Annex 1: Separate Concurring Opinion of Judge Eboe-Osuji

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1. This appeal raises a number of serious questions about essential norms of administration of justice in this Court that impel me to register a separate concurring opinion. The hope must remain that questions such as these are easily resolved by a meeting of the minds amongst judges, who come from various backgrounds after extensive professional lifetimes that had hewn troughs of thought long before their arrival at the International Criminal Court. Failing that, the best that can be done is to identify with candour—rather than elide—these often thorny questions for what they are.

2. I must, at once, express sympathy with the views of observers who often have expressed frustration at the phenomenon of multiplicity of judicial views on the bench of international courts—notably at the ICC and the International Court of Justice. The frustration is understandable, but fairness must temper it: if only for the reason that those who complain are unable to guarantee any better in their own turn. Indeed, the general rule remains that judges should speak with one voice when they agree. For the most part, ICC judges do. But, judges express themselves differently when they are unable to agree on a difficult question. That is so, even on a point of detail. The worry is, of course, that a point of detail today may be the mustard seed that grows into the future oak tree of practice or principle. It is thus idle indeed to insist that judges of an international criminal court must always make compromises in order to spare the public—even the legal scholars amongst them!—the trouble of needing to read the various views that convey differences in judicial opinions and why. It is always possible to accept John Rawls's dictum that 'the rights secured by justice are not subject to political bargaining'—any more so than they are to judicial bargaining.[1] For, as 'first virtues of human activities, truth and justice are uncompromising.'[2] This is the first normative reason why judges write separately, after the exhaustion of reasonable efforts at a congruence of views.

3. Legal imperatives against unreasonable delay in the adjudication of cases comprise another immediate reason that ICC judges write separately. Those imperatives require justice to be done within a reasonable time, notwithstanding entrenched, irreconcilable judicial views that may cause delay. In the result, the system must then contend with those occasions when judges are only able to agree to a common outcome, though arrived at from different perspectives of judicial reasoning. The views that I express in this opinion mostly concern lingering questions about standards of appellate review. I engage that issue in Part I as a question of law, returning to it in Part III in relation to the six factual examples invoked by the Prosecution as demonstrating the errors of the Trial Chamber.

[1] *See* John Rawls, *A Theory of Justice* (1971, revised ed. 1999), p 4.
[2] *Ibid*.

In between, in Part II, I engage questions of statutory interpretation of the Rome Statute, from the perspective of article 74(5) of the Rome Statute.

PART I: THE STANDARDS OF APPELLATE REVIEW

1. The Nature of this Case

4. 'In law, context is everything,' a commentator once wrote.[3] It is a generally understood idea. Appreciably, context has an inconvenient way of skewing work's output. We may then keep in mind the context of this case. The Prosecutor vividly paints that context in the terms that the case was 'factually complex,'[4] 'a vast and complex [case], which likely would have been a challenge for any judicial process or Trial Chamber';[5] 'all the more so [...] a largely circumstantial case,'[6] of a 'unique nature'.[7] The aim of criminal proceedings requires simplification of the process, so that the trier of fact would 'be satisfied so that they were *sure* before they could convict'[8] or '*firmly convinced* of the defendant's guilt.'[9] The complexity of prosecution is not the ideal. More often than not, it can be inversely dynamic to confidence in the judicial view of the defendant's guilt.

2. A Mistaken View of the Appellate Judicial Process

5. The standard of appellate review employed in this appeal followed the standard as restated in the *Ntaganda* merits appeal judgment.[10] For reasons that will become apparent presently, this is an opportune moment to reflect upon the circumstances that necessitated that restatement.

6. It is singularly unimpressive that the Prosecution purports that their second ground of appeal are about 'errors of law'[11] and 'procedural errors' which would not recognise appellate deference for Trial Chambers. There is much sophistry in that argument. No one

[3] Lisa A Silver, 'The *WD* Revolution' in 41 *Manitoba Law Journal* 307 (2018), p 316.
[4] Prosecutor's Appeal Brief, para 135.
[5] *Ibid*, para 126.
[6] *Ibid*, para 260.
[7] *Ibid*, para 135.
[8] *See R v Miah* [2018] EWCA Crim 563 [UK England and Wales Court of Appeal] ('*R v Miah*'), para 34 (emphasis added).
[9] *See Victor v Nebraska* 511 U. S. 1 (1994) [US Supreme Court] ('*Victor v Nebraska*') p 27 (emphasis added) *quoting* from Federal Judicial Center, *Pattern Criminal Jury Instructions*, instruction 21 (US).
[10] *See* Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021 ('*Ntaganda* Appeal Judgment').
[11] As well as procedural errors.

is fooled by stylised arguments that seek to overturn *factual findings*, by disguising the arguments in the terminology of 'errors of law' or 'procedural errors.'

7. It is notable that this is not the first time that the Prosecution has attempted that strategy. In the *Ngudjolo* appeal, the Prosecution had similarly sought to overturn an acquittal, by disguising their arguments as challenging 'errors of law.' In that case, the Trial Chamber found that the Prosecution had not established beyond reasonable doubt the charges brought against the defendant, given the possibility of alternative or competing inferences that would be inconsistent with a guilty verdict. In their first ground of appeal, the Prosecution challenged the Trial Chamber's finding as engaging an 'error of law' in the *assessment* of the evidence. To that end, the Prosecution contended that neither the competing inferences nor the other grounds purportedly supporting a reasonable doubt were based on evidence, logic, reason or common sense. At best, they only hypothetically supported an alternative interpretation of the evidence. This, in the Prosecution's contention, demonstrated that the Trial Chamber effectively required proof of the relevant facts on a standard of absolute certainty, rather than the usual standard of proof beyond reasonable doubt.[12] To *illustrate* the alleged error, the Prosecution referred to several of the Trial Chamber's factual findings that, in their view, indicated that the Trial Chamber misapplied the standard of proof. According to the Prosecution, those 'findings show[ed] a consistent pattern in the analysis of the evidence' according to which the Trial Chamber effectively considered that '*any* doubt—including doubt not based on evidence, reason, logic or common sense' was enough to warrant rejection of the Prosecution's proof.[13] In addition, the Prosecution challenged the Trial Chamber's pronouncements, which in the Prosecution's view demonstrated a misconception of the applicable standard of proof.[14] All this, the Prosecution argued, amounted to an *error of law*—rather than an *error of facts*—on the part of the Trial Chamber.[15]

8. But, the Appeals Chamber was unimpressed. It considered that, since the ground of appeal required the Appeals Chamber to review the Trial Chamber's factual findings, the challenge concerned an error of fact. As the Appeals Chamber put it:

> [T]he Appeals Chamber considers that to the extent that the alleged errors are based on challenges to the Trial Chamber's factual findings, her 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

[12] See Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui,* Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute', 7 April 2015 ('*Ngudjolo* Appeal Judgment'), para 42.
[13] *Ibid*, para 53 (emphasis in original).
[14] *Ibid*, para 43.
[15] *Ibid*, para 44.

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.[16]

9. Recognising the difficulty posed by the failure of their approach in *Ngudjolo*, the Prosecution attempted to distinguish their strategy then from their strategy in the present case. We see that attempt in the following words:

> The Prosecution notes that the Appeals Chamber in *Ngudjolo* has previously considered errors alleged to challenge the assessment of evidence as factual errors. 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.[17]

10. I am not persuaded. In the same way that the Prosecution had sought unpersuasively to urge the Appeals Chamber that it was doing the opposite of what it appeared to the Appeals Chamber that the Prosecution was doing in *Ngudjolo*, I am not persuaded that the Prosecution is doing the opposite of what it appears to be doing in this case. In other words, despite their attempt to paint a different picture, I am of the view that the same *Ngudjolo* prosecutorial strategy is once more at play in the case now at bar.

11. The *Ngudjolo* strategy is strikingly evident in the Prosecution's second ground of the present appeal. According to that ground of appeal, the Prosecution mainly complained that the Trial Chamber Majority had erred in failing to articulate clearly the correct standard of proof applicable in their decision. That ground of appeal *materially* rests on the Prosecution's further argument that '*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* […]'.[18] Yet, the Prosecution was at pains to present their complaints in this regard as sounding in *errors of law*—and not *errors of fact*.

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[16] *Ibid*.
[17] See Prosecutor's Appeal Brief, para 128 (footnote omitted) (emphasis in original).
[18] *Ibid*, para 124 (emphasis added).

12. The point of this prosecutorial strategy is all too obvious. It really is a challenge to 'factual findings and/or incorrect evidentiary assessments, many relating to significant findings.'[19] Yet, the challenge is disguised as a challenge to errors of law—and not errors of fact. The reason for that is apparent. Presented as 'errors of law,' the Trial Chamber's conclusions would attract no appellate deference. But as 'errors of fact,' the Trial Chamber's findings in support of their judgment of acquittal would attract appellate deference.

13. It may well be that the motive for this prosecutorial appellate strategy is revealed in the following admission: '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.'[20] The admission is surprising indeed. Appellate proceedings pursuant to criminal prosecution are not a cocktail party. Those who appeal judgments must be prepared to demonstrate in a compelling and comprehensive way the errors about which they complain. The Prosecution is not free to present a complex case that leads the Trial Chamber to render a thousand page judgment, but then fail on appeal to demonstrate the materiality of alleged errors in the judgment, pleading that the appellate burden was too complex to be discharged.

14. To accept the *Ngudjolo* strategy is to accept a practice pursuant to which the Prosecution's appeals to *overturn* acquittals would be treated according to a different standard of appellate review from that applicable to defendants' appeals to *overturn* convictions. According to this different treatment, a defendant's appeal against a conviction would be assessed according to the standard of appellate review for errors of fact, which would attract appellate deference; but the Prosecution's appeal against an acquittal would be assessed according to the standard of appellate review for errors of law, which would not attract appellate deference to the Trial Chamber's conclusions. This urge of double standards alone should be enough to raise concerns about the differences of treatment and approach to appeals against conviction and acquittal

15. Anticipating that an appellate *overturn* of the Trial Chamber's verdict of conviction in the *Bemba* case would shock those who might have found it inconceivable of the Appeals Chamber to reverse a verdict of conviction so widely hailed as an ICC 'success' story, the following caution was registered in a separate opinion:

[19] *Ibid,* para 124.
[20] *Ibid*, para 260 (emphasis added).

Perhaps, it is also to be kept in mind, … that the right of fair trial is a neutral right enjoyed at the ICC by the defendants, the Prosecution and the victims. *The notion of appellate deference can prove just as inconvenient for the Prosecution and the victims*, given the real possibility of a case in which they may complain that the Trial Chamber's acquittal of an accused resulted from an erroneous factual finding.[21]

16. The caution quoted above is squarely engaged in this appeal, in which the Prosecution seeks an appellate *overturn* a Trial Chamber's verdict of acquittal.

17. Against that background, the protests that greeted the *Bemba* Appeal Judgment will be engaged more fully presently. The protests involved sustained public anguish led by the Prosecutor and commentators sympathetic to her sensibilities, railing against the majority of the Appeals Chamber in declining to accept the factual findings of the Trial Chamber. According to the critics, the Appeals Chamber majority should have simply accepted the factual findings of the Trial Chamber, which resulted in the conviction of the defendant. The public anguish conveyed in the criticisms was certainly understandable from a sentimental point of view, though ultimately indefensible from the point of view of dispassionate legal analysis. It is significant to consider in this regard that the Trial Chamber's conviction of Mr Bemba had excited widespread jubilation in terms as effusive as: 'victory for accountability under "command responsibility" and the eradication of rape as a weapon of war' [22]; '[t]he paramount importance of this verdict cannot be overstated'[23]; and, 'the ICC's greatest success to date.'[24] It was thus understandable that to crush the bouquets with an appellate reversal of the conviction would provoke much heartache. But, it was necessary.

18. In the circumstances, I shall discuss at some length the misplaced controversy about appellate standard of review at the ICC, which greeted the *Bemba* appeal, where the Appeals Chamber raised serious concern about the application of the jurisprudence of appellate deference to factual findings.

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19. In this judgment and in the *Ntaganda* merits appeal judgment, the Appeals Chamber has reformulated the standard of appellate review at the ICC—particularly as regards factual findings of Trial Chambers. The reformulation is unanimous, following a lengthy deliberation by all five judges. The effort was not by happenstance. It is a conscious

[21] Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo,* Concurring Separate Opinion of Judge Eboe-Osuji ('*Bemba* Concurring Separate Opinion of Judge Eboe-Osuji'), 14 June 2018, para 51 (emphasis added).
[22] See #globalJUSTICE, 'Jean Pierre Bemba guilty in landmark ICC trial' on wordpress.com (21 March 2016),
[23] International Federation for Human Rights, 'Jean-Pierre Bemba convicted of crimes against humanity and war crimes in a landmark verdict' on fidh.org (21 March 2016).
[24] See Paul Seils, 'Bemba's 18-Year Jail Sentence Is ICC's Warning to Military Leaders About Sexual Violence' on Huffpost.com (23 June 2016).

jurisprudential reset, following the wake-up call of the *Bemba* Appeal Judgment. But, as with many a wake-up call that terminates repose, *Bemba* provoked protests of its own, as noted above. The only legal argument involved the complaint that the Appeals Chamber had departed from a *settled* point of jurisprudence on the standards of appellate review. [I shall return to that inquiry in due course.]

20. The anti-*Bemba* protests were recently memorialised in the report of a group of external consultants retained to conduct a review of the Rome Statute system.[25] Although the consultants are usually referred to as 'experts' by the lay public, perhaps meaningfully, the designation must be kept in proper perspective. That terminology was never intended to import the meaning of superior knowledge on the part of the consultants, as compared to judges and other professionals at the Court.[26] In order to avoid that confusion, the terminology of 'Review Consultants' or 'Consultants' will be used in this opinion.

21. The Review Consultants hitched their commentary to the train of the earlier protests, in the following words:

> On 21 March 2016, Trial Chamber III in *Bemba* unanimously convicted the accused of the charges against him and sentenced him to imprisonment for 18 years. However, on 8 June 2018, the Appeals Chamber issued a simple-majority Judgment reversing the decision at first instance and acquitting him on all counts. *The Chamber departed from established jurisprudence and formulated a new basis for appellate review on the ground of error of fact*. It held that 'it may interfere with the factual findings of the first-instance Chamber whenever the failure to interfere may occasion a miscarriage of justice, and not "only in the case where [the Appeals Chamber] cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it"', the test set in the case of *Lubanga*.[27]

[25] See Independent Expert Review of the International Criminal Court and the Rome Statute System: 'Final Report', (30 September 2020), ('IER Report') para 608. [Notably, the nomenclature of 'Final Report' is misleading. It suggests erroneously that there had been a *draft* or *provisional* report previously issued. There was none.]

[26] In the processes of the ICC, the terminology of 'expert' does not presume superior knowledge or stature relative to other professionals at the Court in the relevant field. It is rather a title given to outsiders engaged to perform specific functions as contractors or consultants, who are thus brought under the umbrella of privileges and immunities provided for in the Host Country Agreement and the Privileges and Immunities Agreement. In that regard, ICC Registry, Annex I to Administrative Instruction ICC/AI/2016/002 – Terms and Conditions of the Contract, (4 March 2016), para 1, instructively provides as follows: 'The **consultant** shall have the legal status of an "**expert**" for the purposes of the Headquarters Agreement between the International Criminal Court and the host State ("Headquarters agreement") and the Agreement on Privileges and Immunities of the Court ("APIC").' (Emphasis added). Indeed, the Headquarters Agreement, for instance, provides for privileges and immunities for a wide range of persons: article 17 (judges, the Prosecutor, the Deputy Prosecutor and the Registrar), article 18 (Deputy Registrar and Staff recruited internationally), article 19 (staff recruited locally and other staff not otherwise covered under the Headquarters Agreement), article 20 (employment of family members of officials of the Court), article 21 (representatives of States participating in proceedings of the Court), article 22 (representatives of States and representatives of international organisations participating in the sessions and meetings of the ASP and its subsidiary bodies), article 23 (members of the Bureau and subsidiary bodies of the ASP), article 24 (interns and visiting professionals), article 25 (counsel and their assistants), article 26 (witnesses), article 27 (victims), article 28 (**experts**), and lastly, article 29 (other persons required to be present at the Court) [Emphasis added]. See ICC Presidency, Headquarters Agreement between the International Criminal Court and the Host State, ICC-BD/04-01-08, (1 March 2008).

[27] See IER Report, para 609 (emphases added).

22. To be sure, the protests have also been registered in terms far more doubtful in their correctness. But, the commentary of the Consultants is simplistic enough. The record of this Court's jurisprudence requires those protests to be engaged in the fullness of its scope. I do so in the following pages, particularly highlighting immediately that the Review Consultants' invocation of 'established jurisprudence' and 'the test set in the case of *Lubanga* are particularly unrigorous premises for the protest against the *Bemba* Appeal Judgment.

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23. Let it be said, first, that the paradigm of justice is never one-dimensional. It is seldom amenable to easy ditties that appeal chiefly to those in a hurry. Justice is often called a search for the truth. It helps then to keep in mind Jeremy Bentham's description of 'truths' as 'stubborn things.' As he expressed it:

> Truths in general have been called stubborn things …. They are not to be forced into detached and general propositions, uninncumbered with explanations and exceptions. They will not compress themselves into epigrams. They recoil from the tongue and the pen of the declaimer. They flourish not in the same soil with sentiment. They grow among thorns; and are not to be plucked, like daisies, by infants as they run.[28]

24. Justice Benjamin Cardozo has aptly captured the same in the area of jurisprudence, as follows:

> Our survey of judicial methods teaches us, I think, the lesson that the whole subject-matter of jurisprudence is more plastic, more malleable, the moulds less definitively cast, the bounds of right and wrong less preordained and constant, than most of us, without the aid of some such analysis, have been accustomed to believe.[29]

25. Unfortunately, the Review Consultants' commentary was off the track of understanding that Bentham and Cardozo had mapped out.

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26. One of those 'detached and general propositions, unencumbered with explanations'—daisies, as it were, that are conveniently plucked from the field of popular opinion—was the following commentary of the Review Consultants, made in the context of no-case to answer judgments, also a subject matter of the current judgment. According to them:

> An exceptional feature of the Kenya cases was the reservation to prosecute again on the same charges. In both *Ruto* and *Kenyatta*, respectively, the discharge of the accused, and the withdrawal

[28] Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* [Oxford: Clarendon Press] (1907), p 11.
[29] Benjamin Cardozo, *The Nature of the Judicial Process* [New Haven: Yale University Press] (1922), p 161.

of the charges, were both 'without prejudice'. In the former, the accused were discharged 'without prejudice to their prosecution afresh in future', while in *Kenyatta* the charges were withdrawn without prejudice to the possibility of bringing new charges (…) based on the same or similar circumstances. That is inconsistent with the usual consequence of a decision stating that there is no case to answer or the withdrawal mid-trial of the charges by the Prosecutor, which is acquittal.[30]

27. The foregoing commentary gives the impression that the Trial Judges in the *Ruto* case were either not aware that the 'usual consequence [of] stating that there is no case to answer … is acquittal'; or that the judges were erroneously acting in a manner that is 'inconsistent with the usual consequence,' if being aware of it they deliberately ignored it.

28. The Review Consultants were mistaken. They had: (a) completely ignored the fact that the Trial Chamber had clearly recognised that acquittal is the *usual* consequence of a decision that there is no case to answer;[31] and, (b) failed to mention and address the reasons that the Trial Chamber considered that the 'usual consequence' of acquittal would not be appropriate in the particular circumstances of that case. Notably, the judgment of the Trial Chamber recounted at length conducts that were attributable to the national government in which the first defendant held the post of Deputy President. The Trial Chamber considered those conducts as having the effect of intimidating witnesses directly or indirectly.[32] Thus in declining to enter a judgment of acquittal, it was opined as follows:

There is a manifest necessity for that remedy 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. But, more importantly, the prejudicial conducts reviewed above are beyond the corrective facilities of the trial process at the ICC, in any manner that still permits a safe judicial pronouncement of a judgment of acquittal as a result of any weaknesses perceived in the Prosecution case.[33]

29. In the circumstances, there was anxiousness to avoid a situation in which an acquittal would not only reward the witness interference in the case at hand, but would also encourage similar political interference in future cases at the ICC. The point was amply made in the following words:

A verdict of acquittal is particularly unjustifiable in the circumstances, not only because it *will* vindicate the illicit objectives of the unseen hands that had engaged in witness interference, the obvious aim of which is to frustrate the trial of the accused; but it may also encourage future unseen hands to interfere with a criminal trial. What was done against this trial—by way of direct witness interference or undue political meddling … or both—must not become a case study for others inclined to emulate such tactics in future cases of this Court. It may not be too much to

[30] See IER Report, para 532 (footnotes omitted).
[31] See Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, para 139: 'Ordinarily, the finding that the case for the prosecution has been weak should result in a judgment of *acquittal*, according to the applicable principles of no-case adjudication ….' [Emphasis in original]. See also paras 189, 190.
[32] Ibid, paras 139-181.
[33] *Ibid*, para 183.

speak of such tactics in terms of efforts whose aim is to hold justice hostage, with acquittals of accused persons as the envisaged ransom. Hence, for purposes of a mistrial—resulting from obstruction of justice intended to benefit the accused—it does not matter at all that there is no evidence showing the accused as a culprit of the interference. It is enough that the aim of a mistrial is to hold out some hope that justice may be seen to be done sooner or later. And those seeking to obstruct the course of justice, for the benefit of the accused, are made to realise that their efforts will come to nought. … [A]llowing the case to start afresh in the future is better than rewarding the interference and political meddling with a verdict of acquittal.[34]

30. The Review Consultants did not take the trouble to mention any of the foregoing considerations that comprised the specific reason that the Trial Chamber in *Ruto* had considered it inappropriate to enter a judgment of 'acquittal' as the 'usual consequence' of a finding that there is no case to answer.

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31. The same absence of investigation and general lack of rigour in analysis and reflection that attended the Review Consultants' commentary in the *Ruto* trial judgment—as demonstrated above—also tainted their commentary on the *Bemba* Appeal Judgment, which the Review Consultants also went out of their way to criticise.

32. This opinion will demonstrate why the *Bemba* wakeup call was necessary—especially in refusing to follow blindly the appellate deference jurisprudence of the *ad hoc* tribunals (where many of the Review Consultants had worked, as had the majority of the judges in the *Bemba* appeal in one capacity or another, including as judges or as counsel).

33. To be sure, the need to reduce unnecessary fragmentation in international law strongly recommends that ICC judges should first consider the practices and precedents that have been tried, tested and found valuable at the *ad hoc* tribunals. Notably, the individual judges that comprised the majority in the *Bemba* Appeal Judgment have done more than most in promoting that approach at the ICC. That, of course, comes as no surprise, since the three of them are alumni of that system—with lengthy experiences in it.[35] Nevertheless, where the actual text of the Rome Statute, read in light of the object and purpose of the Statute, compels a departure from the jurisprudence of the *ad hoc* tribunals, then ICC judges may not allow the sentiment of their antecedent affinity with the *ad hoc* tribunals to stand in the way. It is even possible that an informed departure might assist in the appropriate correction on a particular point on which the jurisprudence of the *ad hoc* tribunals might originally have been *per incuriam*—an ever present possibility in human affairs, of which the judicial work remains a part.

[34] *Ibid*, para 156.

[35] Indeed, none of the Review Consultants has a greater quantum of applied actual experience with the jurisprudence of the *ad hoc* tribunals than does any member of the *Bemba* appeal majority.

34. Indeed, the fullness of the analysis in this opinion will show that the origins of the *ad hoc* tribunals' jurisprudence—rooted in the *Tadić* Appeal Judgment—may have proceeded on a weak analytical footing. But even without that weakness, the specific text of the Rome Statute—with no equivalence in the ICTY Statute—would not fully accommodate the inclination of the ICC Appeals Chamber to follow the ICTY Appeals Chamber's jurisprudence blindly on that particular point.

a. An Overview of the Essential Considerations

35. By way of overview, the following considerations attend the weakness of the protests against the *Bemba* Appeal Judgment:

- There was not at the ICC a long line of *relevant* jurisprudence on the matter of appellate deference. It is acknowledged that there had indeed been a 'consistent' line of jurisprudence from the ICC Appeals Chamber to the effect that the Appeals Chamber should defer to the factual findings of the Trial Chamber. It is not necessary to question the accuracy of the Prosecutor's characterisation of the longevity of that consistent jurisprudence as going back to the 'inception' of the Appeals Chamber.[36] It is enough to accept that the jurisprudence goes back long enough to matter—if relevant. Yet, what is more crucial is that the purported 'consistent' line of jurisprudence was only in relation to appeals under **article 82** of the Rome Statute—that is to say, either interlocutory appeals or other appeals that do not contest convictions, sentences or acquittals. We shall call these 'article 82 appeals.' They are a different kind of appeal.

