[522] In this context, the Majority explicitly noted that [REDACTED].[523] As the Majority noted, [REDACTED]. [REDACTED].[524]

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[514] [REDACTED].
[515] [REDACTED].
[516] [REDACTED].
[517] [REDACTED].
[518] [REDACTED].
[519] Judge Henderson's Reasons, paras. 1217 (emphasis added), 1608-1613.
[520] Judge Henderson's Reasons, para. 1882.
[521] *But see* Judge Herrera Carbuccia's Dissenting Opinion, paras. 93-96, 429-432, 435-436, 438 (on the RTI march).
[522] Judge Henderson's Reasons, para. 1851.
[523] [REDACTED].
[524] [REDACTED].

244. The Majority further found [REDACTED]. [REDACTED]. [REDACTED].[525] [REDACTED].[526]

245. However, a few paragraphs later—and on the basis of a single footnote (referring again to [REDACTED] testimony)—the Majority found that it could not "exclude the possibility" that some victims were harmed for "reasons other than having been actual or perceived pro-Ouattara supporters", since it was "conceivable" that some of the crimes on 12 April 2011 "were opportunistic in nature".[527] Therefore, yet again, the Majority contradicted its own assessment and findings, this time analysing the *same* witness's evidence inconsistently. [REDACTED]. This again demonstrates its unclear and erroneous approach overall.[528]

IV.B.4.v.c. The Majority applied its evidentiary approach inconsistently

246. In assessing the evidence on rapes, the Majority also inconsistently applied its own stated approach to assessing the evidence. For instance, it characterised [REDACTED] prior recorded testimony that Simone Gbagbo had ordered the rape of women participating in the RTI March as "anonymous hearsay". Yet, as it noted itself, [REDACTED].[529] The identity of the source was thus not completely unknown, such that it could be said to be "anonymous".[530] More so, as the details of the testimony (that the Majority itself relied on) show, [REDACTED].[531]

247. Further, the Majority found that there was "no corroboration" for [REDACTED] account, even as it acknowledged that [REDACTED] Simone Gbagbo's order to rape in "approximately the same terms".[532] Even if one should accept the Majority's own

[525] [REDACTED].
[526] [REDACTED].
[527] Judge Henderson's Reasons, para. 1859, [REDACTED].
[528] *But see* Judge Herrera Carbuccia's Dissenting Opinion, paras. 169, 171-174, 180-181, 184-185, 187, 433-436, 438 (regarding the 12 April 2011 incident).
[529] [REDACTED].
[530] *See* Judge Henderson's Reasons, paras. 43-45.
[531] [REDACTED].
[532] [REDACTED].

view that corroboration is found only when the facts are "the same", these accounts should have satisfied that threshold. In any event, as the Majority's earlier findings on the same witness show, they did so.[533] Yet again, the Majority's approach and findings were internally inconsistent—demonstrating its ambiguous and incorrect approach.

IV.B.4.vi. The Majority erred in assessing the evidence on the overall pattern of crimes against an unnecessary and unsupported empirical benchmark—Example 6

248. Although some relevant context is necessary to establish a pattern of criminality, the Majority adopted an overly rigid approach (requiring empirical precision) to determine the overall pattern of criminality, relevant to ascertaining the existence of a policy to commit an attack directed against the civilian population.[534] That the Majority later stated that its use of numbers and estimates to ascertain the overall pattern of the crimes did not inappropriately "[reduce] the legal definition of an attack against a civilian population to a specific ratio" is immaterial for this purpose.[535] Its approach in this case, as it was set out, was nonetheless inappropriate and unnecessary.