- Conversely, by 'relevant jurisprudence', I mean to say that there has not been a long and consistent line of jurisprudence at the ICC Appeals Chamber saying that the Appeals Chamber should defer to the factual findings of the Trial Chamber in the context of appeals under **article 81** of the Rome Statute—contesting convictions, sentences or acquittals. We shall call these 'article 81 appeals'. Only 3.5 years had elapsed between the *Lubanga* Appeal Judgment—where the attempt was made to introduce the idea of appellate deference to article 81 appeals—and the *Bemba* Appeal Judgment when the majority of the Appeals Chamber issued the 'wakeup call', calling attention to the idea of appellate deference in the context of article 81 appeals. Within that period—i.e. 3.5 years—there had been only four (4) article 81 appeals that engaged the issue of appellate deference. They are the *Lubanga* Appeal Judgment (December 2014), the *Ngudjolo* Appeal Judgment (April 2015), the *Bemba-Article 70* Appeal Judgment (March 2018) and the *Bemba* Appeal Judgment (June 2018).

- It is important to keep in mind that a close reading of articles 81(1) together with article 83(1), contrasted with article 82, makes it clear that the idea of appellate

[36] See OTP News Desk, 'Statement of ICC Prosecutor, Fatou Bensouda, on the recent judgment of the ICC Appeals Chamber acquitting Mr Jean-Pierre Bemba Gombo,' on ICC-cpi.int (13 June 2018).

deference to factual findings of the Trial Chamber is entirely appropriate for all intent and purposes of article 82 appeals. This is because article 82 is silent as to the entitlement of the appellant to appeal 'errors of fact,' in the factual findings that underlie the decision of the Pre-Trial or Trial Chamber being appealed. But, it may be noted that, even in the absence of statutory language entitling appellants to challenge errors of fact in article 82 appeals, the jurisprudence of the Appeals Chamber has sought to authorise the Appeals Chamber to interfere with factual findings in article 82 appeals, when the factual findings that underlie the decision are found to be 'unreasonable,' in the sense that no reasonable Pre-Trial or Trial Chamber could have made them.[37] As the Appeals Chamber illustratively put it in *Katanga*: 'Appraisal of the evidence relevant to continued detention lies, in the first place, with the Pre-Trial Chamber. The Appeals Chamber may justifiably interfere if the findings of the Pre-Trial Chamber are flawed on account of a misdirection on a question of law, a mis-appreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the *sub judice* issues.' [38]

- The line of jurisprudence that allows the Appeals Chamber to interfere if a factual finding is found to be unreasonable *in the context of an article 82* appeal—an interlocutory appeal—holds no parallel significance to the idea of appellate deference in the elementary understanding of how the Appeals Chamber should review the factual findings of the Chamber below in a final appeal on the ultimate merits of a case. Quite the contrary. In any event, a very elementary understanding of the idea of appellate deference does not make it as appropriate for purposes of article 81 appeals as it is for article 82 appeals.[39]

- Similarly, the human rights imperatives of article 21(3) of the Rome Statute restrain the idea of appellate deference to factual findings of Trial Chambers for purposes of

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[37] See Appeals Chamber, *Prosecutor v Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Separate Opinion of Judge Eboe-Osuji, Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's 'Decision on the Review of the Detention of Mr Abd-Al-Rahman pursuant to rule 118 (2) of the Rules of Procedure and Evidence', ICC-02/05-01/20-279-Anx, 5 February 2021 ('*Ali Kushayb* Separate Opinion of Judge Eboe-Osuji').

[38] See, for instance, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008, para 25 (emphasis added). See also: Appeals Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release", 16 December 2008, para 52.

[39] As explained recently: '[T]he force of the rationale for appellate deference to the Pre-Trial Chamber's or the Trial Chamber's factual findings during interlocutory appeals is more compelling for an article 82(1)(d) appeal, which concerns a "decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, *and for which, in the opinion of the Pre-Trial or Trial Chamber*, an immediate resolution by the Appeals Chamber may materially advance the proceedings." Thus, article 82(1)(d) appeals concern classic interlocutory appeals launched in the middle of an ongoing proceeding, in order that an issue may be resolved which would—in the opinion of the Chamber below—materially advance the proceeding. There is thus greater scope for deference to the factual findings of the Chamber below, without inevitable risk of injustice. For, if the proceeding in question is materially advanced by an interlocutory appellate resolution of a stumbling issue, an unsatisfied appellant may pursue an enduring concern in a final appeal in which the appellant may then (also) engage an erroneous factual finding of the Chamber below.' *Ali Kushayb* Separate Opinion of Judge Eboe-Osuji, para 5 (Emphasis in original).

article 81 appeals concerning the ultimate merits of a case, even if less so for interlocutory appeals under article 82.

- Finally, occasional departures by the Appeals Chamber from its previous jurisprudence are entirely consistent with the established jurisprudence of international criminal law—as illustrated by *Aleksovski*—where such departures are for good reasons, such as where previous jurisprudence is demonstrably *per incuriam*.[40]

36. I shall more fully develop these observations in the following pages, beginning with the last point.

b. Stability of Jurisprudence

37. An important aspect of the debate provoked by the *Bemba* Appeal Judgment concerns the adjectival issue of whether the Appeals Chamber must always follow its previous jurisprudence on any point of law, given the need for stability and certainty in the law. As indicated, the debate was recently captured by the Review Consultants. As they put it:

> Both the form and content of the Appeal Judgment in the case of Bemba have been the subject of widespread debate within the Court, as well as widespread debate and criticism among stakeholders and observers of the Court. Views were expressed that the Appeals Chamber had departed from the Court's established jurisprudence and had introduced a new approach to the application of Articles 81(1)(b)(ii) and 83(2) of the Rome Statute in relation to errors of fact.[41]

38. As indicated earlier, the debate is surprising, yet significant—if only because it occurred at all. It thus affords a welcome opportunity to recall the actual state of international law on that question.

39. Notably, the Review Consultants seemed keen to join the debate, by pronouncing themselves as follows:

> Until the *Bemba* case, however, the Court had followed the jurisprudence of the *ad hoc* Tribunals, and had been applying 'a standard of reasonableness in reviewing' a Trial Chamber's factual findings, according to them a margin of deference. The decision to depart from that standard was unexpected. There is no clear explanation why that occurred. The decision has created a void of uncertainty about the applicable standard of review for error of fact. Uncertainty as to the applicable standard is undesirable.[42]

40. In both form and substance, the foregoing observations on the part of the Review Consultants are precipitous. They are precipitous in form because they went beyond their

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[40] *Prosecutor v Aleksovski*, (Appeal Judgment), 24 March 2000, IT-95-14/1-A, [ICTY Appeals Chamber] ('*Aleksovski* Appeal Judgment'), paras 107– 110.
[41] See IER Report, para 608.
[42] *Ibid*, para 611 (footnotes omitted).

remit. As they acknowledged themselves, 'determining matters of law and practice is generally for the Judges of the Court and not for the Experts …'.[43] The Consultants were not free to presume their own exceptions to that limitation.

41. In substance, the foregoing observations run the risk of betraying a poorer understanding of the applicable jurisprudence, as will become evident presently, to the extent that they suggest that the ICC Appeals Chamber is not free to depart from the previous jurisprudence of the *ad hoc* tribunals, let alone its own. The Rome Statute lays down the law that ICC judges are required to follow, as indicated in the footnote below.[44] In that arrangement, judges are not bound to follow principles and rules of law developed in previous decisions and the jurisprudence of other courts is, at best, in the secondary order of importance—and even so of persuasive authority only. Where the previous jurisprudence of the *ad hoc* tribunals on any particular point is not persuasive, it will not be followed. In the course of the opinion, there will be a demonstration of why the jurisprudence of the *ad hoc* tribunals is, with respect, not compelling on the subject of appellate deference.

42. To the extent of any claim that there was 'no clear explanation why [the Bemba departure] occurred,' the Review Consultants' observations are highly misleading. The Majority were well aware of the storm of protest that would follow the reversal of the conviction. It was for that reason that they took care to explain the reversal. The explanation was offered at length in three opinions: one joint opinion of all three judges of the majority, one joint opinion of two of the three judges, and one separate opinion of the third judge. Anyone taking the trouble to read the three opinions with an open mind—without undue perturbation by the reversal of a conviction—would have clearly seen the worry that comprised the explanation.

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[43] *Ibid*, para 614.

[44] According to article 21 of the Rome Statute:

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) *In the second place*, *where appropriate*, applicable treaties and *the principles and rules of international law*, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. (Emphasis added)

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43. It is certainly provocative to suggest that the controversy that followed the Appeals Chamber's *overturning* of the *conviction* in the *Bemba* case has more to do with the fact that conviction was overturned than with a careful consideration of the reasons for that outcome. But it would be seriously naïve to deride that suggestion. And the test of integrity lies in this question. The *Gbagbo and Blé Goudé* appeal involves an effort of the Prosecution to *overturn* a *conviction*. There is a serious question whether the same uproar seen in *Bemba* would ensue, if the Appeals Chamber were to overturn the Trial Chamber's acquittals in *Gbagbo and Blé Goudé*.

44. I have had occasion to reproach the idea of tallying convictions as the true measure of the Court's 'success' or 'performance.' The approach puts undue pressure on the Court to ensure convictions in every case, lest the Court be seen as 'not performing.' Such pressure risks turning the Court into an instrument of 'show trials'—judicial proceedings in which the primary purpose has less to do with proper administration of justice than it is to appease public opinion and reduce opposition. Supporters of the ICC should embrace the idea that acquittals are a normal part of the judicial process, no less so than convictions. In the movie *Nuremberg* (2000), the character of Robert H Jackson, the US Chief Prosecutor (played by Alec Baldwin) correctly expressed the proposition that 'a fair trial means an uncertain outcome. If we don't prove the defendants' guilt, we have to let them walk, even if we can smell the blood on their hands.'

45. But beyond that dramatisation of that legal axiom, Jackson actually left records of his views on the subject. For instance, in a classic pre-Nuremberg speech he gave to the American Society of International Law (on 13 April 1945), he said this:

> The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial ; *the world yields no respect to courts that are merely organized to convict*.[45]

46. Jackson was correct to observe that courts are not organised merely to convict. They are organised to ensure accountability. To insist upon accountability is not the same thing as to insist upon conviction. In its fuller import, accountability means, first and foremost, an assurance that no one is above the law. That is to say, everyone, *regardless of their station in life*, must answer to the law. On that score, the ICC is not only a paramount achievement of the multilateral international order; it is truly a defining hallmark of civilisation in our own age. It needs no convictions tally to justify its value. It only needs to do justice, as it should be done.

[45] Robert H Jackson, 'The Rule of Law among Nations' in 19 *American Bar Association Journal* 135 (1945), p 140-141 (emphasis added).

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47. But, I return to the proposition that the Review Consultants were wrong in their claim that the *Bemba* departure from previous appellate deference jurisprudence was not explained. In their joint opinion, the Majority had carefully explained that the idea of appellate deference to factual findings of the Trial Chamber must be approached with 'extreme caution'.[46] As it was explained, part of the reasons for such a cautious approach to appellate deference to factual findings was that 'when a reasonable and objective person can articulate serious doubts about the accuracy of a given finding, and is able to support this view with specific arguments, this is a strong indication that the Trial Chamber may not have respected the standard of proof and, accordingly, that an error of fact may have been made.'[47] Hence, a factual finding that can reasonably be called into doubt cannot command appellate deference.[48] Those were the normative premises from which the majority evaluated part of the evidence and identified errors in the assessment of facts, and thus concluded that they had material impact on the Trial Chamber's findings. So, the conviction had to be overturned. This analysis was a perfect product of the statutory obligation of conviction 'beyond reasonable doubt,' which is imposed upon 'the Court' in the words of article 66(3) of the Rome Statute: 'In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.' That statutory obligation upon 'the Court' (including its Appeals Chamber) did not require the Appeals Chamber in *Bemba* to continue to pay fealty to the jurisprudence of the *ad hoc* tribunals, as the consultants would have preferred.

48. In addition to the joint opinion of the Majority, Judge Van den Wyngaert and Judge Morrison offered further elaboration on why appellate deference to the factual findings of the Trial Chamber would be incorrect in the circumstances of the case. In that regard, Judge Van den Wygaert and Judge Morrison reasoned as follows, amongst other things:

> Ending impunity is only meaningful if it happens in full accordance with the values and principles that underpin the criminal justice process in an open and democratic society. The presumption of innocence and the corresponding benefit of the doubt in favour of the accused are central to our understanding of the rule of law. We therefore see it as our duty as appellate judges to intervene if we identify significant problems with the manner in which a Trial Chamber has analysed the evidence or applied the standard of proof. Indeed, what distinguishes judgments from reports of special investigation commissions, NGOs and the media is precisely the strength and quality of the evidential foundations of judicial findings of fact. In times where it has become ever more difficult to distinguish facts from "fake news", it is crucial that the judiciary can be relied upon to uphold

[46] Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, para 38.
[47] *Ibid*, para 45.
[48] *Ibid*, para 46.

the highest standards of quality, precision and accuracy. *It is in this light that the Judgment and this opinion should be understood*.[49]

49. Judge Van den Wyngaert and Judge Morrison further complained that '[a] major concern we have is about the opacity of the Conviction Decision in terms of outlining the evidentiary basis for many of the findings. The decision is replete with cross-reference upon cross-reference and the reader is often left to speculate about which specific items of evidence the Trial Chamber relied upon for a particular finding.'[50] And, they observed, '[a] large number of these references relate to hearsay or anonymous hearsay without any specific indication as to the source of the information.'[51]

50. Judge Van den Wyngaert and Judge Morrison also expressed concern about a flawed approach to the drawing of inferences from circumstantial evidence, 'in relation to a number of key findings.'[52] According to them, '[b]y definition, drawing inferences from circumstantial evidence only adds uncertainty. Therefore, if the factual basis of the circumstantial evidence is weak, the inferences drawn from it will be even weaker.'[53] In this respect, Judge Van den Wyngaert and Judge Morrison took issue with the Trial Chamber's identification of eight factors as indicia of policy, where a policy to attack a civilian population was not clearly defined. According to Judge Van den Wyngaert and Judge Morrison:

> [T]he Trial Chamber's finding of an undefined policy … does not come anywhere near to being the only possible inference that can be drawn from the eight factors the Trial Chamber refers to. The fact that senior MLC officers did not do enough to stop the troops from misbehaving can also be explained in several ways and certainly does not compel the conclusion that they deliberately did not intervene so that the troops would engage in criminal conduct. Incompetence, cowardice, indifference (or, most likely, a combination thereof) could reasonably offer an equally plausible explanation for the officers' passivity.[54]

51. Perhaps, the reasons that Judge Van den Wyngaert and Judge Morrison refused to pay lip service to the idea of appellate deference are best summed up in the following defining pronouncement:

> We are indeed **deeply** concerned about the Trial Chamber's application of the "beyond a reasonable doubt standard". Under this standard, the Prosecution's narrative must not only be the best possible explanation of the evidence that is in the case record, it must be the only plausible explanation. As long as there are other plausible explanations, taking into consideration what the evidence has proved and what is still unknown, it is not possible to enter a finding beyond a reasonable doubt. With the greatest respect for our colleagues of the Minority, we are **firmly** of

[49] Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo,* Separate Opinion of Judge Van den Wyngaert and Judge Morrison, 8 June 2018, para 5, (emphases added).
[50] *Ibid*, para 6.
[51] *Ibid*, para 8.
[52] *Ibid*, para 11.
[53] *Ibid*, para 12.
[54] *Ibid*, para 13 (footnotes omitted).

the view that many of the findings in the impugned Conviction Decision fail to reach this threshold, despite the fact that the Trial Chamber correctly defined the standard when setting it out in the abstract. We **strongly** believe that the Appeals Chamber cannot turn a blind eye to such obvious evidentiary problems on the basis of a deferential standard of review. *The deferential standard set out in the jurisprudence of the Court does not require judges of the Appeals Chamber, if they come to the conclusion that a particular finding by the Trial Chamber fails to meet the "beyond a reasonable doubt" threshold, to ignore this and to refrain from drawing the necessary conclusions. Anything less would make appellate review a pointless rubberstamping exercise, which is not what articles 81 and 83 of the Statute plainly require*.[55]

52. In addition to the joint opinion of Judge Van den Wyngaert and Judge Morrison, I also appended a separate opinion of 117 pages, at least 14 of which—i.e. specifically from paragraphs 32 to 80—were devoted to elaborating the reasons for the departure.[56] The sum of the discussion in the 48 paragraphs devoted to explaining the need to reset an understanding of appellate deference, may be helpfully summed up in the following passage:

> In any appeal against conviction in a criminal case, such as this, appeals judges must fulfil the essential task of satisfying themselves that guilt was established beyond reasonable doubt at trial. That essential appellate duty cannot be avoided or obscured by hugging the theory of 'appellate deference' to factual findings of the trial court. Appeal judges 'must bring to bear the sum of their collective judicial experience' in reviewing the complaints of the appellant against the evidence presented in the case; while taking care to not lightly disturb the factual findings of the trial court.[57]

53. It is thus misleading for the Review Consultants to suggest that the Majority did not clearly explain their departure from the jurisprudence of appellate deference that had originated from the *ad hoc* tribunals. I explain below why even that jurisprudence is doubtful in its origins to begin, and was indeed a weak basis to ignore the statutory imperatives of article 66(3) of the Rome Statute.

54. But, the broader question asks what all this means for the conscience and the work of ICC judges? Does it mean that appellate judges who harbour these disturbing views of the evidence, upon which a conviction is based, must ignore their concerns and confirm a conviction: merely because doing so would win them popularity with the public and latter-day Consultants—all of whom were necessarily strangers to the records of the appeal—on a theory that ICC judges must follow prior jurisprudence of the *ad hoc* tribunals on appellate deference?

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[55] *Ibid*, para 14 (footnotes omitted) (emphases added).
[56] *Bemba* Concurring Separate Opinion of Judge Eboe-Osuji.
[57] Ibid, para 9 (emphasis in original).

55. Perhaps, the discussion in this part might be assisted by the wise words of Lord Wright written in 1943. According to him, 'The instinct of inertia is as potent in judges as in other people. Judges would not be less anxious to find and follow precedents than ordinary folk are.'[58] Appreciably, that instinct of inertia—to follow available precedents—may even weigh heavier upon judges confronted with heavy workloads amidst the expectation—indeed requirement—that they must deliver their judgment within a reasonable time. There may be some significance in the fact that the three judges in the majority—all of whom had long experiences as alumni of the *ad hoc* tribunals in one capacity or another, including as judges or as counsel—felt the need to overcome the instinct of inertia, inviting scrutiny to the appositeness of the jurisprudence of the *ad hoc* tribunals at the ICC on the question at issue.

56. Many years ago, while sitting in the ultimate appellate court of the United Kingdom, the House of Lords (as it then was), Lord Denning was unmistakable in the view that final courts of appeal must be able to reconsider past precedents that are inconsistent with fundamental principles of law. As he once put it—and quite rightly:

> It seems to me that when a particular precedent - even in Your Lordships' house - comes into conflict with a fundamental principle, also of your Lordships' House, then the fundamental principle must prevail. This must at least be true when, on the one hand, the particular precedent leads to absurdity or injustice, and on the other hand, the fundamental principle leads to consistency and fairness. It would, I think, be a great mistake to cling too closely to a particular precedent at the expense of fundamental principle.[59]

57. Two years later, Lord Denning returned to the same point, more colourfully: 'The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction, you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps.'[60] Lord Wright was also to observe that 'there is greater public inconvenience in perpetuating an erroneous judicial opinion, than the inconvenience to the Court of having a question, disposed of in an earlier case, reopened.'[61] To the same effect, Justice Robert H Jackson observed at the United States Supreme Court: 'I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.'[62]

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[58] Lord Wright, 'Precedents' in 8 *Cambridge Law Journal* 118 (1942) ('Lord Wright'), p 144.
[59] *London Transport Executive v Betts* [1958] 3 WLR 239, para 264 [UK House of Lords].
[60] *Ostime v Australian Mutual Provident Society* [1960] AC 459 [UK House of Lords].
[61] Lord Wright, p 145.
[62] *Massachusetts v United States*, (1948) 333 US 611, paras 639-640 [US Supreme Court].

58. One recent notable instance in which the UK Supreme Court gave value to the above sentiments of Lord Denning, Lord Wright and Justice Jackson was in the case of *R v Jogee*, concerning the law of joint criminal enterprise.[63] In that case, the Supreme Court overturned the settled and longstanding precedent in *Chan Wing-Siu v The Queen*,[64] later reaffirmed in *Regina v Powell and English*.[65] According to the Supreme Court, the law 'took a wrong turn' in the precedent laid down in the classic case of *Chang Wing-Siu*, to the effect that an associate in a criminal transaction was automatically guilty of the secondary crime that he foresaw—though he did not intend it to be committed—in the course of committing a primary crime that had been agreed upon. As the Supreme Court later clarified in *Jogee*, such a notion of criminal complicity was an incorrect departure from the basic principle that no one is to be convicted of a crime that he or she did not intend. The better view is that foreseeability in the commission of a secondary crime would always render the defendant culpable of the crime of lending assistance to the commission of that crime; and, at worst, it is only *evidence* of *possible* intention to commit the secondary crime. But, the *automaticity* of conviction for the secondary crime, on the basis of the principle laid down in *Chan Wing-Siu*, was a wrong view of the law.

59. The substantive correctness of *Jogee* as regards the law of joint criminal enterprise is beyond the scope of the present discussion. It is enough to say that the incidence of the judgment fully demonstrates that final courts of appeal are not prevented from revisiting questions regarding the correctness of past judicial precedents, where there are cogent reasons to do so.

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60. The actual state of international law on the matter is as follows. There is no doctrine of *stare decisis* to speak of in general international law, let alone one that is cast in stone. The Rome Statute says only that '[t]he Court *may* apply principles and rules of law as interpreted in its previous decisions.'[66] Nevertheless, the better administration of justice according to international law strongly recommends that even courts of final jurisdiction should follow past precedents for the sake of stability and predictability; while remaining free to depart from them for cogent reasons in the interest of justice and socio-legal development.[67]

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[63] *R v Jogee* [2016] UKSC 8 [UK Supreme Court]. See also the companion judgment of the Privy Council in *Ruddock v The Queen (Jamaica)* [2016] UKPC 7 [UK Privy Council].
[64] [1985] AC 168 [UK, Privy Council].
[65] [1999] 1 AC 1 [UK, House of Lords].
[66] See article 21(2) (emphasis added).
[67] See *generally* Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' in 2 Journal of International Dispute Settlement 5 (2011) ('Guillaume'), p 9 *et seq*. especially at p 12. Citing - *Case concerning certain German interests in Polish Upper Silesia (The Merits)* (Collection of Judgments) PCIJ Rep Series A No 7,

61. This approach is fully reflected in the jurisprudence of international criminal law. The leading judgment on the matter is *Prosecutor v Aleksovski*.[68] There, the ICTY Appeals Chamber held that 'in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, *but should be free to depart from them for cogent reasons in the interests of justice*.'[69] The principle was elaborated upon as follows:

> 108. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law."
>
> 109. It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.
>
> 110. What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.[70]

62. These principles have been re-affirmed by the Appeals Chambers of the ICTR and of the Residual Mechanism for the International Criminal Tribunals (MICT).[71]

63. In view of the foregoing, it is incorrect in principle to complain that the Appeals Chamber was not free to reconsider the standards of appellate review in the *Bemba* Appeal for purposes of appeals against conviction and sentence. The better question rather is whether the reconsideration was well grounded in cogent reasons—not whether it was done at all. But, even a casual reading of the various opinions in the *Bemba* Appeal Judgment—let alone a careful reading of my separate opinion of 117 pages (a large part

(25 May 1926), p 19 [PCIJ]; see also *Case Concerning the Factory at Chorzów (Jurisdiction)* PCIJ Rep Series A No 9, (26 July 1927), p 20 [PCIJ]; *Continental Shelf (Libyan Arab Jamahiriya/Malta*) (Application to Intervene, Judgment) [1984] ICJ Rep 3, p 26, para 42 [ICJ]; *Stafford v United Kingdom* [2002] Case No 46295/99 (28 May 2002), para 68 [ECtHR Grand Chamber]; *Metock et al v Minister for Justice, Equality and Law Reform* [2008] Case C-127/08, I-6241, ECR, para 14 [European Court of Justice Grand Chamber].

[68] Aleksovski Appeal Judgment.

[69] *Ibid*, para 107 (emphases added).

[70] *Ibid*, paras 108–110.

[71] See *Prosecutor v Semanza*, Decision on appeal against the 'Decision on the "Motion to Set Aside the Arrest and Detention of Laurent Semanza as Unlawful"', 31 May 2000, ICTR-97-20-A, [ICTR Appeals Chamber], para 92; *Semanza v Prosecutor*, Decision on a Request for Access and Review, 9 April 2018, MICT-13-36-R, [MICT Appeals Chamber], para 15.

of which dealt with the matter)—should make it apparent that the reconsideration was not done on a whim.

64. In the circumstance, it must be said that the controversy that followed the *Bemba* Appeal Judgment does nothing at all to shake the principled basis for that judgment. If anything, it serves only to reveal as extremely unsustainable the basis of the protests registered on the demurral side of the controversy.

c. Appellate Deference as it should be Understood

65. The debate provoked by the *Bemba* Appeal Judgment unwittingly serves a salutary purpose in drawing, perhaps, much needed attention to—and further clarification of—the subject of standards of appellate review of factual findings at the ICC. The vexing point of that debate rests on the question whether the *Bemba* Appeal Judgment now stood for the proposition that there should no longer be appellate deference to factual findings of the Trial Chamber. No. *Bemba* does not reject the idea of appellate deference. It requires only that it be better understood—at a more conscious, actionable level—rather than as absentminded incantation of juristic mantra. The ultimate value of *Bemba* remains the opportunity it has now offered the ICC Appeals Chamber to reset the idea along its proper path—taking firmly into account the actual words of the Rome Statute and their real significance, rather than rote adherence to the jurisprudence of *ad hoc* tribunals. Sadly, the short life of the idea of appellate deference as previously articulated in relation to appeals *against conviction and sentence* at the ICC—and it bears stressing here that it was indeed a *very short* life of 3.5 years only until the *Bemba* Appeal Judgment—reveals that the idea proceeded from what may respectfully be characterised as a rather confused and doubtful understanding of the idea within the appellate process that the Rome Statute has laid down.

d. Paying Close Attention to Actual Statutory Provisions

66. The correct understanding of the proper place of appellate deference in the appellate process provided for by the Rome Statute must begin with paying very close attention—primarily—to the actual provisions of the Rome Statute as article 21 requires.

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67. Perhaps, this is the ideal juncture to recall the text of article 21, which controls this discussion in at least four important ways. It provides as follows:

1. The Court *shall* apply:

> (a) In the *first place*, *this Statute*, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the *second place*, *where appropriate*, applicable treaties and the *principles and rules of international law*, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
>
> 2. The Court *may apply principles* and rules of law as *interpreted* in its *previous decisions*.
>
> 3. The *application and interpretation of law* pursuant to this article *must* be *consistent with internationally recognized human rights*, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. [Emphases added.]

68. Thus, as the emphasised words and phrases show, article 21 controls this debate along the lines of the following four important propositions. The **first proposition** is that the Court shall apply the text of the Rome Statute in the first place. This of course requires paying very close attention to the text of the Rome Statute, in order to see what it actually says and what that means in context.

69. The **second proposition** that flows from article 21 is that the Court shall be guided by applicable treaties and the principles and rules of international law—in the second place—and only where appropriate. It is important to keep in mind that this does not automatically mean compulsory application of the jurisprudence of other international courts—including that of the Appeals Chambers of the *ad hoc* tribunals. It is noted, in this connection that judicial decisions are only 'subsidiary'—and intentionally so[72]—in the hierarchy of sources of international law, according to article 38(1) of the ICJ Statute, which has been traditionally accepted as outlining the sources of international law.[73] Treaties, customary practices, and general principles—not judicial opinions—are the

[72] See, for instance, Guillaume, p 8.

[73] It may be recalled that article 38(1) of the ICJ Statute provides as follows:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as *subsidiary* means for the determination of rules of law. [Emphasis added.]

primary sources of principles and rules of international law. But, even so, none of those sources—primary or subsidiary—may be applied when it is inappropriate to do so.

70. Within the meaning of article 21(1)(b) of the Rome Statute, then, the first indication of inappropriate application of other treaties or principles and rules of international law would be where they seem inconsistent, inapposite or clearly excluded, in the light of actual words of the Rome Statute, the Rules of Procedure and Evidence or the Elements of Crimes.

71. This second proposition of article 21 thus requires that those who apply the Rome Statute are not truly free to gloss over, elide or ignore altogether its actual text, in a hurried bid to arrive at the application of familiar and convenient principles and rules of international law derived from the judicial opinions of other Courts.

72. The **third proposition** is that the ICC may apply rules and principles derived from its previous case law. Obviously, this is not an obligation. It is nevertheless a most desirable rule of good sense, for the sake of certainty and predictability. However, appreciating this rule of good sense in the round requires, in turn, an acceptance, in the first place, that the optional application of previous decisions of the Court necessarily circumscribes the scope of applicability of previous decisions of other international courts. This is in the sense that the decisions of other international courts cannot enjoy higher hierarchy than previous decisions of the ICC. Furthermore, the scope of applicability of previous decisions of international courts is, in general, also circumscribed in another way. This is in the manner of the jurisprudence handed down by the ICTY Appeals Chamber in the *Aleksovski* case, as seen earlier, which underscores not only the need for certainty and predictability—but also the freedom to depart from them for cogent reasons in the interest of justice.

73. Finally, the **fourth proposition** that flows from article 21 of the Rome Statute is that the application and interpretation of the Rome Statute *must* be consistent with internationally recognised human rights. This will then necessarily require close attention to international human rights norms as well as the related pronouncements of international human rights bodies. Notable in this regard are the imperatives of the fundamental human right to fair trial, codified in article 14 of the International Covenant on Civil and Political Rights, as well as General Comment 32 of the UN Human Rights Committee that has interpreted that provision. General Comment 32 insists with crystal clarity that the right to a fair trial is violated if there is no right of appeal to enable meaningful reviews of convictions and sentences. And meaningful review in that regard requires a review of lower courts' judgments in their substance—specifically as to factual findings. All this is clear from the following pronouncement:

Article 14, paragraph 5 of the Covenant provides that *anyone convicted* of a crime *shall* have the right to have their *conviction and sentence reviewed by a higher tribunal according to law*. As the different language versions (crime, infraction, delito) show, the guarantee is not confined to the most serious offences. The expression "according to law" in this provision is not intended to leave the very existence of the right of review to the discretion of the States parties, since this right is recognised by the Covenant, and not merely by domestic law. The term according to law rather relates to the determination of the modalities by which the review by a higher tribunal is to be carried out, as well as which court is responsible for carrying out a review in accordance with the Covenant. Article 14, paragraph 5 does not require States parties to provide for several instances of appeal. However, the reference to domestic law in this provision is to be interpreted to mean that *if* domestic *law provides for further instances of appeal*, the *convicted person must have effective access to each of them*.[74]

74. Insisting specifically that the review of factual findings is at the core of effective access to the right of appeal, the UN Human Rights Committee held as follows:

The right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a *duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence*, such that the procedure allows for due consideration of the nature of the case. *A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant. However, article 14, paragraph 5 does not require a full retrial or a "hearing", as long as the tribunal carrying out the review can look at the factual dimensions of the case*. Thus, for instance, where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the Covenant is not violated.[75]

*

75. In keeping with the commands of article 21 of the Rome Statute, it becomes obvious that the idea of 'appellate deference' must take its proper bearing from the actual text of the Rome Statute concerning the appellate process at the ICC. In this connection, it is clear that there is a difference between appeals governed by article 81 and those governed by article 82. And on very close examination of those provisions, in light of previous case law of the ICC Appeals Chamber until 3.5 years before the Bemba Appeal Judgment, it becomes clear that there is a sound and solid basis for appellate deference in article 82 appeals—but not so much for the application of deference in the same way in relation to article 81 appeals. This, briefly, is because article 81 explicitly gives a party the right to appeal an error of fact, while article 82 is silent as to that right. This will be explained more fully later.

[74] UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to fair trial*, 23 August 2007, Doc No. CCPR/C/GC/32 ('HRC General Comment No. 32'), para 45 (footnotes omitted) (emphases added)

[75] *Ibid,* para 48 (footnotes omitted) (emphasis added).

76. Hence, it is very correct to say that the idea of 'appellate deference' has a very solid place in relation to article 82 appeals. The *Bemba* Appeal Judgment leaves that understanding of the idea entirely undisturbed. But, the *Bemba* Appeal Judgment does not accept the idea of appellate deference in relation to article 81 appeals in the same way that the idea should operate in relation to article 82 appeals. We shall examine the differences more closely next.

e. Article 82 Appeals and Appellate Deference

77. Before the Appeals Chamber's judgment in the *Lubanga* appeal against conviction and sentence, delivered on 1 December 2014, the jurisprudence of the Appeals Chamber consistently held that the Appeals Chamber was to accord appellate deference to the factual findings of the Trial Chamber. The jurisprudence was entirely correct so to hold in the context of those pre-*Lubanga* appeals (more on this later). Those appeals were entirely governed by article 82 of the Rome Statute.[76] The significance of that is three-fold. First, article 82 does *not* concern appeals against *conviction and sentence*. Second, as noted earlier, it does *not* provide for the right to appeal *errors of fact*—thus making it correct that the Appeals Chamber should defer to factual findings of the Pre-Trial or Trial Chamber. And, finally, for purposes of article 82, the Appeals Chamber does *not* enjoy the powers of the Pre-Trial or Trial Chamber which the Appeals Chamber enjoys under article 83(1) to decide a matter as the Chamber below would have done. As will be seen shortly, in all these respects, the converse is true for article 81 appeals. But, before getting to that discussion, it may be helpful to set out the text of article 82. It provides:

> 1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:
>
> (a) A decision with respect to jurisdiction or admissibility;

[76] Appeals Chamber decisions: *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release, 9 June 2008, para 25; *Prosecutor v. Jean-Pierre Bemba Gombo,* Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release", para 52; *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa", 2 December 2009, para 61; *Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release'", 14 July 2011, para 17; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, para 56; *Prosecutor v Kenyatta et al*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, para 55.

(b) A decision granting or denying release of the person being investigated or prosecuted;
(c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;
(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

2. A decision of the Pre-Trial Chamber under article 57, paragraph 3(d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.

3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.

4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

f. Article 81 Appeals and the Incongruity of Appellate Deference of the Article 82 Mould

78. The terms of article 81 are markedly different from those of article 82. To begin with, article 81 is, as already noted, specifically concerned with appeals against conviction or sentence or acquittal. And, in that respect, it specifically gives the appellant the right to appeal errors of fact, among other things, as is clear from the footnote below.[77] What is more, article 83(1) gives the Appeals Chamber all the powers of the Trial Chamber, for purposes of adjudication of appeals brought under article 81. In that regard, article 83(1) specifically provides as follows in relation to article 81 appeals: 'For the purposes of proceedings under article 81 and this article, the *Appeals Chamber shall have all the powers of the Trial Chamber*. '[Emphases added.]

79. It is thus obvious that in giving the parties the right to appeal errors of fact, article 81 is fully compliant with General Comment 32 of the UN Human Rights Committee, which insists that appeals must be meaningful. To be so, the Appeals Chamber must engage in factual review in the appeal—without which the fundamental human right to a fair trial

[77] The text of article 81(1) is as follows:

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:
(a) The Prosecutor may make an appeal on any of the following grounds:
(i) Procedural error,
(ii) *Error of fact*, or
(iii)Error of law;
(b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
(i) Procedural error,
(ii) *Error of fact*,
(iii)Error of law, or
(iv) Any other ground that affects the fairness or reliability of the proceedings or decision. [Emphasis added.]

would have been violated. The drafters of the Rome Statute took care to ensure that no stone is left unturned in guaranteeing that ideal of a meaningful right of appeal. They did so by providing in article 83(1) that the Appeals Chamber shall have all the powers of the Trial Chamber. Notable in this respect is the provision of article 66(3), which as seen earlier, provides as follows: 'In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.' In order to sustain a conviction, therefore, the Appeals Chamber must be satisfied that the accused is guilty beyond reasonable doubt: both because the Appeals Chamber is part of 'the Court' contemplated in article 66(3); and, because article 83(1) subrogates the powers of the Trial Chamber over to the Appeals Chamber for purposes of an article 81 appeal.

80. The critical question thus arises whether it is correct to employ a theory of 'appellate deference' that has the effect of rendering nugatory this right to appeal factual errors. That anomaly is achieved by pressuring the Appeals Chamber, merely through jurisprudence, to *defer* to the factual finding of the same Trial Chamber whose factual finding was appealed against as an 'error of fact', as a matter of right that an accused person enjoys under article 81. That is the critical question that vexed the Appeals Chamber in the *Bemba* appeal.

g. A Better Notion of Appellate Deference for Purposes of Article 81 Appeals

81. There remains a place for the idea of appellate deference in the work of the Appeals Chamber of the ICC—even for article 81 appeals. The Appeals Chamber's judgments recently rendered in the *Ntaganda* merits appeal and now, in the case at bar, have carefully mapped out the proper place for appellate deference at the ICC.

82. But, ultimately, the proper place for appellate deference at the ICC rises no higher than to say that the Appeals Chamber should not lightly reverse the factual findings of the Trial Chamber. The central practical implication of this is that the appellant, even a convict, bears the primary burden of persuasion on appeal. This is in the manner of being required to persuade the Appeals Chamber that the Trial Chamber made an error. The Appeals Chamber is not to overturn the factual findings of the Trial Chamber where the appellant fails to discharge the burden of persuasion on appeal. The notion that a defendant should bear the primary burden of persuasion at any level of the criminal justice process is strikingly significant. To understand the acuity of the significance, it needs only be recalled that at the trial level, it is the Prosecutor that bears the burden of persuasion. The silence of the defendant does not alter that prosecutorial burden—at the trial level. But, by virtue of the idea of appellate deference, in the sense only that the

Appeals Chamber may not lightly disturb factual findings of the Trial Chamber, the primary burden of persuasion rests on the appellant—at the appellate level. It does not rest on the Prosecution when they are the respondents to the appeal. The Appeals Chamber will thus not overturn a factual finding, where the defendant fails, on appeal, to make a credible case that the Trial Chamber had committed an error of fact. Here, if the defendant appellant does nothing more than merely raise a bare ground of appeal without substantiating it, the Appeals Chamber will not be required to review the factual finding concerned. This situation may be contrasted with that at trial, where the burden of persuasion is always on the Prosecution, in the result that the Prosecution is required to establish guilt beyond reasonable doubt, even when the defendant exercises the right to remain silent on the factual issues. On appeal, the convicted appellant is not entitled to remain silent on the factual issues of the appeal. He must persuade the Appeals Chamber that the Trial Chamber had made a factual error.

83. This is all the significance that the hypothesis of 'appellate deference' needs to have, for a legitimate purpose in the situation in which the appellant enjoys a statutory right to challenge a factual finding. It need not have a significance that many thought wrongly it had—before the *Bemba* Appeal Judgment came along to shatter the myth—to the effect that factual findings of Trial Chambers are untouchable on appeal. That was a highly misconceived notion of appellate deference, which permeated the controversy that followed the *Bemba* Appeal Judgment.

h. The Genesis of Appellate Deference in International Criminal Law

84. It may be recalled that in criticising the *Bemba* Appeal Judgment, the Review Consultants complained that the '[Appeals] Chamber departed from established jurisprudence' and 'the test set in the case of *Lubanga*' for purposes of appellate review of factual errors.[78]

85. A proper understanding of the value of the *Bemba* Appeal Judgment requires an accurate view of the very genesis of the idea of appellate deference in international law and the route travelled by the idea before it arrived at the ICC. This is what the Review Consultants were alluding to by 'established jurisprudence.' As adumbrated earlier, with respect, that route is not compelling, having come through the jurisprudence of the *ad hoc* tribunals on the point, mindful of its origins. That should be clear in the following discussion.

[78] See IER Report, para 609.

86. The originating pronouncement on appellate deference in international criminal law was made by the ICTY Appeals Chamber in 1999, in the *Tadić* Appeal Judgment.[79] The pronouncement was, notably, followed in the *Furundžija* Appeal Judgment, in which the ICTY Appeals Chamber referred back to the *Tadić* Appeal Judgment as the precedent authority for the idea of appellate deference.[80] In *Kupreškic*,[81] the ICTY Appeals Chamber also relied on the *Tadić* Appeal Judgment, as well as on the *Aleksovski* Appeal Judgment and the *Čelebići* Appeal Judgment—both of which had, in turn, relied on the *Tadić* Appeal Judgment.[82] So, the *Tadić* Appeal Judgment is the *locus classicus* for the jurisprudence of the *ad hoc* tribunals, on the subject of appellate deference.

87. In the *Lubanga* Appeal Judgment, the ICC Appeals Chamber introduced the idea of 'appellate deference' into appeals under article 81 of the Rome Statute, referring to the jurisprudence of the Appeals Chambers of the *ad hoc* tribunals.[83] Notably, specific reference was made to the *Kupreškic* Appeal Judgment for the proposition.[84] A similar analysis was followed subsequently in the *Ngudjolo* Appeal Judgment.[85] Thus, the *Lubanga* Appeal Judgment was the very first occasion, as the Review Consultants implicitly noted, that the ICC Appeals Chamber introduced the idea of 'appellate deference' in the jurisprudence of the ICC—in the context of an appeal against conviction or sentence, brought under article 81. This was on 1 December 2014. On no proper view could the intervening period from then until the delivery of the *Bemba* Appeal Judgment on 8 June 2018 be reasonably described as a *long history* of operation of the idea *at the ICC*. As noted earlier, it was only 3.5 years. Beyond the longevity of the jurisprudence, however, the reception of the *ad hoc* tribunals' jurisprudence at the ICC, without careful examination of its compatibility with the specific language of the Rome Statute that finds no equivalence in the language of the ICTY Statute, remains a troubling oversight in the *Lubanga* reception.

[79] See Appeals Chamber, *Prosecutor v. Duško Tadić*, (Appeal Judgement), 15 July 1999, IT-94-1-A ('*Tadić* Appeal Judgment').
[80] See Appeals Chamber, *Prosecutor v. Anto Furundžija,* (Appeal Judgement), 21 July 2000, IT-95-14/1-T ('*Furundžija* Appeal Judgment').
[81] See *Prosecutor v Kupreškic*, (Appeal Judgment), 23 October 2001, IT-95-16-A, [ICTY Appeals Chamber], para 30.
[82] See *Aleksovski* Appeal Judgment; *Prosecutor v Delalić et al.* (Appeal Judgment), 20 February 2001, IT-96-21, [ICTY Appeals Chamber] also known as the *Čelebići* Appeal Judgment.
[83] See Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014 ('*Lubanga* Appeal Judgment'), paras 22-24.
[84] I*bid*, paras 23-24.
[85] See *Ngudjolo* Appeal Judgment, paras 23-24.

88. Subsequently in both the *Ngudjolo* Appeal Judgment and in the *Bemba (Article 70)* Appeal Judgment[86]—the latter being the ICC Appeals Chamber's article 81 judgment immediately preceding the *Bemba* Appeal Judgment by a matter of weeks—generous reliance was placed on the *Lubanga* Appeal Judgment, with a further reference to the *Kupreškic* Appeal Judgment.

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89. There is no question, then, that the *Tadić* Appeal Judgment was the basic judicial precedent in international criminal law for the idea of 'appellate deference'. But, the *Bemba* Appeal Judgment decidedly—albeit implicitly—engaged questions about the adequacy and authority of the *Tadić* Appeal Judgment *for purposes of the ICC*. Those questions do not necessarily deny the general correctness of the pronouncements of the ICTY Appeals Chamber in *Tadić*—at the ICTY—in the *light of the provisions of the ICTY Statute*. The questions, rather, concern whether there are specific provisions of the Rome Statute that should engender appropriate adjustment in the understanding and the application of the idea of 'appellate deference' as received at the ICC. We may take a closer look. For that, we must harken back to the *Tadić* Appeal Judgment—the precedent authority for the idea in the jurisprudence of the *ad hoc* tribunals.

90. The totality of the pronouncement—indeed the entire discussion—on the matter in *Tadić* is as follows:

> The two parties agree that the standard to be used when determining whether the Trial Chamber's factual finding should stand is that of unreasonableness, that is, a conclusion which no reasonable person could have reached. The task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.[87]

91. Evidently, the entire discussion and statement of principle of 'appellate deference' occurred in that one and very short paragraph, and nowhere else. There was no discussion of any legal foundation for the idea. Nor was there any further elaboration of the idea. Specifically, *there was no discussion of any provision of the ICTY Statute or Rules of Procedure and Evidence* the interpretation of which would reasonably result in such a fundamental idea of adjudication in a criminal case. Rather, the only indicated rational

[86] See Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, paras 91-95.
[87] *Tadić* Appeal Judgment, para 64.

bases for the idea comprised: (a) an allusion to the agreement of the parties; (b) division of judicial labour, in the sense that the 'task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber'; and, (c) that 'two judges, both acting reasonably can come to different conclusions on the basis of the same evidence.'

92. For purposes of the ICC, this statement of the hypothesis of 'appellate deference' is wholly inadequate for many reasons. First, an agreement between the parties—that appeared to be the entire basis of the pronouncement in the *Tadić* Appeal—can only limit the effects of such an agreement to that particular case. It is an inadequate basis to establish an idea so profound as to control the right of the parties in subsequent cases even before the same court, let alone in cases before other courts.[88]

93. Second, that the agreement between the parties, such as resulted in the idea of appellate deference, may have posed no problem at the ICTY, does not mean that the idea is free from difficulties at the ICC. The problem is all too evident in the indication of division of labour as the second rationale for appellate deference. At the ICC, such a reason can only be a hortatory idea to be cautiously stated. It cannot be a principled statement of peremptory authority. This is because article 81 of the Rome Statute not only gives a party the *right* to appeal an error of fact—a *right* which does not sit comfortably with deference to the very same finding that one has the right to appeal; but also, and relatedly, article 83(1) specifically gives the ICC Appeals Chamber 'all the powers of the Trial Chamber' when adjudicating such appeals against an error of fact. It is specifically to be emphasised that neither the ICTY Statute nor its Rules of Procedure and Evidence contains an equivalent provision to article 83(1) of the Rome Statute. It is thus sufficient to rest the inadequacy of the division of labour hypothesis—between the Appeals Chamber and the Trial Chamber—on the basis that it does not sit comfortably with article 83(1) of the Rome Statute.

[88] Indeed, the *Pinochet* series of cases at the House of Lords afford a famous example of how concessions between parties in an appeal can be seriously mistaken as a basis for judgment. An earlier judgment (Pinochet No 1 - *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 1)* [2000] 1 AC 61) had been rendered on the basis of concession by the parties that all the acts of torture with which Senator Pinochet had been charged were extradition offences under the double criminality rule that controlled the question whether the UK could legally extradite Pinochet [the 'concession']. As will be recalled, that judgment was set aside (in Pinochet No 2 - *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119) on grounds that Lord Hoffman's participation in it attracted apparent bias, since he had not disclosed his affiliation with Amnesty International which was an intervener in the appeal. But, on rehearing the appeal (in Pinochet No 3 - *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147), the concession came under scrutiny and became undone, as a vast majority of the number of the acts of torture charged against Pinochet were found not to be extradition offences.

94. But, even at the ICTY itself, the idea that the 'task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber' might have been undercut in its essential value of suggesting an appellate disadvantage.[89] This is demonstrated by a very significant amendment of the ICTY Rules of Procedure and Evidence on 12 December 2002, by virtue of rule 15*bis*(D). The amendment permitted the ICTY President to assign a substitute judge to a part-heard trial, and the new judge would join the bench only after she had certified that she had familiarised herself with the record of the proceedings.