249. A chamber is bound by the evidence on the record.[536] It must not speculate beyond that record. For instance, in *Gotovina* at the ICTY, the Appeals Chamber reversed several key findings at trial (ultimately acquitting Mr Gotovina on appeal) because the Trial Chamber had suggested an empirical benchmark (the 200 metre standard for its impact analysis to determine if artillery attacks were unlawful or not), without a sufficient specific basis in the evidentiary record.[537]

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[533] [REDACTED].
[534] Judge Henderson's Reasons, paras. 1888-1896 (in particular, paras. 1892-1895).
[535] Judge Henderson's Reasons, para. 1895.
[536] *See* article 74(2), Statute ("[…] The Court may base its decision only on evidence submitted and discussed before it at the trial.").
[537] *Gotovina et al.* AJ, para. 58 ("The Appeals Chamber observes that the Trial Chamber did not explain the specific basis on which it arrived at a 200 metre margin of error as a reasonable interpretation of evidence on the record. The Trial Judgment contains no indication that any evidence considered by the Trial Chamber suggested a 200 metre margin of error. […]"), para. 59 ("[…] However, the Trial Chamber did not justify the 200 Metre Standard

250. The Majority in this case did just that. It speculated beyond the record of the case. This is apparent in its own admissions that its "numbers" were based on "educated guesswork" and "mere assumptions".[538] But in "guessing" in this manner, the Majority took several extraneous—and untested—factors into account in its pattern analysis, which the evidence did not support.

251. For instance, the Majority:

- Assumed that the total population of Abidjan "probably totalled" more than 4 million people (even as it accepted the Prosecution's submission that Abobo had 1.5 million inhabitants); [539]

- Assumed that it was "probably safe" to say that there were "at least 1 million Muslims, northerners and foreigners combined" in Abidjan (some of the identified categories of perceived pro-Ouattara supporters);[540]

- Noted that it was "not entirely clear" how many members of different regular/irregular forces were in Abidjan at the time (or their respective weaponry), but nonetheless found "beyond doubt"(without any further explanation) that there were several thousand armed individuals in Abidjan;[541]

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on this basis. In addition, absent any specific reasoning as to the derivation of this margin of error, there is no obvious relationship between the evidence received and the 200 Metre Standard. […]"), paras. 60-61 ("[…] The Appeals Chamber finds that there was a need for an evidentiary basis for the Trial Chamber's conclusions, particularly because these conclusions relate to a highly technical subject. […] However, the Trial Chamber adopted a margin of error that was not linked to any evidence it received; this constituted an error on the part of the Trial Chamber. The Trial Chamber also provided no explanation as to the basis for the margin of error it adopted; this amounted to a failure to provide a reasoned opinion, another error."), paras. 64-65, 67 (finding that the Trial Chamber's errors with respect to the 200 Metre Standard and targets of opportunity were sufficiently serious that the conclusions of an impact analysis could not be sustained), paras. 77, 82-84 (finding, on this basis, that no reasonable trier of fact could conclude beyond reasonable doubt that the relevant towns were subject to unlawful artillery attacks).

[538] Judge Henderson's Reasons, para. 1893, fn. 4223 (of confidential version) ("It is fully recognised that the numbers used are based on educated guesswork and mere assumptions […]"). *See also* para. 1893 ("[…] Given the scarcity of the evidence in this regard, *it is impossible to make any empirical findings on this point*.") (emphasis added).

[539] Judge Henderson's Reasons, para. 1892.

[540] Judge Henderson's Reasons, para. 1892.

[541] Judge Henderson's Reasons, para. 1892.

- Stated that "[t]hese thousands" of "so-called 'pro-Gbagbo forces'" had "ample opportunity to commit violent crimes", but found that even if all 528 victims that the Prosecution had put forward were accepted, this would only "represent 0.052% of the relevant *potential* victim population";[542]

- Assumed that, out of the "thousands" of pro-Gbagbo forces in Abidjan, "75" of them had the opportunity to harm "at least one" suspected pro-Ouattara supporter "on any given day",[543] and further assumed that there were "more than 10,000 such opportunities throughout the relevant time-period", but that this would mean that "in only slightly more than 5% of cases" a pro-Gbagbo force member actually implemented the policy to attack the civilian population when he had the opportunity to do so;[544] and

- Assumed that the pro-Gbagbo forces ignored the policy to attack the civilian population "more than 90% of the time", and therefore said it could not infer from the overall pattern of crimes that such a policy or common plan existed.[545]

252. None of the numbers or estimates relating to the Majority's mathematical analysis (above) find support in the case record. The Majority's hypothetical reflections amounted to little more than irrelevant speculation. This further demonstrates that the Majority had not directed itself to the evidentiary approach it would apply in this case *before* it had assessed the evidence at the NCTA stage. This approach was incorrect and unreasonable at any stage of the proceedings, let alone the NCTA stage.