95. An extreme application of rule 15*bis*(D) occurred in the *Šešelj* case, where a replacement judge was appointed after the trial had already closed. The replacement judge reviewed the records of the trial, made a declaration of familiarisation in due course, joined the rest of the Chamber *at the deliberation stage* and eventually took part in the Trial Chamber's judgment.[90]

96. Notably, the rule 15*bis*(D) amendment to the ICTY Rules was introduced on 30 December 2002.[91] This occurred after the ICTY Appeals Chamber had introduced the idea of appellate deference in *Tadić* (15 July 1999) and *Furundzija* (21 July 2000)—based on the rationale of appellate disadvantage that appeals judges laboured under in relation to the evidence heard at trial. But the amendment has the effect of reducing to the vanishing point any relative advantage that trial judges might have enjoyed in other jurisdictions that did not have the same facilities (of transcripts and audio-visual records) that made rule 15*bis*(D) workable at the ICTY. If it is possible for a new judge to familiarise herself with the record of the entire trial and then proceed with the case, pursuant to rule

[89] That hypothesis of Appellate disadvantage was stated as follows in the *Furundžija* Appeal Judgment: 'The reason the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known; the Trial Chamber has the advantage of observing witness testimony first-hand, and is, therefore, better positioned than this Chamber to assess the reliability and credibility of the evidence'. See *Furundžija* Appeal Judgment, para 37.
[90] Notably, the procedural background in *Šešelj* records the following amongst other things: 'The trial stage ended on 20 March 2012; the Prosecution presented its closing arguments on 5 and 6 March 2012, and the Accused presented his closing arguments from 14 to 20 March 2012. On 12 April 2013, the Chamber issued a Scheduling Order setting the date for the delivery of the Judgement as 30 October 2013, which was "rescinded" on 17 September 2013, following Judge Harhoff's disqualification on 28 August 2013. On 12 February 2016, the Chamber issued a new Scheduling Order setting the date for the delivery of the Judgment as 31 March 2016': *Prosecutor v Šešelj* (Judgment – Volume 1), 31 March 2016, [ICTY Trial Chamber], Annex 2, para 10. 'By his Order dated 31 October 2013, the acting President of the Tribunal assigned Judge Mandiaye Niang to replace Judge Harhoff. On 13 November 2013, the newly formed Chamber invited the parties to present their observations on the continuation of the proceedings; the Accused did so in November 2013, and the Prosecution in December 2013.' *Ibid*, para 28. 'On 13 December 2013, the Chamber decided to continue the proceedings with the new Judge, from the point after the closing arguments, as soon as Judge Niang had finished familiarising himself with the record. In his separate opinion, Judge Niang gave himself an initial period of six months to familiarise himself with the record.' *Ibid*, para 29. 'In an Order issued by the Chamber on 13 June 2014, Judge Niang indicated that he would need additional time to familiarise himself with the record. The time required for Judge Niang to familiarise himself with the record lasted until June 2015.' *Ibid*, para 31.
[91] See ICTY, *Rules of Procedure and Evidence*, Doc No IT/32/Rev. 26, 30 December 2002, p 15.

15*bis*(D)—and this is notwithstanding the extreme application of rule 15*bis*(D) in *Šešelj*—what makes it impossible for the Appeals Chamber to familiarise itself with the record of trial in the discrete factual issues where the findings of a Trial Chamber are challenged? I discuss that aspect of the matter under a different subheading.

97. Finally, the illustrative formula indicated in the rule of reasonableness in the *Tadić* Appeal Judgment, as the third rational basis for appellate deference is deeply problematic in a criminal case. It is true that 'two judges, both acting reasonably can come to different conclusions on the basis of the same evidence.' But, that does not mean that an accused person may lawfully be convicted, merely because judges can reasonably disagree. Indeed, the dilemma may well implicate the very definition of reasonable doubt. It remains a question whether an accused person can properly be found guilty on the basis of the reasonable evidential finding of a judge, when the reasonable finding of another judge on the same evidential data points to innocence.

98. It is important to stress that, in the context of a criminal case, the sustainability of the reasonableness of the Trial Chamber's factual findings *necessarily* has a different effect in the eventuality of an acquittal, contrasted with that of a conviction. Notably, in the *Ngudjolo* Appeal Judgment, the Appeals Chamber cited with approval the following dictum of the ICTY Appeals Chamber:

> [T]he Appeals Chamber notes that the ICTY Appeals Chamber held in relation to an acquittal decision that "[it] will reverse only if it finds that no reasonable trier of fact could have failed to make the particular finding of fact beyond reasonable doubt and the acquittal relied on the absence of this finding". The Appeals Chamber considers that, given that the onus is on the Prosecutor to prove the guilt of the accused (see article 66(2) of the Statute) such an approach to alleged factual errors in appeals by the Prosecutor pursuant to article 81(1)(a) of the Statute against an acquittal decision is appropriate.[92]

99. Great care is required in the appreciation and application of the foregoing dictum. It has no equal value for a defendant's appeal against a conviction as it does a prosecution appeal against an acquittal. The application of the burden of proof of guilt beyond *reasonable* doubt will readily sustain an acquittal where judges *reasonably* disagree as to the import of the evidence tendered to support guilt. But, it does not follow, by a parity of reasoning, that the burden of proof beyond reasonable doubt is discharged when judges *reasonably* disagree as to the import of the evidence. It may be that the existence of such a *reasonable* disagreement means that the burden of proof has not been discharged

[92] *Ngudjolo* Appeal Judgment, para 26; *citing* the ICTY Appeals Chamber's judgments in *Blagojević and Jokić*, (Appeal Judgment), 9 May 2007, IT-02-60-A, para 9; *Brđanin*, (Appeal Judgment), 3 April 2007, IT-99-36-A, paras 12-14.

beyond a *reasonable* doubt, because *reasonable* doubt exists in the mind of judges in need of persuasion.

i. *Lubanga*: A Closer Look

100. As indicated earlier, as at the time of the *Bemba* Appeal Judgment, the ICC Appeals Chamber had not developed a long line of appellate jurisprudence on article 81 appeals—i.e. appeals of acquittals, convictions or sentencing. There had only been four such appeals: *Lubanga* (delivered in December 2014); *Ngudjolo* (delivered in April 2015); *Bemba (Article 70)* (delivered in March 2018), and *Bemba* (delivered only in June 2018).

101. But, aside from those four cases that preceded the *Bemba* Appeal Judgment, the Appeals Chamber had delivered a host of decisions on article 82 appeals. These appeals did *not* concern acquittals, convictions or sentencing.

102. It bears emphasising the critical differences between appeals under article 81 and under article 82. Under article 81 the appellant has a right to appeal an 'error of fact.' [See article 81(1).] And, in the adjudication of that error, the Appeals Chamber has 'all the powers of the Trial Chamber.' [See article 83(1)]. Conversely, in relation to article 82 appeals, the Statute does not say that the appellant has a right to appeal an error of fact; nor does the Statute say that the Appeals Chamber has all the powers of the Trial Chamber when adjudicating appeals under that provision. The difference is of critical importance.

A Certain Tangle

103. In my respectful view, *Lubanga* was a decision *per incuriam*—a mistaken source of jurisprudence—in relation to the notion of 'appellate deference' for article 81 appeals. This is because the authority relied upon in *Lubanga* to introduce the idea of 'appellate deference' to factual findings in article 81 appeals was the previous jurisprudence of the ICC Appeals Chamber. The difficulty is that all those previous ICC judgments were article 82 appeals. It was thus mistaken in *Lubanga* to have introduced the idea of appellate deference into the ICC jurisprudence for purposes of article 81 appeals, merely by juxtaposing the jurisprudence of appellate deference that arose from article 82 appeals that serve an entirely different purpose. It was a classic case of crossing jurisprudential wires. The error was not minor because, in doing so, care was not taken to advert to the essential differences (outlined above) between article 81 and 82 appeals, let alone explain why that difference should not matter at the ICC, if it was thought that the difference was truly immaterial.

104. To begin with, this mistake is clear from paragraph 21 of the *Lubanga* Appeal Judgment and the authorities cited in support of the primary proposition in the paragraph. As the proposition was expressed in the paragraph:

> Regarding factual errors, the Appeals Chamber has held that it will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. [Footnote 13] As to the "misappreciation of facts", the Appeals Chamber has also stated that it "will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it". [Footnote 14]

105. Footnote 13 in paragraph 21 cites the following authorities, all of them from the ICC Appeals Chamber:

> *Ruto* et al OA Judgment, para 56; *Kenyatta* et al OA Judgment, para 55, footnote 117 referring to *Bemba* OA 2 Judgment, para 61, citing *Katanga and Ngudjolo* OA 4 Judgment, para 25. See also *Bemba* OA Judgment, para 52.

106. And, footnote 14 in paragraph 21 cites the following authorities, again, all of them from the ICC Appeals Chamber:

> *Ruto* et al OA Judgment, para 56; *Kenyatta* et al OA Judgment, para 55. See also *Mbarushimana* OA Judgment, paras 1, 17.

107. It is important to note the consistent occurrence of the code 'OA' in the citation to all the previous judgments referred to in footnotes 13 and 14 in the *Lubanga* Appeal Judgment. 'OA' stands for 'other appeals.' It derives from the phrase 'Appeal against other decisions' which appears in the subheading to article 82 of the Rome Statute. This contrasts with the code 'A', meaning 'appeal,' used to designate an appeal under article 81, which concerns 'Appeal against decision of acquittal or conviction or against sentence.'

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108. As an aside, it may be interesting to note for present purposes that it has strangely become a practice of the Appeals Chamber to call every decision of the ICC Appeals Chamber a' judgment' and every judgment of the Trial Chamber a 'decision'—even when a Trial Chamber titles its final 'judgment' as such, the Appeals Chamber somehow insists on changing it to 'decision.'[93] In other international criminal justice

[93] For instance, in *Prosecutor v Ngudjolo*, Trial Chamber II titled its judgment of 18 December 2012 as 'Judgment pursuant to article 74 of the Statute.' But in its own judgment on the appeal, dated 7 April 2015, the Appeals Chamber employed the following title: 'Judgment on the Prosecutor's appeal against the *decision* of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute"' [emphasis added]. Similarly in *Lubanga*, the Trial Chamber had titled its judgment as 'Judgment pursuant to Article 74 of the Statute', but the Appeals Chamber insisted on describing it as 'the *decision* of Trial Chamber I entitled "Judgment pursuant to Article 74 of the Statute"': See *Lubanga* Appeal Judgment, p 6, (emphasis added).

systems, the term 'judgment' is generally reserved for the disposition of the case on the merits, while 'decision' is reserved for interlocutory dispositions, regardless of the level of the Chamber. The practice is not convincingly motivated by ostensible fidelity to article 74 and article 83(4) of the Rome Statute, which respectively speak of the 'Trial Chamber's *decision'* and the '*judgement* of the Appeals Chamber.' [Emphasis added.] There is nothing at all in the Rome Statute to suggest an imposition of any distinction in terminology according to which the term 'judgment' retains exclusive application to the Appeals Chamber. Such a reading may play havoc to the import of article 50(1), which provides that the 'judgements of the Court'—not just the 'judgments of the Appeals Chamber'—shall be published in the official languages, as well as other decisions resolving fundamental issues before the Court. Such an exclusive terminology will surely import confusion to the application of article 109(3) which requires that '[p]roperty, or other proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.' In speaking of 'a judgement of the Court' in article 109(3), the Rome Statute cannot be understood as referring only to the 'judgment of the Appeals Chamber.'

109. If not for those awkward practices, it might have become more apparent that all the authorities cited in footnotes 13 and 14 of the *Lubanga* Appeal Judgment were, without exception, interlocutory decisions of the Appeals Chamber made under article 82. None of them engaged a pronouncement under article 81—concerning conviction, acquittal or sentencing.[94]

[94] Specifically, in their order of appearance in the paragraphs:

→ '*Ruto et al.* OA Judgment' is the 30 August 2011 'Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"';

→ '*Kenyatta et al.* OA Judgment' is the 30 August 2011 'Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"';

→ '*Bemba* OA 2 Judgment on the Interim Release Decision' is the 2 December 2009 'Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa";

→ '*Ngudjolo* OA4 Judgment' is the 9 June 2008 'Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release';

→ '*Bemba* OA Judgment' is the 16 December 2008 'Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release"'; and

*

110. It is instructive that the first in the series of decisions referred to in footnotes 13 and 14 of the *Lubanga* Appeal Judgment was the Appeals Chamber's decision of 9 June 2008 in the *Katanga* case. More interesting is the fact that the reference was specifically to paragraph 25 of that decision in the *Katanga* case. But on closer inspection, it is clear that the paragraph was dealing with '[a]ppraisal of the evidence relevant to continued detention' in an appeal against the decision of the Pre-Trial Chamber on the appellant's application for interim release. Similarly, the second decision referred to in the same footnotes in the *Lubanga* Appeal Judgment was the Appeals Chamber's decision of 16 December 2009 in the *Bemba* case. The specific reference was to paragraph 52 of that decision. Again, it is apparent from the very opening lines of that paragraph that the Appeals Chamber was recalling 'the standard of review for appeals against decisions rejecting applications for interim release.' None of those discussions of standard of appellate review concerned an article 81 appeal—i.e. an appeal against conviction, sentence or acquittal.

111. Also, the mistake of failing to distinguish article 81 and article 82 appeals, for purposes of the idea of 'appellate deference' is not assisted at all by later references to the pronouncements of the Appeals Chambers of *ad hoc* tribunals, given the difficulties already discussed above concerning the applicability of that jurisprudence in the light of the particular provisions of the Rome Statute.

112. Indeed, it is apparent from a review of paragraphs 22 to 24 of the *Lubanga* Appeal Judgment that the discussion entailed a very obvious analytical cross-wiring in a bid to devise jurisprudence of appellate deference for purposes of article 81 appeals. This was purportedly achieved by the simple artifice of juxtaposing the idea of appellate deference correctly enunciated in previous ICC Appeals Chamber's jurisprudence for purposes of article 82 appeals and, then, splicing it together with the jurisprudence of the *ad hoc* tribunals on the subject of appellate deference—while remaining completely silent on the fundamental differences between article 82 and article 81 appeals. This is particularly significant to the analysis, considering that article 83(1) (which gives the Appeals Chamber all the powers of the Trial Chamber) is an attribute of article 81 and not article 82.

→ '*Mbarushimana* OA Judgment' is the 14 July 2011 'Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release'"'.

113. In light of the foregoing shortcomings, the *Lubanga* Appeal Judgment was, in my view, an inadequate basis for the articulation of the idea of 'appellate deference' at the ICC—in relation to appeals against acquittal, conviction or sentence. It is less a credible basis for the complaint that there had been an 'established' or settled line of ICC jurisprudence on the point, which was improperly overturned in *Bemba* in relation to such appeals. The Review Consultants were mistaken in their bare contention otherwise.

j. *De Novo* Appellate Adjudication

114. Another consideration that motivated the more peremptory idea of appellate deference engages the worry that the appellate system at the ICC eschews *de novo* adjudication in respect of factual findings. Once more, the *Bemba* Appeal Judgment does not reject this consideration. It merely resets it, more appropriately.

115. It is useful to recall here the distinction drawn by the UN Human Rights Committee in the context of the appellate process. They rightly observed that to conduct a substantive appellate review of conviction or sentence 'on the basis of sufficiency of the evidence and of the law' is not the same thing as rehearing the case (in other words a trial *de novo*). As they put it:

> The right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5 [of the International Covenant on Civil and Political Rights] imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant. *However, article 14, paragraph 5 does not require a full retrial or a "hearing", as long as the tribunal carrying out the review can look at the factual dimensions of the case. Thus, for instance, where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the Covenant is not violated*.[95]

116. The process that the Human Rights Committee describes does not necessarily entail a *de novo* review. And it is a process that is commonly engaged in many appellate reviews. It was the process engaged in the *Bemba* appeal.

117. Here it must be pointed out that there are two kinds of *de novo* adjudication, none of which *Bemba* imports. The more comprehensive kind occurs by virtue of an appellate system in some parts of the world where an appeal in a criminal case involves an actual retrial of the case in whole or in part in the appellate court. Even in common law

[95] HRC General Comment No. 32, para 48 (emphasis added).

jurisdictions, notably, the UK, an appeal of a conviction handed down by a magistrate's court involves a fresh trial, with a Crown Court judge and two magistrates.[96] Similarly in some Canadian provinces, a superior court adjudicating an appeal against the judgment of a provincial judge may effectively try the case anew in the interest of justice.[97] Such appellate trials *de novo* are certainly not what *Bemba* contemplated. What was contemplated did not go beyond what the UN Human Rights Committee described—i.e. a substantive appellate review of a judgment of acquittal, conviction or sentence 'on the basis of sufficiency of the evidence and of the law,' without rehearing the case.

118. The second kind of *de novo* consideration is far more nuanced. It entails the obverse of what is implicated by the legitimate idea of appellate deference. That is to say, *de novo* consideration raises worries that the Appeals Chamber may proceed as if the jural slate before it is clean of the panoply of legal consequences that flow from the fact that the Trial Chamber has decided a matter at its own functional level. According to this manner of *de novo* consideration, a defendant's appeal on a factual matter would mean that the Prosecution would bear the primary burden of persuasion on a theory of presumption of innocence that remains unaltered on appeal, notwithstanding that the Trial Chamber has tried the case and found the defendant guilty. As explained earlier, this is not what *Bemba* stands for. Quite the contrary, *Bemba* stands for the proposition that the Appeals Chamber will not lightly overturn the factual findings of the Trial Chamber. In the result, the

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[96] See UK, gov.uk, Guidance: Criminal Procedure Rules and Practice Directions 2020, *Appeal*, available at <www.gov.uk/guidance/rules-and-practice-directions-2020>. It is notable also that s 79(3) of the *Senior Courts Act* (1981) [UK] provides as follows: 'The customary practice and procedure with respect to appeals to the Crown Court, and in particular any practice as to the extent to which an appeal is by way of rehearing of the case, shall continue to be observed.'

[97] See, for instance, section 117 of the *Provincial Offences Act* (1990) [Ontario, Canada]. According to the provision:

> 117 (1) The court may, where it considers it to be in the interests of justice,
> (a) order the production of any writing, exhibit or other thing relevant to the appeal;
> (a.1) amend the information, unless it is of the opinion that the defendant has been misled or prejudiced in his or her defence or appeal;
> (b) order any witness who would have been a compellable witness at the trial, whether or not he or she was called at the trial,
> (i) to attend and be examined before the court, or
> (ii) to be examined in the manner provided by the rules of court before a judge of the court, or before any officer of the court or justice of the peace or other person appointed by the court for the purpose;
> (c) admit, as evidence, an examination that is taken under subclause (b)(ii);
> (d) receive the evidence, if tendered, of any witness;
> (e) order that any question arising on the appeal that,
> (i) involves prolonged examination of writings or accounts, or scientific investigation, and
> (ii) cannot in the opinion of the court conveniently be inquired into before the court,
> be referred for inquiry and report, in the manner provided by the rules of court, to a special commissioner appointed by the court; and
> (f) act upon the report of a commissioner who is appointed under clause (e) in so far as the court thinks fit to do so.

appellant bears the primary burden of persuasion that the Trial Chamber had erred in respect of the relevant findings of fact. On an appeal against conviction, the Prosecution no longer bears the primary burden of persuasion. That burden now encumbers the defendant. His or her failure to discharge it would result in the failure of the appeal. That being the case, *Bemba* does not entail *de novo* considerations of factual findings, which would have meant retrial of the case in any event, before the Appeals Chamber merely because there was an appeal. But where the defendant discharges that primary burden of persuasion by articulating demonstrable factual error, the Appeals Chamber is *obligated* to intervene—as a function of an appellant's statutory right (under article 81) to appeal an 'error of fact' that the Trial Chamber has committed.

k. Holistic Appraisal of Evidence

119. For purposes of conviction beyond reasonable doubt, it is axiomatic that the evidence must be looked at as a whole.[98] But the axiom needs to be kept in its proper perspective.

120. There is certainly much that recommends pronouncements such as follows from the High Court of Australia:

> 'It is not the law that a jury should examine separately each item of evidence adduced by the prosecution, apply the onus of proof beyond reasonable doubt as to that evidence and reject it if they are not so satisfied.' At the end of the trial the jury must consider all the evidence, and in doing so they may find that one piece of evidence resolves their doubts as to another. For example, the jury, considering the evidence of one witness by itself, may doubt whether it is truthful, but other evidence may provide corroboration, and when the jury considers the evidence as a whole they may decide that the witness should be believed.[99]

121. Notwithstanding the general validity of the foregoing dictum, it is still the case that in the realms of the appropriate standard of proof in a criminal case, the axiom remains easier stated than applied. No defendant may be convicted despite the existence of reasonable doubt. The idea of a holistic appraisal of evidence cannot require sweeping under the forensic carpet evidential gaps and weakness that entail reasonable doubt in critical aspects of a criminal case. The challenge thus boils down to how to appraise the evidence as a whole, while not losing sight of those critical weaknesses.

122. The following very simple example may be illustrative. Consider that a particular criminal case has a set of five binary items of evidence, with each item allowing only the possibility of a 'Yes' or 'No' answer to the question of whether the item tends to

[98] See *R v B (G)* [1990] 2 SCR 57, p 77*a* [Supreme Court of Canada]. See also *Chamberlain v R* (1984) 58 AJLR 133, p 139 [High Court of Australia] ('*Chamberlain v R*').
[99] *Chamberlain v R*, p 139.

prove guilt. Assuming that even two of the items invite the 'No' answer and three the 'Yes', it will not be reasonable to ignore all the 'No' items, on the theory of holistic evidential appraisal. The dilemma persists even in any case in which that set of binary items of evidence is replicated any number of times.

123. The unreasonableness of ignoring the 'No' answers becomes more acute, if they relate to the more critical aspects of the case. For, instance, they could relate to more fundamental aspects of the case, such as questions that dispose of problems of identification of the accused, his presence at the scene of crime (where he is accused of actual perpetration), or his *mens rea* or mental state of fault. In those circumstances, it becomes difficult to reconcile the plurality of the 'Yes' answers with the minority of the 'No' answers on the truly critical aspects of the case, for the sake of the holistic theory of evidential appraisal.

124. Of course, the multidimensional construct that involves proof in a criminal case entails resolution of the trier's mind to the truth of a forensic proposition on the basis of the evidence adduced in the case. This imports, in turn, a composite dimension to the incidence of the binary scale outlined above. This is made more complex in the average case by the familiar phenomenon that evidence is often ambivalent, incomplete and contradictory in the ability to present a neat 'Yes' or 'No' answer in the binary way. Yet, the broader point remains the same.

125. In the circumstances, Dean Jennifer Mnookin's treatment of the 'atomism' versus 'holism' debate in the realms of judicial function merits helpful attention.[100] According to her, the distinction is surely something worth knowing—at least for purposes of conceptualising the judicial function in the relevant respect. Nevertheless, it is possible that the utility of the distinction, in the actual work of judges, may well be overlaboured. For, the choice of either method in that task is neither made out as such nor indeed desirable. The ascription of the pattern in judicial work may even be an artificial exercise, since the judicial assessment of evidence reveals alternating tendencies, rather than an immutable choice between the 'holistic' and the 'atomistic' method on the part of any judge; and there is salutary value in such alternation of approaches as appropriate. I share that assessment.

126. Perhaps, the broader point is that the holistic theory ultimately raises the jurisprudence of proof in a criminal case no higher than the traditional inquiry that focuses on the quality of a contended doubt. That traditional focus requires not only that

[100] Jennifer L Mnookin, 'Atomism, Holism, and the Judicial Assessment of Evidence' in 60 *UCLA L Rev* 1524 (2013).

there must be reason for any doubt; but also that any such reason must not be fanciful, taking all the other evidence—i.e. the evidence as a whole—into account. The holistic theory is merely another approach to the very same understanding.

127. How, then, is proof beyond reasonable doubt to be appreciated?

l. Appreciating the Standard of Proof beyond Reasonable Doubt

128. From time immemorial, an appreciation of the standard of proof beyond reasonable doubt has been a source of perennial concern for the judicial systems that apply that standard. In the UK, the Court of Appeal for England and Wales has simply explained that what is required is a 'clear instruction to the jury that they had *to be satisfied so that they were sure* before they could convict.'[101] It is not enough to instruct the jury to be 'satisfied' that the defendant is guilty. They have to be 'sure' before they can convict.[102]

129. As a practical matter, however, some of the better elaborations of the standard may be found in the model jury instructions that the Canadian National Judicial Institute has recommended for judges, to assist the understanding of juries. The recommendations are as follows:

> [5.1.5] It is virtually impossible to prove anything to an absolute certainty, and the [Prosecution] is not required to do so. Such a standard would be impossibly high. However, the standard of *proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt*. You must *not find [the Defendant] guilty unless you are sure s/he is guilty*. Even if you believe that [the Defendant] is *probably guilty or likely guilty, that is not sufficient.* In those circumstances, you must give the benefit of the doubt to [the Defendant] and find him/her not guilty because the Crown has failed to satisfy you of his/her guilt beyond a reasonable doubt.
>
> [5.1.6] I will explain to you the essential elements that the [Prosecution] must prove beyond a reasonable doubt to establish [the Defendant's] guilt. For the moment, the important point for you to understand is that the requirement of proof beyond a reasonable doubt applies to each of those essential elements. It does not apply to individual items of evidence. You must decide, looking at the evidence as a whole, whether the [Prosecution] has proved [the Defendant's] guilt beyond a reasonable doubt.[103]

130. In *Victor v Nebraska*, US Supreme Court Justice Ginsburg cited with approval the model jury instructions proposed by the US Federal Judicial Center. The model is particularly helpful, not only because it contrasts the standards of proof in civil cases, but

[101] See *R v Miah*, para 34, (emphases added).
[102] *Ibid*, para 33.
[103] See Canadian National Judicial Institute, Model Jury Instructions, *5.1 Presumption of Innocence, Burden of Proof and Reasonable Doubt*, (last revised March 2011) (emphases added).

also stresses the appropriate standard of the conviction of the mind for conviction in criminal cases. In the words of the model:

> [T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. *Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt*.
>
> Proof beyond a reasonable doubt is proof that leaves you *firmly convinced* of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are *firmly convinced* that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.[104]

131. It may be helpful to note that in a famous Canadian case, the Supreme Court attempted to simplify how the jury should apply the standard of proof beyond reasonable doubt, when the defendant testified in a case. According to the Court:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.[105]

132. It may also be considered that the meaning of conviction of the mind as to guilt beyond reasonable doubt may be given quantitative interpretation in the following famous maxim, commonly known as the Blackstone's ratio: '[I]t is better that ten guilty persons escape than that one innocent suffer.'[106] It is that understanding of proof of 'defendants' guilt' in a 'fair trial' that underlies the saying, recalled earlier, attributed to Robert H Jackson (Nuremberg Chief Prosecutor and Associate Justice of the US Supreme Court, to the effect that 'a fair trial means an uncertain outcome. If we don't prove the defendants' guilt, we have to let them walk, even if we can smell the blood on their hands.'[107]

133. It was precisely the foregoing understandings of the law that informed the *Bemba* majority's appreciation of the proposition that the Appeals Chamber may not uphold a finding of fact which, in its view, no reasonable Trial Chamber would have

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[104] See *Victor v Nebraska*, p 27 (emphases added). See also Federal Judicial Center, *Pattern Criminal Jury Instructions*, (1987) [US], p 28, Instruction 21.
[105] *R v W(D)* [1991] 1 SCR 742, p 758 [Supreme Court of Canada].
[106] See William Blackstone, *Commentaries on the Laws of England* [George Sharswood edition, 1893] Bk IV, ch 27, p 358.
[107] See the film *Nuremberg* (2000).

properly made. In light of article 66(3) of the Rome Statute, which permits convictions *only* when 'the Court' is convinced beyond reasonable doubt that the accused is guilty, a conviction cannot be reasonable if that standard is not met. For that standard to be met, a reasonable Trial Chamber must be 'sure' or 'firmly convinced' of the guilt of the accused. The Appeals Chamber cannot uphold a conviction, if it is not convinced that the record of the evidence could allow a reasonable Trial Chamber to be 'sure' or 'firmly convinced' that the accused person was guilty.

PART II: ARTICLE 74(5) OF THE ROME STATUTE

1. The 'Shall' Imperative

134. Much of the debate in this appeal concerning the interpretation of article 74(5) is occasioned by the occurrence of the auxiliary verb 'shall' in many places in the provision. Naturally, this has led some to take the view that failure to do that which 'shall' be done, must result in the invalidation of what was done that was not in keeping with that imperative. This of course is much too simple an approach to reflect correctly the realities of an endeavour so complex as the administration of justice.

135. Society is served best when the law unites with common sense and ordinary experiences; except in those instances when what is viewed as a matter of common sense or ordinary experience harbours an appreciable risk of serious injustice. In a famous passage in *Oliver Twist*, Charles Dickens delivers the message of the law's need to adhere to common sense and ordinary experience, in the following words:

> "If the law supposes that," said Mr Bumble, squeezing his hat emphatically in both hands, "the law is a ass — a idiot. If that's the eye of the law, … and the worst I wish the law is, that his eye may be opened by experience — by experience."

136. But it is not only Mr Bumble that worries about excessive *rigor iuris*. Such worries have also vexed eminent jurists themselves. Amongst them was Lord Wilberforce who famously reproached the 'austerity of tabulated legalism,'[108] which can induce a miscarriage of justice in the name of blind adherence to perceptions of the letters of the law in a certain way. It is even possible that those who wrote those letters of the law were motivated by entirely different mischiefs, or had infelicitously expressed themselves in relation to the mischief they were addressing. Here, we recall the wisdom of the dictum

[108] See *Minister of Home Affairs v Fisher* [1980] AC 319, p 328 [Canada Privy Council]. The dictum of Lord Wilberforce has been quoted with approval in the Canadian Supreme Court. See, for instance. *Hunter v Southam* [1984] 2 SCR 145, p 156 [Canada Supreme Court].

in the *Pertulosa Claims* case cautioning that 'an interpreter is likely to find himself distorting passages if he imagines that their drafting is stamped with infallibility.'[109]

137. There are, of course, different strategies that jurisprudence has devised in the bid to protect the law from perceptions of derisive over-simplifications resulting from the use of discrete words and phrases in legislation. As discussed presently, the interpretation of article 74(5) of the Rome Statute invites a consideration of some of those strategies, in relation to the word 'shall' that occurs in the text.

138. Since the 'shall' whose purpose is in issue is an English word, it behoves this international court to pay close attention to the views of the supreme courts and the most eminent publicists in the English-speaking legal world, to see how they have coped with that word in the legal context.

139. There is, of course, a surfeit of eminent views to the effect that in certain circumstances 'shall' may mean 'may.'[110] But that is possibly an awkward way to emphasise a rather subtle but critical point.

140. Undeniably, 'shall' lays down an imperative course of action. But, there is quite simply no agreement in the authorities to the effect that the wholesale invalidation of a prior legal or judicial process must always be the fate of everything done in the process that was not strictly in keeping with a 'shall' imperative. Even in ordinary life, failure to act in keeping with a command does not always result in the most drastic punishment possible. Quite the contrary. Unless the consequences are already clearly prescribed in escapable terms, appropriate punishment is often calibrated according to what is suitable in the given circumstances. Suitable consequences may range from complete pardon or mild admonition of an aberration, before escalation to the more drastic measures.

141. It may be enough to make a simple correction of slip errors that are amenable to correction. One classic example of such procedures may be found in the *Criminal Procedure Rules* of New Zealand. The court or a Registrar is allowed to correct a judgment or order, or the reasons for the judgment or order: (a) on the court's or Registrar's own

[109] Robert Jennings and Arthur Watts, *Oppenheim's International Law*, vol 1, 9th ed [London & New York: Longman, 1996] Part 4, Chapter 14, p 1273, footnote 12, citing *Pertulosa Claim*, ILR, 18, 18 (1951), No 129, p 418.

[110] See *Gutierrez de Martinez et al v Lamagno et al.* 515 US 417 (1995) [US Supreme Court], pp 432-433, footnote 9; *Railroad Co v Hecht* 95 US 168 (1877) [US Supreme Court], p 170; *Fidelity Bank plc v Monye* SC.263/2005 (2012) [Supreme Court of Nigeria] ('*Fidelity Bank plc v Monye*'). See also *Ifezue v Mbadugha* 1 SCNLR 427 (1984) [Supreme Court of Nigeria] ('*Ifezue v Mbadugha*'), especially per Bello JSC observing as follows: 'It is germane to the issue to state that the word "shall" has various meanings. It may be used as implying futurity or implying a mandate or direction or giving permission.'

initiative; or (b) on an application made for that purpose. Such corrections may be made if: (a) the judgment or order, or the reasons for the judgment or order, contain a clerical mistake or an error arising from any accidental slip or omission whether the mistake, error, slip, or omission was made by an officer of the court or not; or (b) any judgment or order is so drawn up as not to express what was actually decided and intended.[111]

142. No doubt, such corrections are readily made if the only error to speak of concerns, for instance, the requirement to file a judgment in writing, as in this case. Where it is possible simply to print out or recreate the precise text that the Presiding Judge read out in open court and have that filed in the Registry, the law would richly deserve its Dickensian reproach if appellate judges would insist on invalidating a two-year trial, merely because of such a slip that is so readily corrected.

143. In all of this, care must be taken to avoid occasioning greater harm—especially to people who bear no blame for the given error—in the name of punishing those who violated the given command. Consider this. If upon the successful completion of a dam it is discovered that the engineers had not observed every detail of the imperatives prescribed in the building plan or code, there may be a question of justice in asking whether the only appropriate punishment in the circumstances is to demolish the entire dam, merely because a certain detail in the building plan or code was not observed—notwithstanding that the consequences of the punitive demolition may be flooding that may cause immense damage to private riparian estates. It may be that the more appropriate punishment for the engineers would be severe review (which even may blight hard-earned professional reputation) or the withholding of payment in whole or in part, or some other punishment that need not harm other persons who were not responsible for the error. Similarly, much injustice may result from an invariable insistence that the invalidation of a concluded judicial process is the only appropriate remedy whenever judges violate a 'shall' imperative that should have guided the process.

144. Motivated by the need to avoid disproportionate consequences to violations of procedural imperatives, Supreme Courts in the English speaking world have developed case law that: (a) draws a distinction between 'mandatory' and 'directory' imperatives; (b) insists on inquiring into the intention of the legislation as to the better guide to appropriate consequence of violation, taking into account the entire legislative scheme; and, (c) conduct a functional analysis to see whether justice was still done adequately, notwithstanding the violation in question. All this is to say, violation of an imperative does not automatically produce invalidation of a prior process.

[111] See New Zealand, *Criminal Procedure Rules* (2012), r 1.6 - Correction of accidental slip or omission

2. 'Mandatory' vs 'Directory' Requirements

145. In construing the different norms indicated in article 74(5), it may be necessary always to keep in mind the distinction that exists in helpful jurisprudence, between *requirements* that are 'mandatory' and those that are only 'directory.' That distinction entails a strategy that seeks to liberate the law from excessive rigidity that is pointless—if not entirely counterproductive.

146. The word 'shall' serves the accepted purpose of signalling a requirement. But jurisprudence also amply instructs that the word does not always carry a mandatory connotation. 'Shall' has in many instances been held as only directory. As Judge Shahabuddeen put it in a decision of the Appeals Chamber of the ICTR, '[I]t is said that the "language of a statute, however mandatory in form, may be deemed directory whenever legislative purpose can best be carried out by [adopting a directory] construction."'[112]

147. At the national level, there is, as indicated earlier, an abundance of legal authorities to that effect from the senior ranks of the judiciary.[113] A useful representative of the jurisprudence in that regard is the following pronouncement of the Supreme Court of India:

> The use of the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, on consequences to flow from such construction would not so demand. *Normally, the word 'shall' prima facie ought to be considered mandatory but it is the function of the Court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon*. The word 'shall', therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be described to the word 'shall' as mandatory or as directory accordingly. Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory. *However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory*.[114] [Emphasis added]

148. Thus, we see, that one of the determinant factors is the consequences of the failure to comply with the requirements. As indicated above, a requirement will be

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[112] *Prosecutor v Barayagwiza*, (Decision [on] Prosecutor's Request for Review or Reconsideration), 31 March 2000, [ICTR Appeals Chamber], Separate Opinion of Judge Shahabudeen, para 53.

[113] See *Fidelity Bank plc v Monye*. See also *Ifezue v Mbadugha* ,especially per Bello JSC observing as follows: 'It is germane to the issue to state that the word "shall" has various meanings. It may be used as implying futurity or implying a mandate or direction or giving permission.' See also *State v Rice*, 174 Wash 2d 884 (2012)], paras 23-26 [US Supreme Court of Washington].

[114] *State of Haryana & Another v Raghubir Dayal*, (1995) 1 SCC 133, para 5 [Supreme Court of India] (emphasis added).

construed as directory if 'serious general inconvenience' let alone injustice 'is caused to innocent persons or general public, without very much furthering the object of the legislation.

149. According to this approach, the question arises whether it is correct to invalidate an entire criminal trial that lasted two years, during which the defendants were in detention. Is it right to re-expose them to the jeopardy of a second fresh prosecution, merely because the judges in the case committed an 'error,' by failing to follow the formality required for the rendering of the judgment—assuming even that they had indeed committed an error in proceeding as they did?

3. The Purposive Approach in view of Consequences of Total Invalidity

150. One of the more recent instances of the relevant lines of jurisprudence—and a modulating one—is the 2008 judgment of the Supreme Court of Uganda in *Sebalu v Njuba & the Electoral Commission*.[115] As part of its pronouncements, the Supreme Court observed as follows:

> The courts have overtime endeavoured, not without difficulty, to develop some guidelines for ascertaining the intention of the legislature in legislation that is drawn in imperative terms. One such endeavour, from which the courts in Uganda have often derived guidance is in the case of *The Secretary of State for Trade and Industry vs. Langridge* (1991) 3 All ER 591, in which the English Court of Appeal approved a set of guidelines that are discussed in *Smith's Judicial Review of Administrative Action* 4th Ed.1980, where at p.142 the learned author opines that the court must formulate its criteria for determining whether the procedural rules are to be regarded as mandatory or as directory notwithstanding that judges often stress the impracticability of specifying exact rules for categorizing the provisions.[116]

151. In elaborating on the point, the Supreme Court quoted the following text of *Smith's Judicial Review of Administrative Action*:

> The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. *Although nullification is the natural and usual consequence of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if serious public inconvenience would be caused*

[115] *Sebalu v Njuba & the Electoral Commission* [2008] UGSC 7.
[116] *Ibid*, p 9 (emphasis in original).

by holding them to be mandatory or if the court is for any reason disinclined to interfere with the act or decision that is impugned.[117]

152. In further elaboration of the point, the Supreme Court also quoted the following pronouncements of Lord Steyn in *R v Soneji & Anor*, a judgment of the UK House of Lords:

> A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply invalidates the act in question. Where it is merely directory a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance.[118]

153. Ultimately, the Supreme Court of Uganda approved of a different, less formalistic approach—described by Lord Steyn as 'a new perspective' discerned from Lord Steyn's review of the case law of the 'English Court of Appeal, the Privy Council, and courts in New Zealand, Australia and Canada.'[119] The approach is to ask whether the legislator may fairly be taken to have intended total invalidity of a given process as the consequence of failure to follow particular statutory prescriptions laid down to guide that process. As Lord Steyn described that approach:

> Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in *Attorney General's Reference (No.3 of 1999)*, *the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can be fairly taken to have intended total invalidity.*[120]

154. In line with the foregoing approach, the Supreme Court of Uganda agreed with the following dictum of the High Court of Australia in *Project Blue Sky Inc. Australian Broadcasting Authority*:

> [A] court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory, and if directory, whether there has been substantial compliance. *A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid* …. In determining the question of purpose, regard must be had to the language of the relevant and the scope and object of the whole statute.[121]

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[117] *Ibid*, pp 9-10 (emphasis in original).
[118] *Ibid*, p 10.
[119] *Ibid*.
[120] *Ibid*, (emphasis in original).
[121] *Ibid*, pp 10-11 (emphasis in original).

155. In the end, the Supreme Court of Uganda 'had no hesitation in answering in the negative, the question whether the purpose and intention of the legislature was to make an act done in breach of [the statutory provision in issue] invalid. In so doing, we noted the use of imperative language in the provision but also took into consideration the whole purpose of enactment of [the relevant part].' In the view of the Supreme Court of Uganda, the examination of the entire statutory scheme indicated that the legislative intent was the matter over which the statute in issue was concerned. That matter required that the question presented was to be 'determined on the merit' following a 'fair trial,' rather than by the mere technicality of violation of discrete apparently imperative provisions. As the Supreme Court put it:

> It cannot be gainsaid that the purpose and intention of the legislature in setting up an elaborate system for judicial inquiry into alleged electoral malpractices, and for setting aside election results found from such inquiry to be flawed on defined grounds, was to ensure, equally in the public interest, that such allegations are subjected to fair trial and determined on merit.[122]

156. Some jurisdictions have even gone further to legislate the need to focus on the merits rather than the technicality of failure to follow procedural requirements. In Ontario, Canada, for instance, the Rules of Criminal Procedure begin with a statement of the 'Fundamental Objectives' of the Rules as follows: 'The fundamental objective of these rules is to ensure that proceedings in the Ontario Court of Justice are dealt with justly and efficiently.' [123] Next, the phrase '[d]ealing with proceedings justly and efficiently' is explained as including: (a) dealing with the prosecution and the defence fairly; (b) recognizing the rights of the accused; (c) recognizing the interests of witnesses; and (d) scheduling court time and deciding other matters in ways that take into account (i) the gravity of the alleged offence, (ii) the complexity of what is in issue, (iii) the severity of the consequences for the accused and for others affected, and, (iv) the requirements of other proceedings.[124] The Courts are required to 'take the fundamental objective into account when: (a) exercising any power under these rules; or (b) applying or interpreting any rule or practice direction.'[125] And, finally, in one of the terminal provisions of the Rules, the Court is permitted to 'excuse non-compliance with any rule at any time to the extent necessary to ensure that the fundamental objective … is met.'[126] Similarly, in the Rules of Criminal Proceedings of the Ontario Superior Court, '[a] judge of the court may only

[122] *Ibid*, p 11.
[123] See *Criminal Rules of the Ontario Court of Justice*, (Canada, Ontario), r 1.1(1).
[124] *Ibid*, r 1.1(2).
[125] *Ibid*, r 1.1(4).
[126] *Ibid*, r 5.3.

dispense with compliance with any rule where and to the extent it is necessary in the interests of justice to do so.'[127]

157. The tendency to not allow technical procedural violations to undermine the merits of a case is not unique to Canada or Uganda. The same tendency exists in Australia,[128] Kenya,[129] Tanzania,[130] and, the United States.[131] The tendency is fully consistent with the general principle of justice, which insists that rules of procedure are merely handmaidens of justice and not its mistress. Collins MR classically expressed that principle in the following words:

> Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, *as to be compelled to do what will cause injustice in the particular case*.[132]

158. In my view, this principle must govern 'the relation of rules of practice to the work of justice,' regardless of where those rules of practice (or procedural imperatives) are contained—whether they are in a separate document titled 'Rules of Procedure and

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[127] *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, (Canada), SI/2012-7, r 2.01.

[128] In this regard, the following provisions may be noted in the Australian *Federal Court (Criminal Proceedings) Rules* (2016): 'The Court may dispense with compliance with these Rules, either before or after the occasion for compliance arises': r 1.06; 'The Court may make an order that is inconsistent with these Rules and in that event the order will prevail': *Ibid*, r 1.07. Similarly, r 1.15 of the *Supreme Court (Criminal Procedure)* Rules (2017) (Australia, Victoria) provides as follows: '(1) A failure to comply with these Rules is an irregularity and does not render a proceeding or step taken, or any document, judgment or order in a proceeding a nullity. (2) The Court may dispense with compliance with any of the requirements of these Rules, either before or after the occasion for compliance arises. (3) Without limiting paragraph (2), the Registrar may dispense with compliance with any of the requirements of these Rules in relation to criminal appeals, either before or after the occasion for compliance arises. (4) Except as provided by these Rules, a failure to comply with these Rules or with any rule of practice in force under the Criminal Procedure Act 2009 shall not prevent the prosecution of an appeal or an application for leave to appeal if the Court considers that, in the interests of justice, the failure should be waived or remedied and the matter proceed.' To the same effect, r 14(1) of the *Supreme Court Criminal Rules* of South Australia (2014) provides as follows: 'The Court may at any time dispense with compliance with all or any part of these Rules including a rule relating to or governing powers that the Court may exercise on its own initiative.' Similarly, r 6(1) of the Australian Capital Territory, *Court Procedures Rules* (2006): 'The court may, by order, dispense with the application of a provision of these rules to a particular proceeding, before or after the provision applies and on any conditions it considers appropriate.'

[129] *The Constitution of Kenya* (2010) (Kenya) requires that Rules of Court must conform to the principle that 'the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities': see s 22(3)(d).

[130] *The Constitution of the United Republic of Tanzania* (1977) (Tanzania) provides: 'In delivering decisions in ... civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say... to dispense justice without being tied up with provisions which may obstruct dispensation of justice': see article 107A(2)(e).

[131] The US *Federal Rules of Criminal Procedure* provides: 'These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay': See r 2. And the *Local Rules of Practice*, (US. District Court for the District of Nevada) more explicitly provides: 'The Court may *sua sponte* or on motion change, dispense with, or waive any of these rules if the interests of justice so require': r IA 1-4.

[132] *In Re Coles and Ravenshear* [1907] 1 KB 1 at p 4 [UK, Court of Appeal of England and Wales] (emphases added).

Evidence' or whether they are in a constitutive instrument of a court titled 'Statute' of the Court. What matters is whether the particular prescription pertains to a procedure or to a substantive right of a party.

159. This emphasis on the need to focus on the merits of the case, rather than on the technicality of violation of an imperative provision effectively describes the central approach to appellate decision-making in appeals involving complaints that the trial court had failed to follow an imperative that must guide the trial.

160. If we are to follow the guidance of the Supreme Court of Uganda in *Sebalu*, the Appeals Chamber in the case at bar would be compelled to examine the significance of other provisions of the Rome Statute that have a bearing on what the Trial Chamber did in this case. That inquiry requires balancing the requirements of article 74(5) with the imperatives of article 21(3), which provides that the 'application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights …'. Notably, 'this article' as referred to in the provision includes clause 21(1)(a) which provides that the Court 'shall apply … in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence.' In that regard, the Appeals Chamber must consider that the manner in which the Trial Chamber proceeded was not the result of absent-mindedness or sheer ignorance of what article 74(5) and rule 144 of the Rules required them to do. Quite the contrary, the Trial Chamber explained the human rights imperatives that drove their method, in the following way:

> The Chamber recognises that it would have been preferable to issue the full decision at this time. However, although rule 144(2) of the Rules of Procedure and Evidence states that the Chamber must provide copies of its full decision 'as soon as possible' after pronouncing its decision in a public hearing, there is no specific time limit in this regard.
>
> *The Majority is of the view that the need to provide a full and reasoned opinion 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*.[133]

[133] Trial Chamber I, Transcript of Hearing, 15 January 2019, pp 3-4 (emphasis added). See also Trial Chamber, Reasons 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, 16 July 2019 ('Reasons for the 15 January 2019 Decision'), p 7.

161. And beyond the imperatives of human rights indicated in article 21(3) of the Rome Statute, another provision that must be put in the scale against article 74(5) is article 85(1), which provides for the payment of compensation for victims of 'unlawful detention'. Surely, the judges of the Majority must be expected to be troubled by the pressure of their own conscience, to the effect that the continued detention of the defendants (beyond the point when the judges were convinced of acquittal) is an ethical conduct that has significance from the point of view of article 85(1).

4. The Functional Approach

162. A related approach employed by some appellate courts when dealing with failure of trial judges to respect the norms that 'shall' guide their functions has been to adopt the 'functional' approach in the assessment of the error. The Supreme Court of Canada has developed that approach in a line of case law, dealing with complaints about inadequate judicial reasons,[134] beginning with two companion judgments—*R v Sheppard*[135] and *R v Braich*[136]—delivered on 21 March 2002.