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[542] Judge Henderson's Reasons, paras. 1892 (emphasis added), 1893 (also finding that this number was not "necessarily determinative").
[543] Judge Henderson's Reasons, para. 1893.
[544] Judge Henderson's Reasons, para. 1893.
[545] Judge Henderson's Reasons, para. 1894.

IV.C. The Majority's errors materially affected the 15 January 2019 Oral Acquittal Decision

253. As set out above, the Majority erred in law and in procedure. By failing to properly direct itself to the standard of proof and other evidentiary principles before it assessed the evidence at the half-time stage, the Majority erred in law—invalidating the decision. Additionally, by failing to formulate the standard of proof and the evidentiary approach that it would apply before it assessed the evidence, the Majority erred in procedure—materially affecting the decision. These errors are so fundamental that they ruptured the proceedings and prejudiced the Prosecution.

254. *First,* the Majority's legal error—its failure to direct itself to what relevant evidentiary standards applied at the NCTA stage—is sufficient by itself to invalidate the decision. As earlier submitted, the correct standard of proof is an essential tool in any judicial arsenal.[546] Without it, any attempt to assess evidence must necessarily be flawed: conclusions reached based on an incomplete assessment are necessarily only partially informed.[547] In this case, as the record shows, the Majority did not have a concrete NCTA standard in mind when it assessed the evidence. Furthermore, it resisted attempts to define such a standard before and during the NCTA proceedings. That Judge Henderson set out his approach to NCTA motions *six* months after he had acquitted Mr Gbagbo and Mr Blé Goudé does not remedy his failure to ensure clarity on the issue from the start of the process. That Judge Tarfusser continued to fundamentally disagree with the NCTA procedure itself—and said that he had used "neutral if not ambiguous" "procedural formulas" *in lieu* of a NCTA procedure—makes the error and its impact even more stark. For these reasons alone, the decision to acquit Mr Gbagbo and Mr Blé Goudé should be reversed.

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[546] *See* paras. 142-151.
[547] *Ayyash et al.* AD, paras. 38-41.

255. *Second,* and in addition to the legal error, the Majority also erred in procedure, which materially affected the decision. It erred in failing to set out its approach as to how it would assess the evidence at the crucial half-time stage. This error is demonstrated not only by the chaotic procedural narrative of this case, but also in the multiple incorrect and inconsistent factual assessments that the Majority made *because* it had failed to reach clarity and consensus on the proper approach to be taken.

256. As Judges Tarfusser and Trendafilova underscored in the *Ngudjolo* appeal, in circumstances where a trial chamber has *failed* to adopt a course of action (as the Majority in this case failed to do), an appellant must demonstrate the "erroneous nature of the inaction", but cannot be expected to demonstrate any more.[548] In other words, it is enough for the Prosecution to highlight the Majority's legally and procedurally erroneous approach to seek reversal of the verdict.

257. But, even if in such circumstances an appellant must demonstrate impact,[549] in this case the Prosecution has demonstrated that in the absence of the legal and procedural errors, the decision would have been substantially different.