163. The facts of *Sheppard* are these. The accused, a carpenter with no criminal record, separated from his girlfriend, with whom he had a stormy relationship that ended in acrimony. He had been renovating his house and, two days after the separation, his ex-girlfriend told the police that he had confessed to her to stealing two windows from a local supplier. The supplier confirmed that two windows were missing from a storage truck parked across the road from his shop. Employees and passers-by had access to the area and there had been no indication of forced entry. The accused was charged with possession of stolen property. At trial, the ex-girlfriend's testimony was the only evidence connecting him to the missing windows. She testified that he stole them 'to use in his house,' but there was no evidence that a search had been made of his premises. No stolen windows were found in the accused's possession or elsewhere. The accused testified and asserted his innocence. Despite the weaknesses of the Crown's evidence, he was convicted. In a reasoning of only one sentence, in which none of the troublesome issues in the case was addressed, the trial judge said only this: 'Having considered all the testimony in this case and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged.' Characterising the trial judge's reasons as 'boiler plate,' a majority of the Court

[134] Justice David Stratas, of the Federal Court of Appeal of Canada, has provided a useful summary of the evolution of the jurisprudence of the Supreme Court of Canada on this subject, in his paper titled 'Decision-makers Under New Scrutiny: Sufficiency of Reasons and Timely Decision-Making,' Presented at the CIAJ Roundtable. Toronto, Ontario, Canada, 3 May 2010.
[135] *R v Sheppard* [2002] 1 SCR 869 [Supreme Court of Canada] ('*R v Sheppard*').
[136] *R v Braich* [2002] 1 SCR 903 [Supreme Court of Canada] ('*R v Braich*').

of Appeal set aside the conviction and ordered a new trial, on grounds of absence of adequate reasons. On further appeal, the Supreme Court upheld the judgment of the Court of Appeal.

164. In their own reasoning, the Supreme Court articulated the importance of reasoning in the adjudicatory function. And the adequacy of judicial reasoning depends on whether those reasons would pass the 'functional test,' in the sense of assisting appellate review,[137] judicial accountability[138] and transparency of the judicial process.[139] As the Supreme Court put it:

> [T]he requirement of reasons is tied to their purpose and the purpose varies with the context. At the trial level, the reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be.[140]

165. Quite significantly, the Supreme Court stated the kernel of the functional approach in the following terms: 'The requirement of reasons, in whatever context it is raised, should be given a functional and purposeful interpretation.'[141] As for how the functional test is to be appreciated in the context of the appellate process, the Supreme Court held that '[t]he mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose.'[142] According to the Supreme Court, an appellate court is not free 'to intervene simply because it thinks the trial court did a poor job of expressing itself.'[143] Against that background, the Supreme Court specifically rejected the idea of challenges to judicial reasoning as 'a freestanding ground of appeal' that does not pass the muster of the 'functional test'. As the Court put it:

> [T]he effort to establish the absence or inadequacy of reasons as a freestanding ground of appeal should be rejected. A more contextual approach is required. The appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case.[144]

166. Having subjected the single-sentence reasoning of the trial judge to that 'functional test,' the Supreme Court found that the *Sheppard* reasoning did not pass the test.

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[137] *R v Sheppard*, para 15.
[138] *Ibid.*
[139] *Ibid*, para 24.
[140] *Ibid*.
[141] *Ibid*, para 53.
[142] *Ibid*, para 28.
[143] *Ibid*, para 26.
[144] *Ibid*, para 33.

167. But, in the companion case of *Braich*, the Supreme Court reached the opposite conclusion. A group of friends was swept with low trajectory gunfire from a passing van. One victim died and three others were wounded. A van owned by one of the respondent brothers was later found in a parking lot, thoroughly cleaned. At trial, the respondents were convicted of manslaughter and aggravated assault primarily, if not exclusively, on the basis of eyewitness identification by the two main prosecution witnesses who were members of the victim group. The first witness identified one of the respondents as the driver, and the second identified both respondents respectively as the driver and shooter. The trial judge noted the possibility of collusion and some omissions and variation from their prior statements to police but nonetheless accepted their identification evidence as both credible and reliable. The trial judge rejected the identification evidence of a third eyewitness as unreliable. On appeal, a majority of the Court of Appeal considered the convictions to be unsafe, because the frailties and inconsistencies of the identification evidence had not been subjected to sufficient analysis in the reasons for judgment. The convictions were quashed and a new trial ordered. On further appeal, the Supreme Court reversed the Court of Appeal.

168. The Supreme Court reasoned that, while the trial judge in the companion case of *Sheppard* had issued inadequate reasoning of only one sentence, in *Braich* the trial judge's reasons were 17 pages long and were therefore adequate to inform the accused and the appeals court. Identification was the only live issue at trial. The respondents were left in no doubt as to why the convictions were entered. The trial judge summarised the defence in terms to which no objection was taken and his reasons show that he came to grips with the principal issues defined by the defence. He accepted some of the identification evidence as credible and reliable and, showing himself alive to the major difficulties with the identification evidence, resolved those difficulties against the respondents. The Supreme Court recalled the functional test, in the terms that '[t]he appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case.'[145] And '[t]he test, in other words, is whether the reasons adequately perform *the function* for which they are required, namely to allow the appeal court to review the correctness of the trial decision.'[146]

169. Having reviewed the circumstances of the case, the Supreme Court found that the functional test was met. The identification evidence was somewhat confusing and contradictory, but the basis of the trial judge's acceptance of the evidence of the two main

[145] *R v Braich*, para 31.
[146] *Ibid*, (emphasis in original).

prosecution witnesses was not in doubt.[147] The majority of the Court of Appeal considered the conviction 'unsafe,' but that conclusion was driven more by the peculiarities of the facts than the alleged inadequacies of the trial reasons.[148]

170. Echoing the earlier theme in *Sheppard*, that an appellate court may not intervene merely because it thinks that the 'trial court did a poor job of expressing itself,'[149] the Supreme Court rejected the expectation that trial judges need 'to exhibit the novelist's touch for character delineation and motivation'[150] when writing judgments. Similarly, the Supreme Court rejected the idea that appellate courts may correctly overturn a trial judgment on the supposition that 'if the trial judge had thought harder about the problems and written a more extensive analysis, he might have reached a different conclusion.'[151]

171. *R v Walker*[152] is another interesting judgment in the *Sheppard* and *Braich* progeny. *Walker* is particularly instructive as regards how the functional approach operates in relation to the standard of proof beyond reasonable doubt even in the context of prosecution of an especially odious crime. Bradley Walker was charged with second degree murder for shooting and killing his live-in partner, Valerie Reynolds, following an eventful night of heavy drinking by the defendant and a conflict between the couple, when in anger the victim left the defendant at a bar because of his efforts to arrange a sexual *ménage à trois*. At the end of the trial, the trial judge acquitted him of the charge of murder, but convicted him instead of the charge of manslaughter, reasoning as follows:

> Although it's not a specific finding of fact, it is my distinct impression that in part due to the effects of alcohol and in part to his personality, at the time of the shooting Walker was engaged in an act of bravado or machismo. He was showing off his latest toy [the shotgun] in an effort to intimidate Ms Reynolds and impress her with his disappointment at her failure to embrace his desire to engage in a sexual threesome and her gall at walking away from him at the bar. As disgusting and as utterly contemptuous as I find that conduct to be, it is not and I cannot find it to be tantamount to an intention to kill or an intention to cause bodily harm likely to cause death. And under the circumstances, I find Walker not guilty of murder, but guilty of manslaughter.[153]

172. A majority of the Court of Appeal reversed the trial judge's acquittal of second degree murder and ordered a new trial. In reaching his decision the trial judge noted evidence of intoxication and accident, but in the view of the majority he did not make clear the 'pathway' he followed to the acquittal of the appellant of the more serious

[147] *Ibid*, para 35.
[148] *Ibid*, para 39.
[149] *R v Sheppard*, para 26.
[150] *R v Braich*, para 39.
[151] *Ibid*.
[152] *R v Walker* [2008] 2 SCR 245 [Supreme Court of Canada] ('*R v Walker*').
[153] *Ibid*, para 13.

charge. According to the Court of Appeal majority, it was not clear from the trial judge's reasoning whether the acquittal was 'based on the evidence of the accused's intoxication, or on the evidence of his having accidentally shot [the victim], or on some combination of the two (in the sense that intoxication can increase the prospect of accident)'.[154]

173. The dissenting Court of Appeal judge disagreed. According to her, the case was not a particularly complicated case, as it involved a charge of second degree murder and the defences of accident and drunkenness. It is in light of such an uncomplicated nature of the case that the trial judge's reasons must be read. According to the dissenting appellate judge, what is important is that the trial judge clearly concluded that the specific intent for murder had not been made out. Once the defence of accident is eliminated, the basis for the verdict becomes obvious. In the event, the reasons are sufficient to permit an assessment of the acquittal based on a defence of intoxication. Thus, the dissenting appellate judge considered that the trial judge's reasons reveal no error of law with respect to the defence of intoxication. She would have dismissed the appeal.[155]

174. In their turn, the Supreme Court agreed with the dissenting judge of the Court of Appeal, reversed the majority and restored the judgment of the trial judge, holding that 'the trial judge's reasons in this case adequately explained his reasons for the acquittal on the second degree murder charge,'[156] thus revealing no error that invited appellate intervention. The prosecution had established culpable homicide beyond a reasonable doubt, thus warranting the manslaughter conviction. The remaining issue was whether the evidence had established beyond reasonable doubt the requisite *mens rea* for murder—i.e. that the appellant *intended* to cause the death of the victim, or to cause her bodily harm that he knew was likely to cause her death, and was reckless whether death ensued or not.[157] The Supreme Court was not persuaded by the prosecution's argument that there was a minimum duty on the trial judge to indicate whether his reasonable doubt in relation to the *mens rea* for murder was due to intoxication, accident, or a combination of both. The Supreme Court found that the reasons of the trial judge on that point were 'intelligible when assessed in terms of their appellate purpose.'[158] The trial judge reasoned that the culpable homicide resulted from an accident fuelled by alcohol or 'some combination of the two (in the sense that intoxication can increase the prospect of accident)'.[159] As the Supreme Court noted, '[t]he trial judge did not find that the consumption of alcohol prevented the appellant from forming the requisite intent for

[154] *R v Walker*, para 1.
[155] *Ibid*, para 15.
[156] *Ibid*, para 23.
[157] *Ibid*.
[158] *Ibid*, para 24.
[159] *Ibid*.

murder. Rather, he concluded (admittedly using a curious turn of phrase): "Although it's not a specific finding of fact, it is my distinct impression that *in part* due to the effects of alcohol and *in part* to his personality, at the time of the shooting Walker was engaged in an act of bravado or machismo. He was showing off his latest toy in an effort to intimidate Ms Reynolds and impress her with his disappointment at her failure to embrace his desire to engage in a sexual threesome and her gall at walking away from him at the bar."'[160]

175. The Supreme Court was mindful that 'the trial judge stated, somewhat enigmatically it is true, that his "distinct impression" was *not* a "finding", but he nevertheless put it forward as the explanation for the conclusion that follows immediately thereafter, as stated: "As disgusting and as utterly contemptuous as I find that conduct to be, it is not and I cannot find it to be tantamount to an intention to kill or an intention to cause bodily harm likely to cause death. And under the circumstances, I find Walker not guilty of murder, but guilty of manslaughter."[161] The Supreme Court found that '[t]he trial judge's "distinct impression" was well supported by the evidence' and that 'on a fair reading of the trial judge's reasons as a whole, his reasonable doubt as to intent was raised by what he considered to be the real possibility that the shooting was the result of an accident in which the appellant's alcohol consumption played a significant role.'[162]

176. It is significant that, as part of their analysis, the Supreme Court noted that '[a] *major difference* between the position of the [Prosecution] and the accused in a criminal trial, of course, is that the accused benefits from the presumption of innocence.'[163] Elaborating on the point, the Supreme Court reasoned as follows:

> The intervener Attorney General of Ontario argues that '[t]he fact that the accused is presumed innocent doesn't derogate in any way from the judge's duty to correctly apply all applicable legal principles' ... . This is true, so far as it goes, but *whereas a conviction requires the prosecution to establish each of the factual elements of the offence beyond a reasonable doubt, no such requirement applies to an acquittal which, unlike a conviction, can rest simply on the absence of proof*. The trial judge may just conclude that one or more of the elements of the offence was 'not proven' to the criminal standard. This difference does not excuse a trial judge from failure to provide intelligible reasons for an acquittal, but *it necessarily informs an assessment of whether the reasons are so deficient as to preclude effective appellate review*.[164]

177. Instructively, the Supreme Court accepted that '[a] reasonable doubt need not rest upon the same sort of foundation of factual findings that is required to support a conviction. A reasonable doubt arises where an inadequate foundation has been laid.'[165]

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[160] *Ibid*, para 24.
[161] *Ibid*, para 26.
[162] *Ibid*, para 26.
[163] *Ibid*, para 22 (emphases added).
[164] *Ibid* (emphases added).
[165] *Ibid*, para 26.

178. The 'functional approach' that the Canadian Supreme Court articulated in the *Sheppard* and *Braich* line of case law is not unique to that court. In England and Wales, there are both statutory authorities and case law in support of the same approach. For instance, s 4(1) of the *Criminal Appeal Act* 1907 (UK) contained the following proviso: 'Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.' In *R v Meyer*,[166] the Court of Appeal held that that it 'enable[s] the court to go behind technical slips and do substantial justice.' In 1965, the Donovan Committee (on the reform of criminal appeals in England and Wales) proposed an amendment to that proviso to s 4(1) that allowed the Court to dismiss the appeal if 'no substantial miscarriage has actually occurred.'[167] Apparently, the Committee felt that the word 'substantial' should be deleted as 'it seems to us devoid of practical significance.'[168] In its modern iteration, the essence of the old s 4(1) remains recognisable in the present day section 20, which provides as follows:

> If it appears to the registrar that a notice of appeal or application for leave to appeal does not show any substantial ground of appeal, he may refer the appeal or application for leave to the Court for summary determination; and where the case is so referred the Court may, if they consider that the appeal or application for leave is frivolous or vexatious, and can be determined without adjourning it for a full hearing, dismiss the appeal or application for leave summarily, without calling on anyone to attend the hearing or to appear for the Crown thereon.[169]

179. However one looks at it, it would seem that there is still good law in *R v Meyer,* which holds that an appellate court should 'go behind technical slips and do substantial justice.' That is the essence of the Supreme Court of Canada line of jurisprudence in *Sheppard* and *Braich*.

180. At the ICC, it is wise of the ICC Appeals Chamber to follow a similar approach in resolving comparable problems that arise in the cases before it. The Appeals Chamber should 'go behind technical slips and do substantial justice.'

[166] *R v Meyer* (1908) 1 Cr App R 10 (UK Criminal Court of Appeal). See Stephanie Roberts, 'Reviewing the Function of Criminal Appeals in England and Wales' (2017) in 1 *Institute of Law Journal* 3 ('Roberts'), p 12.
[167] Donovan Committee, Report of the Interdepartmental Committee on the Court of Criminal Appeal Cmnd 2755 (1965, HMSO, London), para 164. See Roberts, p 11.
[168] Donovan Committee, *ibid*. See Roberts, p.13.
[169] *Criminal Appeal Act* (1968) (UK), s 20.

5. One Decision

181. In the end, the issue here involves the practical matter of allowing judges on a panel to express themselves in their reasons, when they don't agree.

182. We may put to one side the fact that in many national jurisdictions, it is unremarkable that judges on a panel do write separately when they do not agree. In some, still, judges on a panel are required to write separately—even when they do agree.[170]

183. But, looking past national practice, it helps to note that writing separate or dissenting opinions was (or is) always part of the practice at the defunct Permanent Court of International Justice,[171] the International Court of Justice, the African Court of Human and Peoples' Right,[172] the European Court of Human Rights, the International Tribunal on the Law of the Sea,[173] the Inter-American Court of Human Rights,[174] the International Criminal Tribunal for Rwanda[175] and many other international courts and tribunals.[176] As one commentator put it, 'from 1920 onwards, the possibility of appending dissenting opinions has existed at the international scene. ... In a few words, dissenting opinions appeared at the international scene, with the firm intention of being here to stay.'[177]

184. If that were so, as appears to be the case even by the practice of this Court up until this appeal, one wonders upon which basis the Appeals Chamber of the ICC should make this very international practice difficult for the judges of the Trial Chamber of the ICC. Is a pedantic approach to the interpretation of article 74(5) enough to engender such difficulty? Would such pedantry[178] not reduce this Appeals Chamber to mere judicial caricatures who must apply perceived rules with extreme inflexibility only because the rules were *perceived* that way. This, notwithstanding that such extreme predisposition to

[170] See s 294(2) of the *Constitution of the Federal Republic of Nigeria* (1999): 'Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion …'. Notably, it is only at the Court of Appeal and the Supreme Court that judges sit in panels. At first instance, trials are conducted by single judges.
[171] See the *Statute for the Permanent Court of International Justice* (1920), art 57.
[172] See the *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights* (1998), art 28(7).
[173] See the *United Nations Convention on the Law of the Sea* (1982), Annex VI, art 30(3).
[174] See the *American Convention on Human Rights* (1969), art 66.
[175] See the *Statute of the International Criminal Tribunal for* Rwanda (1994), art 22(2).
[176] See the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), art 45.
[177] Sarmiento Lamus, 'The Proliferation of Dissenting Opinions in International Law: A comparative analysis of the exercise of the right to dissenting at the ICJ and the IACtHR', (2020) (Leiden University, Doctoral Thesis) p 49.
[178] The *Oxford English Dictionary* defines a pendant as: '1. A schoolmaster, a teacher; a pedagogue. 2. A person who parades or reveres excessively academic learning or technical knowledge; a person excessively concerned with trifling details or insisting on strict adherence to formal rules or literal meaning. Also, a person obsessed by a theory, a doctrinaire.'

follow *perceived* rules would result in severe strain—if not apparent injustice—in the system, when there is no offsetting substantive benefit to be gained by resorting to the extreme view. This, also notwithstanding that such inflexible insistence on following perceived rules goes against a broader context or system in which a different practice had always been followed with good and just results—in this case the widely accepted international judicial practice of issuing separate and dissenting opinions—and there had not been a serious complaint or injustice.

Different Practices for Different Judges of the ICC?

185. It may be helpful to keep in mind that article 83(4) allows Appeals Chamber judges to issue separate and dissenting opinions at will. And in the practice, all judges of this Appeals Chamber have always issued such opinions on any point they have seen fit to do so.[179]

186. That article 83(4) allows the Appeals Chamber judges to do all of this should caution the same Appeals Chamber to be extremely careful about how it interprets article 74(5) in the equivalent part. Here a vexing question becomes this: would it be right to presume that the drafters of the Rome Statute meant to allow the Appeals Chamber judges to issue separate and dissenting opinions however and whenever they want—so too presumably may judges of the Pre-Trial Chamber. But, notwithstanding that, the drafters meant to impose a different regime on the Trial Chamber judges because of the way that article 74(5) is perceived? What serious reasoning could there possibly be for such a different treatment of the Trial Chamber judges? There is a need for great care.

187. In my view, then, a certain model of judgment drafting to be found amongst the practice of the New Zealand legal system—employed by the Supreme Court in *Mist v R*[180]—is entirely consistent with article 74(5), which says this: 'When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and minority.'

188. According to the New Zealand model referred to above, the 'Judgment of the Court' immediately sets out the outcome of the appeal and the disposition of the case. And

[179] A dissenting opinion was even issued by a member of this panel who disagreed with four of the five judges of the Appeals Chamber when they elected one of them to preside in this very appeal. See *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Dissenting Opinion of Judge Luz del Carmen Ibañez Carranza, 18 January 2019, (Annexed to Decision on the Presiding Judge of the Appeals Chamber in the appeal of the Prosecutor against the oral decision of Trial Chamber I taken pursuant to article 81(3)(c)(i) of the Statute).
[180] *Mist v R* [2005] NZSC 77 [Supreme Court of New Zealand].

immediately after that comes the 'Reasons', in which different judges may express themselves differently. In *Mist*, for instance, paragraphs 1 to 48 contained the reasons of Elias CJ and Keith J, the reasons of Gault J ran from paras 49 to 64, and the reasons of Blanchard and Tipping JJ ran from paras 65 to 114.

189. It is difficult to conceive of a better way to accommodate judges of a panel who want to express their different views as fully as they wish and in the desired nuances, in the minimum amount of time. As a practical matter, it is impossible to insist that the Rome Statute or the Rules of Procedure and Evidence gives any guidance that precludes the New Zealand model being followed at the ICC. That being the case, the Appeals Chamber of the ICC should take care to avoid pedantry in a way that creates unnecessary difficulty for the judges of the Trial Chambers, when there is no substantive reason of justice to impose such difficulty.

190. In reflecting upon the meaning of 'one decision' in the context of article 74(5), it helps to keep in mind that the Rome Statute does not define what the term means. It is not necessary then to see the provision as solely concerning the matter of separate or dissenting opinions and their formats. It is possible that the 'one decision' requirement is intended to address the following objectives:

- In a trial of one defendant on an indictment containing three charges, the Trial Chamber should issue 'one decision' instead of three

- Regarding the principle which holds that every defendant in a joint trial must be treated as if he is on trial alone, the 'one decision' requirement may mean that the Trial Chamber must issue only decision instead of multiple separate decisions according to the number of defendants in a joint trial

- In the practice of some of the *ad hoc* tribunals the Trial Chamber issued 'one decision' comprising both the verdict of guilt and the sentence. At the Special Court for Sierra Leone, as at the ICC, the practice was to split the process—with two decisions resulting from the same trial

- It is even possible to contend that 'one decision' precludes a separate decision on reparation

- It is also possible to contend that the 'one decision' requirement forbids the Trial Chamber from issuing a judgment comprising more than one volume.

6. Delivery of Verdicts with Reasons to Follow

191. This appeal also directly or indirectly engages the question whether the Trial Chamber committed an error in announcing their verdict in January 2019, with reasons to follow, which were then eventually published some six months later, in July 2019.

192. To begin with, it must be acknowledged immediately that to accept—on the supposed basis of article 74(5)—that the Trial Chamber committed an error in following that procedure is effectively to prohibit ICC trial judges from ever issuing a verdict with reasons to follow. This is the case, regardless of the time-lag between the delivery of the verdict and the publication of the reasons.

193. I do not accept the interpretation that a reasonable application of article 74(5) forbids the Trial Chamber from delivering their judgment with reasons to follow. Such a procedure is a facility that has been employed by other courts at both the international and national levels, with no known deficit to justice as it were.

194. In my view, the arguments presented by the Prosecutor in this case do not justify such a ban at this Court. Here is why.

195. We may begin by recognising these two alternative assumptions at play to justify the alternative positions. The one assumption, implicit in the proposition that there has been an error, is that the Trial Chamber judges had not reasonably considered the verdict in the case before they announced it. That is to say, they had not reasonably engaged in a prior reflection on guilt or innocence all along, before the verdict was announced; it was only after the announcement of the verdict that they started thinking about the verdict. That is the assumption. And the difficulties attending such an assumption are all too apparent. It is, perhaps, enough to say that in the absence of clear and concrete proof to the contrary, the assumption faces the obstacle of the presumption expressed in the maxim *omnia praesumuntur rite et solemniter esse acta* [all things are presumed to have been done correctly and solemnly]. This is a presumption that protects the judicial function from uncouth, uncivilised and unproven conjectures of bad conducts and conspiracy theories behind the scenes. The presumption has a proper place in the processes of this Court.

196. The alternative assumption is the opposite one, which expects that trial judges would have been evaluating the evidence, as the case evolved, and that deliberations and judgment drafting should be done as the case unfolded. This was what the judges of this

Court agreed to in their retreat in October 2019, as the best practice.[181] It is even possible that some judges of the Trial Chamber of this Court had followed that model even long before the judges' agreement to follow that model in that retreat.

197. That assumption is necessarily inconsistent with the proposition that it is an error for the Trial Chamber to announce a verdict immediately upon termination of the trial, with reasons to follow. For, if trial judges had been reflecting on the sufficiency of the evidence all along, they should be in a position to make up their minds quickly as to the outcome of that reflection soon after the trial—and announce that outcome, with their detailed written reasons to follow.

198. But, the case at bar involved something more. First, the Trial Chamber judges had invited the Prosecution to file 'Mid-Trial' submissions showing how they had proved their case. In the round of 'Mid-Trial' submissions, the judges invited submissions from the Defence on whether they saw the need to make motions of no case to answer. It is possible that these invitations had resulted from the judges' prior reflections on the strengths of the case. But, what is more, the Trial Chamber announced their verdict after a period of deliberation following the closing submissions of the parties on the no case to answer motions. The judges explained this event as follows. After the period of deliberations that followed the submissions of the parties indicated above, the majority came to the conclusion that they must acquit the accused. Having come to that conclusion, they considered it wrong to continue to keep the accused in detention while they wrote their detailed reasons for judgment. That being the case, they felt it more appropriate to announce the verdict of acquittal with the full reasons to follow.

199. The foregoing analysis negates the presumption that the judges would only have started a 'results-oriented' process of judicial reasoning, after they had announced a verdict that did not truly reflect the genuine strengths and weaknesses of the case.

7. Judgment 'in writing'

200. I am respectfully unable to agree with my colleagues in the expressed view that judgments of ICC Chambers captured on transcripts are not judgments 'in writing' for purposes of article 74(5). First, there is quite clearly no substantive authority for that view. Such an authority must proceed from: (a) the Rome Statute's own definition of 'writing' or such a definition in the Rules of Procedure and Evidence; (b) from prior binding or persuasive jurisprudence that precludes transcribed judgments from being

[181] See International Criminal Court, 'Chambers Practice Manual' (29 November 2019 version), p i read together with para 86.

accepted as judgments 'in writing'; or (c) from the ordinary meaning of what 'in writing' or 'written' means. No such authority is availing.

201. Second, the interpretation that precludes transcribed judgments from being accepted as written judgments may actually unfairly have ignored a factual process that regularly produces what judges of the ICC including those of the Trial Chamber read onto the record following deliberations, which is then transcribed. Generally that process is as follows: (a) a judge (or legal officers working under the direction and guidance of a judge) would actually produce the draft judgment—in writing; (b) judges deliberate on the draft; (c) the draft is then finalised; (d) then the presiding judge takes that written judgment into the courtroom and then reads it onto the record, where it is transcribed; and (e) more often than not, the finalised document would have been given to the interpreters and court reporters to help them interpret or record accurately what the presiding judge read out aloud.

202. It would be incorrect to ignore the central role that 'drafting' or 'writing' plays in the process described above, merely because of the final act of the presiding judge in having read written words out aloud in the courtroom, either from paper or from an electronic screen.

203. Third, it is also necessary to consider what 'writing' or 'written' means in ordinary usage. In the *Oxford English Dictionary*, one may find the following helpful definitions:

1. ▸a Score, outline, or draw the shape of (a thing).

   ▸b Form (letters, symbols, or words) by carving, engraving, etc.; trace in or on a hard or plastic surface, esp. with a sharp instrument; record in this way. Now chiefly as passing into sense 2a.

   ▸c Carve, engrave, or trace letters or words on (a hard or plastic surface). Now rare or obsolete.

   [...]
2. ▸a Form or mark (a letter, characters, words, etc.) on paper etc. with a pen, pencil, typewriter, etc. Later also, produce (a specified kind or style of handwriting).

   ▸b Cover, fill, or mark (a paper, sheet, etc.) with writing.

   ▸c Enter or record (a name) with a pen etc.; arch. mention (a person) in this way.
3. ▸a Set down in writing; express or present (words, thoughts, feelings, etc.) in written form.

   ▸b Paint (a message or sign).

   [...]

   ▸d Of a recording device: produce (a graphical record).

204. In any circumstance in which words must be given their ordinary meaning, there should be no reason in principle or practice why the foregoing definitions of 'writing' or 'written' alone should not guide the interpretation of article 74(5) when the transcript has captured on paper the words of the judgment read aloud in the courtroom.

205. But, we may also look at the matter from the point of view of definition of *transcript*—in those instances where the judgment was captured on transcript. It means that which has been *transcribed*. Again we look at the dictionary for the meaning of 'transcribe':

> 1. ▸a Make a copy of in writing.
> [...]
> 3. verb trans. Transliterate; write out (shorthand, notes, etc.) in ordinary characters or continuous prose. Formerly also, translate. [...]

206. All the foregoing denotations of writing or written are also adequately captured in legal usage. In *Black's Law Dictionary*, for instance, 'writing' is defined as:

> The expression of ideas by letters visible to the eye. The giving an outward and objective form to a contract, will, etc, by means of letters or marks placed upon paper, parchment, or other material substance.
>
> Any intentional reduction to tangible form or an agreement, commitment, right to payment, property rights, or other abstraction. See UCC § 1—201(46) (definition of "written" or "writing").
>
> In the most general sense of the word, "writing" denotes a document, whether manuscript or printed, as opposed to mere spoken words. Writing is essential to the validity of certain contracts and other transactions.
>
> "Writings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. Fed Evid R 1001(1).
>
> "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof. Calif Evid Code § 250.

207. Considering the matter from a slightly different angle, it is significant that in the definitions of 'writing' set out above, it is observed that '[i]n the most general sense of the word, "writing" denotes a document.' The observation is correct. In rule 31.4 of the *Civil Procedure Rules* of England and Wales, it is provided that 'document' means anything in which information of any description is recorded.' In rule 222(1) of the *Federal Court Rules of Canada*, '***document*** includes an audio recording, a video recording, a film, a photograph, a chart, a graph, a map, a plan, a survey and a book of account, as well as data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device'. [Emphasis added].

208. Fourth, it also needs to be considered that the reduction of a judge's spoken words onto transcript created by professional court stenographers does not stand in an inferior place compared to an administrative assistant or other scribe who captures and reduces to script, as a letter or other document, a dictation from his or her principal or some other person in need of assistance in creating the document. In the latter instance, much solemnity is conferred upon such a letter or document by the mere act of the principal appending his or her signature to the letter or document. In many jurisdictions, the law would even allow the putative maker of the document to affix a thumbprint, an 'x' sign or some other sign, if that putative maker is for some reason unable to write the document in his or her own hand. But the significance of the signature, the thumbprint, the 'x' or some other sign, is only to serve as proof of authorship on the part of the putative owner of the document, notwithstanding that few witnesses if any (except the certifying scribe) might have witnessed the making of the document.

209. Proof of authorship is presented even more starkly in relation to transcripts of proceedings—especially at the ICC. The elements of proof are even stronger that the words recorded on the transcript are indeed the words of the judge who spoke them. Such elements include the certification of the professional stenographers, in addition to the audio-visual recording of the proceedings in which the words are spoken. Those elements of proof of authorship of the document could not be inferior to the signature appended on a letter or other document created out of public sight.

210. Finally, the ultimate question of purpose engages the reason that legal documents—including judgments of courts of law—are required to be in writing. It is for proof of authorship and certainty of content. When a representation is made in writing, it becomes difficult to deny that representation. Because the representation is in writing it affords the law a reliable basis to operate in connected respects. For a judgment of a court of law, the need for certainty of the judicial representation becomes especially exacting, given that judgments of courts operate to settle finally and authoritatively the legal dispute before the court that issued the judgment. In a criminal case, the parties, the victims and the world are reliably informed, in a transparent way, as to how the court has disposed of the dispute. The relevant authorities would have a concrete basis for the imposition of the resulting penalties against a convict. An acquitted person will have the concrete judicial testament that vindicates his or her presumption of innocence. Where an appeal is warranted, a party would have a reliable judicial representation that can be appealed; and an appellate court will know precisely whether the representation as made is fraught with errors. Such are the reasons that judgments must be in writing.

211. The transcript of the Trial Chamber's judgment of 15 January 2019 fully satisfied all those purposes for which a court judgment must be in writing. In that connection, it is important to note that regulation 27(2) of the Regulations of the Court provides that 'transcripts constitute an integral part of the record of the proceedings. The electronic version of transcripts shall be authoritative.' That provision serves an important value in capturing a judgment read out onto the record 'in writing', notwithstanding that the judges who read it out infelicitously declared themselves as rendering an oral judgment.

212. Even if one were to have found that the Prosecutor was correct and that the verdict needs to be filed with the Registry, it cannot be ignored that the verdict that was delivered on 15 January 2019 in this case was also filed on 16 July 2019 in the Reasons for the 15 January 2019 Decision. Article 74(5) must be interpreted sensibly and fairly. As stated in the Judgment of the Appeals Chamber, the purpose of the protections in article 74(5) is to ensure 'that "each party and participant to the case is fully apprised of the outcome in a predictable manner, which must be public and reasoned," and to guarantee the right to appeal.'[182] The Appeals Chamber has also stated that the Prosecutor's attempt to read the 15 January 2019 Decision as separate from the written reasons issued in July 2019, cannot stand; both were intended to be read together.[183] Filing the verdicts of acquittal with the Registry in January 2019 would not have altered the certain terms of the verdicts, or their nature or effect.

PART III: THE SIX EXAMPLES ANALYSED

213. The Prosecutor submits six examples of evidential analysis that she claims help to demonstrate the legal and procedural errors that the Trial Chamber committed—in particular, the lack of clarity in the Trial Chamber's approach and assessment of the evidence.[184] She submits that the analysis of those six examples requires 'only a relatively limited examination, without going beyond what is already clearly apparent in the [Reasons for the 15 January 2019 Decision] and on the record.'[185]

1. Standard of Appellate Review

214. As indicated at the outset of this opinion, I am not persuaded by the approach adopted by the Prosecution in seeking to engage a review of the Trial Chamber's factual

[182] Judgment of the Appeals Chamber, paras 112, 161.
[183] Judgment of the Appeals Chamber, para 157.
[184] Prosecutor's Appeal Brief, paras 128, 131, 132-141, 162-252.
[185] *Ibid,* para 128.

assessments using the standard of appellate review reserved for legal or procedural errors. In my view, the correct approach is that articulated in the *Ngudjolo* Appeals Judgment, according to which the standard of appellate review of factual errors is the correct approach 'to the extent that the alleged errors are based on challenges to the Trial Chamber's factual findings.'[186]

215. It may, of course, be accepted that no case to answer adjudications entail a mixed question of law and fact. The question of law pertains to the ability of a trial chamber to correctly appreciate the *legal norms* that guide the question of sufficiency of the evidence for the purposes of putting the defence to their case. But, beyond the identification of the correct legal norm that guides the determination of the question of sufficiency of the evidence, the assessment of sufficiency of the evidence itself is inevitably also a question of fact that directly actualises the case's outcome.

216. Accordingly, to the extent that the Prosecutor's arguments challenge how the Trial Chamber assessed individual items of evidence in the six examples, the Appeals Chamber should, as in *Ngudjolo*, apply the standard of reasonableness, as it is the culmination of the standard of appellate review for errors of fact. Only if it is found that the Trial Chamber's assessment in relation to a given finding was unreasonable will consideration be given to the Prosecutor's broader argument as to the alleged errors in respect of the applicable legal principles guiding the evidentiary analysis.

2. The *Braich* Test

217. As I assess, in this part, the Prosecution's complaints against the reasoning of the Trial Chamber in relation to the six examples, I draw much inspiration from the line of relevant case law of the Supreme Court of Canada that I discussed earlier. Notable amongst them is *R v Braich*. In that case, it is recalled, the trial court had convicted the accused persons following an analysis of conflicting evidence, accepting some, and rejecting others including the identification evidence of an eyewitness. The Court of Appeal considered the conviction to be unsafe, reasoning that the trial judge's reasons revealed insufficient analysis of the frailties and inconsistencies of the identification evidence. On further appeal, the Supreme Court reversed the judgment of the Court of Appeal. Dismissing the complaint against the conclusions drawn by the trial judge, the Supreme Court of Canada considered that the conclusions of the trial judge were driven more by the peculiarities of the facts than the alleged inadequacies of the trial judge's

[186] See *Ngudjolo* Appeal Judgment, para 44.

reasoning.[187] The Supreme Court of Canada reiterated, in the companion case of *R v Sheppard* that an appellate court may not intervene merely because it thinks that the 'trial court did a poor job of expressing itself.'[188] The Supreme Court of Canada rejected the idea that appellate courts may correctly overturn a trial judgment on the supposition that 'if the trial judge had thought harder about the problems and written a more extensive analysis, he might have reached a different conclusion.'[189] For present purposes, I shall refer to this compost of pronouncements as 'the *Braich* test.'

218. Regarding contradictory testimonies, it is notable that the Appeals Chamber accepted in the *Ntaganda* Appeal Judgment (delivered yesterday) that 'it is open to the trier of fact to accept a witness's evidence and reject a contradictory denial from the accused without impacting on the burden of proof.'[190] If this is so when the contradiction is between the testimony of a prosecution witness and that of the accused, it must also be so when the contradiction occurs between prosecution witnesses.

219. What is more, the particular circumstances of the case at bar call into view the wisdom of judicial truisms represented in Lord MacMillan's maxim that 'in almost every case, except the very plainest, it would be possible to decide the issue either way with reasonable legal justification.'[191] As we ponder the fullest import of that maxim, the moral of which is uncertainty of outcomes in litigation, we may consider that the demarcation line is only possibly drawn at the 'plainest of cases.' The case at bar is not one of them. By the Prosecution's own admission, it was a complex case. Notably, Lord MacMillan's maxim serves a purpose in all types of litigation; but it particularly accentuates the enormous burden upon the Prosecution in a criminal case where, above all else, guilt must be established beyond reasonable doubt. That burden evidently increases in a case of any complexity.

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[187] *R v Braich*, para 35.
[188] *R v Sheppard*, para 26.
[189] *R v Braich*, para 39.
[190] *Ntaganda* Appeal Judgment, para 592. Citing, *R v R E M* [2008] SCC 51, para 66 [Supreme Court of Canada]: '[T]he trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously challenged" (para. 68). It followed of necessity that he rejected the accused's evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required. In this context, the convictions themselves raise a reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt'.
[191] Lord Macmillan, *Law and Other Things* [Cambridge: CUP, 1937], p 48. *Tadić* Appeal Judgment, para 64 (in a similar vein, the ICTY Appeals Chamber had considered it 'important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence').

220. Here, again, I recall the apposite pronouncements of the Supreme Court of Canada in *Walker*, also considered earlier. There, as will be recalled, the Supreme Court of Canada underscored the major difference between the position of the prosecution and that of the defence in a criminal trial, in light of the presumption of innocence that the accused enjoys and the burden of proof beyond reasonable doubt that the prosecution must discharge in order to displace that presumption.[192] Let us recall once more the Supreme Court of Canada's observation that 'a conviction requires the prosecution to establish each of the factual elements of the offence beyond a reasonable doubt, no such requirement applies to an acquittal which, unlike a conviction, can rest simply on the absence of proof. The trial judge may just conclude that one or more of the elements of the offence was "not proven" to the criminal standard.'[193] In the Supreme Court's view, '[a] reasonable doubt need not rest upon the same sort of foundation of factual findings that is required to support a conviction. A reasonable doubt arises where an inadequate foundation has been laid.'[194]

3. The Six Examples

221. In relation to the six examples, then, the Prosecutor submitted in particular that the Trial Chamber erred in assessing the evidence as regards: (a) the attribution of gunfire to the FDS convoy for the 3 March 2011 incident (Abobo I, third charged incident);[195] (b) the attribution of the shelling to the FDS/BASA for the 17 March 2011 incident (Abobo II, fourth charged incident);[196] (c) Mr Gbagbo's involvement in the shelling in Abobo (late February 2011 and 17 March 2011);[197] (d) the clashes on the *Boulevard Principal* (25 February 2011, Yopougon I, second charged incident);[198] (e) the rapes committed in connection with the RTI march (16-19 December 2010, first charged incident) and Yopougon II (12 April 2011, fifth charged incident);[199] and (f) the overall pattern of crimes against an unnecessary and unsupported empirical benchmark.[200] I will now assess the Prosecutor's arguments in relation to these examples in turn.

1) The First Example

[192] *R v Walker*, 26 February, [2008] SCC 34, para 22 [Supreme Court of Canada].
[193] *Ibid*.
[194] *Ibid*, para 26.
[195] Prosecutor's Appeal Brief, paras 166-182.
[196] *Ibid*, paras 183-198.
[197] *Ibid*, paras 199-213.
[198] *Ibid*, paras 214-233.
[199] *Ibid*, paras 234-247.
[200] *Ibid,* paras 248-252.

222. The Prosecutor submits that the Trial Chamber erred in assessing the evidence as to the attribution of gunfire to the FDS convoy in relation to the 3 March 2011 incident (Abobo I, third charged incident).[201]

(i) Relevant part of the Impugned Decision

223. When assessing the evidence regarding the injuries and deaths resulting from the gunfire during the women's march in Abobo, on 3 March 2011, and the attribution of liability for them, the Trial Chamber made the following findings. First, Judge Henderson noted:

> 1773. The Prosecutor alleges that on 3 March 2011, an FDS convoy intentionally fired upon peaceful female anti-G[b]agbo demonstrators and that it did so on political, national, ethnic, or religious grounds. According to the Prosecutor, seven women were killed and six other persons seriously wounded as a result of the shots fired by the FDS convoy.
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> 1774. It is not necessary, for the purposes of this decision, to determine whether there is any merit in Mr Gbagbo's claim that the evidence for this incident is unreliable and that, in particular, the video footage has been doctored. Nor is it necessary to determine whether the march was organised by or at the behest of Mr Ouattara's supporters in the Golf Hotel. What matters is whether it is possible for a reasonable trial chamber to determine, on the basis of the available evidence, who fired the shots that killed and injured the victims and why they opened fire.
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> 1775. In relation to the first question, there is no direct evidence as to who fired the shots that hit the victims. Expert analysis of video footage of the incident (CIVOTP-0077-0411) has identified 27 shots being fired within less than 90 seconds (assuming the video shows one and the same sequence of events without interruption). Ten of these shots are thought to be from heavy calibre weapon(s), the remaining 17 shots from a different/lighter calibre weapon. Of these 27 shots, only the first three can 'likely' be attributed to one of the two machine guns that are mounted on the turret of the BTR 80 that is visible in the video. Subsequently to these three shots, panic breaks out and the camera image swings around violently. It is thus impossible to establish the source of the following noises or blasts.
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> 1776. A number of observations follow from this: first, unless it is established that the 13 victims were killed or injured by the first burst of three shots, it is not possible to know who is responsible for their deaths and injuries. The first show of bodies in the video comes at roughly one minute after the first burst of gunfire. By then 24 potential shots have already been heard. Significantly, none of the autopsy reports submitted by the Prosecutor indicate the calibre of the bullets that caused the deaths. For the sake of completeness, it is worth mentioning that a 'large bullet [of] approximately 55mm in length and 12mm in diameter' was found in the bodybag containing the remains of one of the victims, Malon Sylla. Assuming that the measurement of the diameter of the bullet was correct, there is nothing to link this projectile to the 14.5mm gun of the BTR 80. Moreover, the person who conducted the autopsy testified that nothing could be concluded from the fact that the bullet was found inside the body bag in relation to the wounds of Ms Sylla. In short, it is not possible to link the first burst from the BTR 80 to any of the casualties.
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> 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

[201] Prosecutor's Appeal Brief, paras 166-182.

injuries of the 13 victims. 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. Given that no information is available in this regard, no reasonable trial chamber could conclude that any of the women were killed or injured by direct shots fired by the FDS convoy.

1778. According to [REDACTED], the only witness with first-hand information on this point, the purpose of the initial bursts was to disperse the crowd, which was blocking the road, in order to allow the convoy to pass. It appears that very quickly thereafter the convoy came under attack and that two soldiers inside the BTR 80 opened fire with their assault rifles in response. From this evidence, it does not appear as if the men in the BTR 80 deliberately targeted the female demonstrators because they were supporters of Mr Ouattara.[202]

[…]

1781. The Prosecutor also claims that witnesses P-0184, P-0580, and P-0114, contradict [REDACTED]. However, P-0184 testified that she did not know 'where the fire was coming from'. Moreover, she stated that she was with her back towards the oncoming convoy, that she fell twice and lost consciousness 'for a few seconds or minutes', which hardly makes her a reliable witness to give an account of the events on 3 March 2011. P-0184 also testified that the demonstrators initially clapped when they saw the convoy approaching, because the 'tank' had a white flag on it. However, the video footage shows no flag on the BTR 80. The witness also said that the convoy opened fire *after* it passed by her, which is also not in line with what can be seen on the video.

1782. The Prosecutor also relies on P-0580's testimony to cast doubt on [REDACTED]. P-0580 allegedly witnessed the events of 3 March 2011 personally. However, when describing the convoy, he only mentioned two vehicles, rather than five. The witness did not see the convoy firing but only heard shots. In particular, the witness stated that he first heard a 'very loud noise, and then I heard gunshots'. According to the witness, the shooting lasted for 1-2 minutes, which corresponds with what can be heard on the video. The witness also confirmed that the bodies of the victims were lying in relatively close proximity to each other. Apart from confirming some of what can be seen in the video (which was widely disseminated at the time, and is still available on the internet today), P-0580's account does not add much useful information, especially in light of the fact that the witness did not actually see the shots being fired. The testimony of P-0580 therefore cannot be said to contradict [REDACTED].

1783. The Prosecutor also relies on the testimony of P-0114 in order to cast doubt [REDACTED]. In his testimony, P-0114 said that he did not see any armed individuals among the demonstrators. However, the fact that the witness did not personally see armed individuals in a mass of several hundreds or even thousands of people obviously does not mean that none were actually present. Moreover, it is noteworthy that, in his prior recorded statement, P-0114 stated that the 'tank' fired only once. And during his testimony, he declined to answer a question as to how many vehicles he saw; simply repeating that he saw 'the tanks'. Finally, P-0114 stated that he had forgotten a lot about the events of 3 March 2011. P-0114's testimony is thus not a very instructive when it comes to the details about what happened on 3 March 2011.[203]

224. In concurring, Judge Tarfusser further observed as follows:

[202] Judge Henderson, Reasons of Judge Geoffrey Henderson, 16 July 2019, (Annexed to Reasons for the 15 January 2019 Decision) ('Judge Henderson's Reasons'), paras 1773-1778 (footnotes omitted).
[203] *Ibid*, paras 1773-1777 (footnotes omitted).

84. As regards the 3 March incident in connection with the march of women, the Reasons explain in detail the evidentiary elements making it impossible for the Chamber to conclude that the convoy deliberately attacked the demonstrators. Apart from this, what most strikes, is the Prosecutor choice to ignore the evidence to the effect that women taking part in the march had been used as human shields by snipers hidden among them and aiming first at the FDS convoy; a point made all the more important in light of his consistency with other evidence to the effect that the nature, frequency and type of attacks against them made the FDS fear being sent or having to travel through Abobo: '*quand vous revenez, vous dites merci au Seigneur*'. Furthermore, the Prosecutor never attempted to explain why this particular march (and this one only) would have been chosen as a deliberate target; the evidence shows that marches by RHDP political supporters were held throughout the post-electoral crisis, with the FDS intent in ensuring that they would be authorised and to prevent that they may lead to disturbances of the public order. Against this background, as illustrated in the Reasons, it does not appear that the convoy 'deliberately targeted the female demonstrators because they were supporters of Mr Ouattara'. Accordingly, it becomes superfluous 'to determine whether there is any merit in Mr Gbagbo's claim that the evidence for this incident is unreliable and that, in particular, the video footage has been doctored' or 'whether the march was organised by or at the behest of Mr Ouattara's supporters in the Golf Hotel'.[204]

(ii) Assessment of the First Example

225. With this example, the Prosecutor argues that the Trial Chamber failed to appreciate, as a whole, eye-witness testimony, video footage, expert testimony and autopsy reports, all of which supported the proposition that the FDS gunfire caused the deaths and injuries of the victims.[205] She also submits that the Trial Chamber failed to appreciate that the evidence was consistent and corroborated.[206] I shall address the Prosecutor's arguments in turn.