258. *Firstly,* if the Majority had not erred, but instead had set out a clear approach which it applied consistently, its analysis would have been properly informed. But, as the examples demonstrate, the Majority failed to draw the natural and inevitable conclusions when the evidence readily allowed it. It failed to apply its *own* stated approach to assessing the sufficiency of evidence consistently, sometimes departing from it without explanation. It declared and adopted an inflexible, narrow, unreasonable and unrealistic view of what it considered as corroboration, thus failing to recognise when evidence was intrinsically consistent and incorrectly rejecting it. It assessed eye-witness accounts from victims of shooting, grenade attacks and sexual

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[548] *Ngudjolo* AJ Dissenting Opinion, para. 30.
[549] *Ngudjolo* AJ, para. 21 ("[…] the appellant needs to demonstrate that, in the absence of the procedural error, the decision would have substantially differed from the one rendered."); para. 285 ("[…] In the circumstances of [the] case, it has to be established that there is a high likelihood that the Trial Chamber, had it not committed the procedural errors, would not have acquitted […]").

violence, among others, in an unreasonably clinically-detached manner, disregarding the impact of both trauma and the socio-cultural context of Côte d'Ivoire. It substituted its own views for those of experts on complex technical matters (for instance, ballistics). In sum, the Majority's ambiguous and incorrect approach affected its determination on whether evidence was sufficient or not at the NCTA stage. In these circumstances, the Majority's approach could not have led to a reliable result.

259. *Secondly,* the Majority's approach suffered serious methodological flaws. For instance, it subjected the evidence on sexual violence to a higher and unjustified level of scrutiny, inconsistent with the Court's legal framework. It also engaged in unnecessary hypothetical reflections on numbers and estimates, requiring an impossible level of mathematical precision to establish patterns of criminality, and speculating well beyond the case record. Again, a judicial approach that is so methodologically flawed cannot be considered reliable.

260. *Thirdly,* as the examples demonstrate, the Majority's inconsistent and incorrect analysis affected every one of the five charged incidents—all significant components of the Prosecution's case. These factual assessments, in turn, were key building blocks leading up to the Majority's verdict. This is all the more so in a largely circumstantial case, where the Trial Chamber was expected to look at this case by taking into account all of those building blocks, but which the Majority failed to do. Therefore, the Majority's approach and analysis had a substantial impact on the decision, sufficient to meet the Prosecution's burden on appeal. Indeed, an appellant appealing against an almost 1000-page decision acquitting accused persons in a complex case such as the present one—involving multiple predicate factual findings— cannot be expected to demonstrate that the final disposition of the case would necessarily have been different. Much less should the Prosecution be expected to demonstrate such an impact in relation to a decision that was itself based on such an unclear and procedurally irregular decision-making process as transpired in this case. Significantly, the Dissenting Judge's assessment demonstrated that a reasonable trier

of fact could reach reasonable positive conclusions in this case, based on the evidence, had the proper procedure been followed.

261. *Fourthly*, because the Majority rendered its decision to acquit Mr Gbagbo and Mr Blé Goudé in circumstances where it itself lacked clarity, it failed to guide the Parties and participants as to how it would assess the sufficiency of evidence at the NCTA stage. As the Appeals Chamber held in the *Lubanga* reparations proceedings, a failure to guide the parties, resulting in different approaches and ambiguity, is an error that materially affects the decision.[550]

262. In particular, the Prosecution as the party bringing the case suffered prejudice. The Prosecution has a role that goes beyond its role as a party in judicial proceedings.[551] It represents the interests of the international community in seeking to address impunity for the most serious international crimes. In these circumstances, abruptly halting the Prosecution's case against Mr Gbagbo and Blé Goudé—in circumstances that were neither clear nor correct—was unfair to the Prosecution. This in turn frustrates the greater expectations that vest in the Office's mandate and is unfair to other stakeholders such as the victims in this case, the citizens of Côte d'Ivoire and the broader international community.

263. For all the reasons above, the Prosecution respectfully requests the Appeals Chamber to grant ground 2 of its appeal.

[550] *Lubanga* Second Reparations AD, paras. 168-169.
[551] *Rutaganda* AJ, Judge Shahabuddeen Separate Opinion, para. 10 ("The prosecution side embraces the interests of the international community. Certainly, the interests of the international community comprehend the necessity to ensure that the defence has a fair trial. But justice is also due to the international community. […]"); *Bemba* Judge Eboe-Osuji Concurring Opinion, para. 51 ("[…] the right to a fair trial is a neutral right enjoyed at the ICC by the defendants, the Prosecution and the victims. […]").

V. The appropriate remedy is to reverse the 15 January 2019 Oral Acquittal Decision and to declare a mistrial

264. The circumstances of this case were unique. As demonstrated above, Mr Gbagbo and Mr Blé Goudé were acquitted without the Majority having entered a proper and fully informed decision of acquittal as the Statute required. Mr Gbagbo and Mr Blé Goudé were also acquitted without the Majority having directed itself to the proper legal standard or evidentiary approach *before* it assessed the evidence in this case. This necessarily made their analysis inaccurate and unpredictable. In these circumstances, neither the process nor the outcome was reliable.

265. Circumstances such as these demand a declaration of mistrial.[552] Given the manner in which these acquittals were rendered, confidence in the proceedings of this case was seriously impaired. As Judge Eboe-Osuji has said, a mistrial is necessary, when "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated".[553] Although this statement was made in a different context (serious witness interference during the proceedings), it is an apt analogy in terms of how these proceedings were prejudiced. In *Ruto and Sang*, external factors prejudiced the proceedings. In this case, internal factors—the Majority Judges' own approach, it is submitted with respect—prejudiced the proceedings. The factors might be different; the harm to the proceedings is the same.[554]

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[552] *See* *Bemba et al.* AJ, para. 108 (noting, in a different context, that the appropriate remedy will depend on the circumstances).

[553] *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), para. 184 (citing *United States v. Perez,* 22 US (9 Wheat) 579 (1824).

[554] *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), para. 185 ("[…] a mistrial does not require fault-finding against a party in the case […] another instance in which a mistrial is declared is when there is a serious procedural error […]"). *See also* *Ruto and Sang* NCTA Decision (Reasons of Judge Fremr), para. 147 (noting the "disturbing level of interference with witnesses, as well as inappropriate attempts at the political level to meddle with the trial and to affect its outcome", finding that although these circumstances had an effect on the proceedings, the impact was not of such a level so as to render the trial null and void."); para. 148 ("Notwithstanding my above remark that in a normal state of affairs, I would have been in favour of entering an acquittal, rather than vacating the charges against both Mr Ruto and Mr Sang and discharging them, I can agree to this outcome, because of the special circumstances of the case. […]").

266. Although the power to declare a mistrial is one that should be used sparingly, it is one that is available to the Appeals Chamber.[555] Article 83(2)(a) allows the Appeals Chamber to reverse a decision, if it finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision, or that the decision appealed from was materially affected by legal or procedural errors.[556] The proceedings in this case were unfair and unreliable, and the decision was affected by legal and procedural errors and accordingly the Prosecution respectfully requests the Appeals Chamber to reverse the decision. In addition, instead of requesting the Appeals Chamber to order the continuation of the trial before the Trial Chamber—which is no longer constituted and in relation to which one of the Judges is no longer a judge at the Court—, or asking the Appeals Chamber to order a new trial (which would be a possible remedy), the Prosecution requests the Appeals Chamber to declare a mistrial. This will leave the case in the hands of the Prosecutor to decide on its future course and how justice may best be served in this case. [557]

267. For all the above reasons, the Prosecution respectfully requests the Appeals Chamber to grant its appeal, reverse the 15 January 2019 Oral Acquittal Decision acquitting Mr Gbagbo and Mr Blé Goudé and declare a mistrial.

Fatou Bensouda, Prosecutor

Dated this 30th day of April 2021

At The Hague, The Netherlands

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[555] *See by analogy* rule 149, noting that rules governing proceedings before Pre-Trial and Trial Chambers also apply *mutatis mutandis* to proceedings in the Appeals Chamber.
[556] Article 83(2), Statute.
[557] *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), para. 183 ("[…] There is a manifest necessity for [the remedy of mistrial] in the circumstances of this case, not least because to acquit in the circumstances will make a perfect mockery of any sense of the idea that justice has been seen to be done in this case. […]").