(a) Whether the Trial Chamber failed to look at the evidence in its totality

226. It is recalled that, when addressing the Prosecutor's allegation that on 3 March 2011, an FDS convoy intentionally fired upon peaceful female anti-Gbagbo demonstrators resulting in the death of seven women and in the injury of another six women, the Trial Chamber stated that '[w]hat matters is whether it is possible for a reasonable trial chamber to determine, on the basis of the available evidence, who fired the shots that killed and injured the victims and why they opened fire.'[207]

227. In this regard, the Trial Chamber found that 'it [was] not possible to determine' that the soldiers in the BRT 80 or in any of the other vehicles in the FDS convoy caused the deaths and injuries of the 13 victims who took part in the march in Abobo on 3 March

[204] Judge Tarfusser, Opinion of Judge Cuno Tarfusser, 16 July 2019, (Annexed to Reasons for the 15 January 2019 Decision) ('Judge Tarfusser's Opinion'), para 84 (footnotes omitted).
[205] Prosecutor's Appeal Brief, paras 168-176.
[206] *Ibid*, paras 177-181.
[207] Judge Henderson's Reasons, para 1774.

2011.[208] In the Trial Chamber's view, '[t]here [was] simply too much that remains unclear about this incident to allow a reasonable trial chamber to come to any firm conclusions.'[209] In reaching this finding, the Trial Chamber referred to the video-footage of the incident, the expert examination of that video to discern ballistics and the reports concerning the three autopsied victims.[210]

228. The Prosecutor submits that the Trial Chamber, in reaching this finding, disregarded five eye-witnesses' testimony, which proved that the march was peaceful, that everyone in the march was unarmed, and that the FDS convoy was firing as it passed through the march.[211] In particular, she refers to witness P-0580, who testified that he did not see any armed person;[212] witness P-0582, who testified that the people he saw in the march were not armed, but were simply 'blowing whistles' and beating 'empty containers of tomatoes,' 'djembes and the drums';[213] witness P-0184, who testified that the only armed persons she saw were military personnel in the tank and the truck;[214] witness P-0114, [REDACTED];[215] and witness P-0190, who testified that she saw the tank firing at the demonstrators.[216] It is noted that the Trial Chamber referred to the testimony of the five witnesses indicated by the Prosecutor only when addressing the question of why the convoy opened fire. In that section, the Trial Chamber did not mention their testimony, that no one among the demonstrators was armed and that the only armed persons were those in the FDS convoy. In my view, this testimony was directly relevant to the question of who was the source of the gun fire that caused the deaths and injuries, and there is no apparent reason that would explain why the Trial Chamber did not address it in relation to that question. Nevertheless, considering that the Trial Chamber discounted the evidence of some of these witnesses later, when it addressed the question of why the convoy opened fire, I shall address the reasonableness of the Trial Chamber's approach to this evidence below, when entertaining the question of whether the Trial Chamber failed to consider the evidence as consistent and corroborated.

229. Regarding the Prosecutor's submission that the Trial Chamber's assessment of the timing was incorrect and that, in reality, the dead bodies were already visible about 28 seconds after the first shot was heard, in minute 04:07,[217] the Prosecutor takes issue

[208] *Ibid*, paras 1773-1777, 1787.
[209] *Ibid*, para 1787.
[210] *Ibid*, paras 1775-1777.
[211] Prosecutor's Appeal Brief, paras 169-170.
[212] See *Ibid*, para 170.
[213] See *Ibid*, para 170. .
[214] See Prosecutor's Appeal Brief, para. 170.
[215] See *Ibid*.
[216] See *Ibid*.
[217] *Ibid*, para 172.

with the Trial Chamber's finding that '[t]he first show of bodies in the video comes at roughly one minute after the first burst of gunfire.'[218] It is noted, first, that the expert report referred to by the Prosecutor in support of her contention does not appear to address the image at minute 04:07.[219] It is further noted that the Trial Chamber found that '[s]ubsequently to [the first] three shots, panic breaks out and the camera image swings around violently.'[220] It is not unreasonable for the Trial Chamber to have concluded, on the basis of the evidence before it, that the first show of bodies on the video occurs at roughly one minute after the first burst of gunfire.[221] In any event, I am not persuaded that the Trial Chamber's potential misconstruction of the timeline would support the Prosecutor's broader claim that the Trial Chamber failed to assess the evidence in its totality. This is because the Trial Chamber clearly considered the video footage. As acknowledged by the Prosecutor, the issue raised is thus one concerning the appreciation of the evidence. I shall therefore not consider the matter any further.

230. I am similarly not persuaded by the Prosecutor's argument that other aspects of the video footage, notably the reaction of the crowd to the gunfire, should have been considered by the Trial Chamber and should have resulted in a different conclusion.[222] There is no indication that the Trial Chamber did not consider this aspect when assessing the video footage. Likewise, considering that the Trial Chamber did not dispute, at this stage of the proceedings, the authenticity of the video-footage,[223] I see no need to address the OPCV's arguments in this regard.[224]

231. As to the arguments of the Prosecutor concerning the Trial Chamber's pronouncement that even if the shots could be linked to the deaths and injuries of the 13 victims, 'it would still have to be determined whether the injuries were caused by direct

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[218] Judge Henderson's Reasons, paras 1776.
[219] See Prosecutor's Appeal Brief, para 172, referring to CIV-OTP-0089-1030 (Forensic expert report examination of a video) at 1044-1047, p 15-18.
[220] *Ibid*, paras 1775.
[221] *Ibid*, paras 1776.
[222] *Ibid*, para 173.
[223] Having noted that counsel for Mr Gbagbo challenged the authenticity of the video-footage, the Trial Chamber observed that 'for the purposes of this decision, it was decided to give the Prosecutor the advantage of the doubt and to analyse the video as if it were authentic and recorded on 3 March 2011. This position does not prejudice any future conclusions regarding the authenticity/date of this exhibit'. See *Ibid*, footnote 3962.
[224] OPCV, Victims' Observations on the issues on appeal affecting their personal interests, 22 April 2020 ('OPCV's Observations'), para 154. The OPCV notes the following in her observations: '(i) the relevant images have been showed to eye-witnesses of the 3 March 2011 incident and all of them have recognised the place, the march and the victims; (ii) the video has been found by expert P-0606 to be free of any manipulation and to be authentic; (iii) expert P-0606 also clarified that whether the metadata related to video CIV-OTP-0077-0411 indicate a different date is not relevant, being an information given by the file structure of the support (*i.e.* the camera) and not of the video itself; and (iv) the woman that the Defence bluntly accused twice to be acting her own death in the video was identified by several witnesses as being Moyamou Koné, one of three women for which it was possible to identify the body and to establish the kinship with dual status P-0582, through a DNA test.'

fire or whether they resulted from ricocheting bullets,'[225] the Prosecutor submits that the Trial Chamber 'disregarded expert pathology and ballistics evidence without apparent justification [and] supplanted its view for those of the experts on the record.'[226] The Prosecutor argues that, without any basis on the record, the Trial Chamber presented the alternative hypothesis that women could have died and been injured by 'ricocheting bullets.'[227] In the Prosecutor's view, the question of whether the injuries were caused by direct gunfire or ricocheting bullets is not relevant for the question of attribution of their source, as long as the bullets, the death and injuries are attributable to the FDS convoy.[228]

232. It is noted in this regard that the Prosecutor presented expert testimony indicating that the bullet injuries in the autopsied victims, and possibly in others, showed a pattern that would not have been present had the bullets bounced on other objects before hitting the victims.[229] Indeed, expert witness P-0585, who performed the autopsy of three victims and produced autopsy reports, testified that the locations of the injuries of the three autopsied victims are 'all remarkably similar.'[230] He stated that '[a]ll the injuries on all three bodies are about the same level, the neck and the shoulder area,' and that '[t]hey all appear to be injuries with bullets coming from left to right.' He thus concluded that 'there is a pattern within them.'[231]

233. As for the victims on whom he did not perform any autopsy, he further testified that having 'seen photographs of the scene where the death is,'[232] he found 'other bodies there with clearly damage to the head.'[233] This led him to conclude: 'So again, again, all around about the same, same level.'[234] It is further noted that the ballistics expert's evidence 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.[235]

234. It is noted that while the Trial Chamber referred to this evidence, specifically to the part of the testimony where expert witness P-0585 (who performed the autopsies) referred to the bullet found in the body bag,[236] the Trial Chamber did not refer to the part where the expert testified that there is a pattern in the injuries of the bodies he

[225] Judge Henderson's Reasons, para 1777.
[226] Prosecutor's Appeal Brief, para 174.
[227] *Ibid*, paras 174, 176.
[228] *Ibid*, para 175.
[229] *Ibid*, paras 176, 181.
[230] P-0585, T-189-ENG, p 29, line 23. See also p 29, lines 20-22.
[231] Prosecutor's Appeal Brief, para 176, referring to P-0585, T-189-ENG, p 29, lines 20 to p 30, line 5.
[232] Prosecutor's Appeal Brief, para 181.
[233] Prosecutor's Appeal Brief, paras 176, 181.
[234] Prosecutor's Appeal Brief, para 176.
[235] Prosecutor's Appeal Brief, para 181.
[236] Judge Henderson's Reasons, para 1776.

autopsied,[237] and that the bodies he autopsied and those he saw in photographs have similar injuries.[238] There is no reasonable explanation for the Trial Chamber's failure to do so, which lends support to the Prosecutor's argument that the Trial Chamber failed to consider the evidence in its totality. However, I am not persuaded that this concern is determinative of the issue. First, because the Trial Chamber's overarching concern was to determine whether there was an intent to target the marching women because they were pro-Ouattara supporters, or whether they were the tragic victims of chaotic violent circumstances. In considering the reasonableness of the Trial Chamber's concerns in this regard, it may help to do so in light of the record of the proceedings that adverts to circumstances including: an internal armed conflict or violent unrest in which Mr Gbagbo's Government might have felt under siege or under attack by an armed insurgency;[239] security forces of Mr Gbagbo's administration needing to clear their path to get to where their armed opponents were, but being impeded by the civilians whom the security forces thought had armed insurgents shielding amongst them (this invites questions of competing inferences between intent to target civilians versus considerations of military necessity). Indeed, the Trial Chamber's findings must be appreciated in the context of a violent political history, including a civil war that had remained unresolved at all material times. This is one case, where the Appeals Chamber must exercise much caution before overruling the Trial Chamber on its factual findings, given the dynamics of the complex case that the Trial Chamber heard at trial.

235. As to the Prosecutor's allegation that in any event, the reference to possibility of victims being hit by ricocheting bullets is 'entirely speculative,'[240] it may be accepted

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[237] P-0585, T-189-ENG, p 29, lines 23-25.
[238] *Ibid*, p 29, line 23, to p 30, line 5.
[239] In this connection, I am unable to ignore observations in that regard first registered by Judge Van den Wyngaert in her dissenting opinion to the Confirmation Decision, and then by Judge Henderson in his reasons for the judgment. According to Judge Van den Wyngaert: 'It is important to bear in mind, in this regard, that the military was deployed in order to fight a heavily armed insurgency group and that regular law enforcement (police, gendarmerie) were no longer able to handle the situation. Although it might be argued that by sending military units into a densely populated civilian area, Laurent Gbagbo created and accepted a risk that innocent civilians might be harmed (i.e. dolus eventualis), this falls short, in my view, of actively instructing/instigating those troops to deliberately target civilians': Pre-Trial Chamber I, *Prosecutor v Gbagbo* (Decision on the confirmation of charges against Laurent Gbagbo), 12 June 2014, Dissenting Opinion of Judge Van den Wyngaert, para 6. And according to Judge Henderson: 'It is also important to stress that, at all times relevant to the charges in this case, there appears from the evidence to have been an ongoing armed conflict in Côte d'Ivoire. The fact that Côte d'Ivoire was the scene of a drawn-out civil war must have been at the forefront of everyone involved in the post-electoral crisis. In particular, the awareness that there was an armed and organised force that posed an active threat to the Gbagbo regime may well have informed a number of key decisions that were made by the accused. By ignoring or downplaying this reality, the Prosecutor casts a different light on many of the events. While this fits her narrative, it does not correspond with reality on the ground': Judge Henderson's Reasons, para 72. *See also* para 2036 to a similar effect; *see further* paras 67, 72, 73, 74, 179, 295, 297, 376, 381, 451, 515, 706, 724, 759, 875, 1220, 1238, 1303; footnotes 1726, 2122.
[240] Prosecutor's Appeal Brief, para 176.

that such an alternative hypothesis posited by the Trial Chamber does not appear supported by evidence on the record.[241] Nevertheless, I am not persuaded that the possibility that the Trial Chamber may have engaged in such occasional speculation would support the Prosecutor's argument that the Trial Chamber failed to assess the evidence on the record as a whole.

236. In sum, I am not persuaded that the Prosecutor's argument that the Trial Chamber failed to consider the evidence as a whole finds support in the allegations she has presented in respect of the first example.

(b) Whether the Trial Chamber failed to consider evidence as consistent and corroborated

237. The Prosecutor argues that the Trial Chamber failed to appreciate that the evidence was consistent and corroborated. In her view, due to its 'inflexible' understanding of corroboration and consistency of evidence, the Trial Chamber rejected 'a wealth of consistent evidence' (eye-witness accounts, video footage, expert evidence and autopsy reports) indicating that the FDS opened fire on the women.[242] As the Prosecutor submits, the fact that the Trial Chamber was impressed by prosecution witness [REDACTED] 'was not reason enough to reject all other relevant and probative evidence on the record' (including the evidence of three other witnesses, the video evidence and the autopsy reports and the expert ballistic evidence.)[243] In particular, the Prosecutor submits that the Trial Chamber discounted the testimony of witnesses P-0184, P-0580, and P-0114, and rather relied on the 'partial testimony' of witness [REDACTED] that the convoy was under attack.[244] The OPCV adds that none of the insider witnesses ([REDACTED], P-0156 and P-0321) provided evidence pointing to the presence of any armed person who could have fired against the crowd.[245] It is noted that the Prosecutor essentially challenges the Trial Chamber's evaluation of the different and competing evidence that the Prosecutor herself introduced in the case. For the reasons set out above, in respect of the standard of review, I shall assess these arguments on the standard of reasonableness.

238. It is noted that the Trial Chamber relied on the testimony of prosecution witness [REDACTED] that the convoy fired first to disperse the crowd in order to clear a

[241] Judge Henderson's Reasons, para 1777. See Prosecutor's Appeal Brief, para 176; OPCV's Observations, paras 149-158.
[242] Prosecutor's Appeal Brief, para 177.
[243] *Ibid*, paras 178-181.
[244] *Ibid*, paras 177, 179.
[245] OPCV's Observations, para 149.

path of travel for their vehicles, and that the convoy was then under attack and two soldiers inside the BTR 80 fired in response.[246] With regard to the other available witness testimony, the Trial Chamber made the following assessments. As for witness P-0184, the Trial Chamber questioned the witness's reliability on the basis of her saying that she did not know where the gunfire was coming from, that she had her back towards the oncoming convoy, and that she fell twice and lost consciousness for a few seconds or minutes.[247] The Trial Chamber further noted that the witness' testimony was not in line with what can be seen on the video footage because she testified that the tank had a white flag on it and that it fired after passing by her location: while, in the Trial Chamber's view, the video showed something different.[248] Regarding witness P-0580, the Trial Chamber observed that he mentioned two instead of five vehicles in the convoy, that he heard but did not see the convoy firing, and that '[a]part from confirming some of what can be seen in the video (which was widely disseminated at the time, and is still available on the internet today), P-0580's account does not add much useful information, especially in light of the fact that the witness did not actually see the shots being fired.'[249] Lastly, regarding witness P-0114, [REDACTED], the Trial Chamber observed that 'the fact that the witness did not personally see armed individuals in a mass of several hundreds or even thousands of people obviously does not mean that none were actually present.'[250] The Trial Chamber further took issue with the witness' inability to recollect a lot about the events of that day.[251]

239. The Prosecutor further submits that the Trial Chamber, by relying on witness [REDACTED] evidence, disregarded other consistent evidence on the record, *i.e.*, the video footage, the autopsy reports and the evidence from the report of the ballistic expert.[252]

240. In my view, the Trial Chamber was thus presented with conflicting evidence regarding the potential source of the gunfire. I am not persuaded by the Prosecutor's contention that the Trial Chamber disregarded relevant evidence. The Trial Chamber explained in detail why it found that the source of the fire could not be established and why it discounted some of the evidence. As regards specifically the witnesses who testified that they saw no one armed amongst the demonstrators, the Trial Chamber explained, why this did not allow it to reach a conclusion that there was indeed no one armed among the demonstrators. Given the detailed reasonable explanations provided by

[246] Judge Henderson's Reasons, para 1778. It may be noted that, to that effect, the Trial Chamber referred to relevant portions of the witness's testimony.
[247] *Ibid*, para 1781.
[248] *Ibid*.
[249] *Ibid*, para 1782.
[250] Judge Henderson's Reasons, para 1783.
[251] Judge Henderson's Reasons, para 1783.
[252] Prosecutor's Appeal Brief, para 178.

the Trial Chamber, I am not persuaded that it has been established that the Trial Chamber's conclusion was indeed unreasonable. The complaint against the Trial Chamber's assessment of the evidence fails what I described earlier as the *Braich* test.

241. Once more, it is important to stress that the overriding issue is whether the women were targeted because they were pro-Gbagbo supporters, or whether they were the tragic victims of chaotic violent circumstances. For instance, the Trial Chamber relied on the testimony of witness [REDACTED]and said that the convoy fired into the air [REDACTED] and that it was under attack.[253] It is important to stress that this was a witness for the Prosecution. Notably, the Prosecutor points out that [REDACTED].[254] And, as Judge Herrera Carbuccia noted, '[REDACTED]'[255] This conjures up a Fred Flintstone scenario of tragic proportions, perhaps unfounded fear of being under attack, rather than an intent to massacre civilians as such because they were pro-Ouattara supporters or anti-Gbagbo demonstrators.

242. In conclusion, I am not persuaded that the first example bears out the Prosecutor's broader arguments as to alleged errors in the Trial Chamber's approach to the evidence.

2) The Second Example

243. In the second factual example, the Prosecutor argues that the Trial Chamber erred in assessing the evidence as to the attribution of the shelling to the FDS/BASA for the 17 March 2011 incident (Abobo II, fourth charged incident).[256] She submits that this example demonstrates that the Trial Chamber: (a) failed to draw reasonable inferences from the evidence; (b) assessed expert evidence inconsistently and unreasonably; and (c) failed to appreciate that the evidence was consistent and corroborated. I shall consider these arguments in turn.

(i) Relevant part of the Impugned Decision

244. The Trial Chamber made the following findings when assessing the evidence regarding a number of explosions causing severe bodily harm to several persons and

[253] Judge Henderson's Reasons, para 1778, referring to [REDACTED].
[254] Prosecutor's Appeal Brief, para 179, referring to [REDACTED].
[255] Judge Herrera Carbuccia, Dissenting Opinion of Judge Herrera Carbuccia, 16 July 2019 (Annexed to Reasons for the Oral Decision) ('Judge Herrera Carbuccia's Dissent to the Reasons for the 15 January 2019 Decision'), para 105.
[256] Prosecutor's Appeal Brief, paras 183-198.

damaging civilian property in Abobo, on 17 March 2011, and the attribution of liability thereof.

245. First, Judge Henderson, noting foremost that it is 'difficult to fully understand what exactly happened with regard to the location, timing and number of explosions that took place on that date,' but recognising nevertheless that the accounts of witnesses allow a reasonable trial chamber to conclude that 'there were at least one to two explosions in the area of the Siaka Koné market between 11h00 and 17h00, and three to four explosions in the SOS village neighbourhood in the morning or early afternoon.'[257] Judge Henderson then examined the questions of (a) what caused the explosions, (b) when the shells were fired and by whom, (c) what the target of the shelling was, and (d) who ordered or authorised the firing of the mortars.[258] As to the first question, after having analysed the expert evidence and multiple testimonies relating to the deployment of 120mm mortars, Judge Henderson observed as follows:

> 1811. On the basis of the above evidence, it is difficult to make any determination about whether and, if so, when 120mm mortars arrived in Camp Commando. Although one trustworthy witness may suffice, in this case there are so many different accounts about the circumstances under which 120mm mortars were allegedly deployed at Camp Commando that it is impossible to decide which one is accurate. It is also possible that several of the testimonies are true. But in that case it would seem that mortars were brought back and forth to and from Camp Commando quite frequently, or at least that they were put in and out of battery by different persons on several occasions. Whatever the case may be, the main factor from the above analysis is that none of the evidence regarding the presence of 120mm mortars at Camp Commando specifically and unequivocally concerns the date of the incident in question, that is 17 March 2011 — with the exception of P-0047, who seems to deny their presence on the relevant date. It follows that on the basis of the abovementioned evidence, no reasonable trial chamber could affirm that 120mm mortars were present in Camp Commando on 17 March 2011. This does not establish that there were in fact no mortars in Camp Commando on that day. It only means that the evidence concerning the firing of 120mm mortar shells from Camp Commando on 17 March 2011, which will be discussed next, is not independently supported by any of the other evidence.[259]

246. As to the second question of 'when were the shells alleged[ly] fired and by whom,' after having analysed a number of witness testimonies and a UN report, Judge Henderson concluded:

> 1820. All this makes it 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 which means. Accordingly, this part of the Prosecutor's narrative does not withstand scrutiny. It follows that it is not possible to attribute responsibility for this incident.[260]

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[257] Judge Henderson's Reasons, para 1803.
[258] *Ibid*, paras 1805-1838.
[259] *Ibid*, para 1811.
[260] *Ibid*, para 1820.

247. As to the third question of the target of the shelling, assuming for the sake of further analysis that 'it was a BASA (or other FDS) unit that had fired heavy mortars on 17 March 2011,'[261] Judge Henderson noted:

> 1830. The key consideration, in this regard, is that the civilian population must be the primary target of the attack. Even assuming that mortars were fired without regard to potential civilian casualties and that it was expected that the number of civilian casualties would be excessive, it still would not necessarily follow that the intention was *primarily* to harm civilians who supported Mr Ouattara". […]
>
> 1831. Accordingly, even if all the Prosecutor's factual allegations in relation to the shelling of the 17 March 2017 were accepted at face value, this would not suffice to show that the shells were fired with the aim of attacking civilians deemed to belong to the political opposition or in the knowledge that such individuals would be disproportionally harmed in the ordinary course of events.[262]

248. As to the fourth question of who ordered or authorised the firing, with particular regard to Mr Gbagbo, Judge Henderson found it difficult to believe the testimonies of a number of FDS witnesses regarding the order to fire, and then concluded:

> 1838. Accordingly, it would not be possible for a reasonable trial chamber to rely on this evidence to conclude that, if 120mm 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, either directly or indirectly.[263]

249. Based on the above analysis, Judge Henderson concluded that 'it is clear that the available evidence is manifestly inadequate to support the Prosecutor's theory, both in relation to the contextual elements and in relation to who bears the responsibility for the harm that was caused by the explosions that occurred in Abobo on 17 March 2011.'[264]

250. Concurring with Judge Henderson, Judge Tarfusser noted:

> 85. As regards the 17 March incident, as stated in the Reasons, the Chamber did see 'a lot of evidence of human and material devastation.' However, this evidence was completely inadequate in pointing to a coherent narrative, even less so as regards the determination of the individual authorship of the events causing such devastation and the legal responsibilities. Suffice it to mention that two crucial insider witnesses, Witnesses P-0009 and P-0047, both stated, on the basis of technical considerations of a military nature, the nature and technical features of the weapon allegedly used for the shelling (more specifically, their range of action and their projected impact), on the one hand, and the geographical respective locations of Camp Commando and the targeted site, on the other hand, would make it impossible to adhere to the narrative according to which the shelling would have originated from Camp Commando in Abobo. All the Prosecutor did to challenge those testimonies was (i) to refer to the expert report of Witness P-0411, whose intrinsic inconclusiveness was referred to earlier; (ii) to caution that P-0009 and P-0047 could

[261] *Ibid*, para 1821.
[262] *Ibid*, paras 1830, 1831 (footnote omitted).
[263] *Ibid*, para 1838.
[264] *Ibid*, para 1839.

not be relied upon as credible in this particular matter since they 'have an interest in minimising their involvement (and that of their subordinates) due to possible criminal responsibility for their conduct in failing to prevent or punish these acts'; and (iii) to downplay Witness P-0009's expertise by stating that he 'did not perform any measurements at the scene, nor has he been qualified as an expert in mortars or military engineering.'[265]

(ii) Assessment of the Second Example

251. It is noted that the Trial Chamber found that it was 'not possible to attribute responsibility' for the shelling of locations in Abobo on 17 March 2011, and 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 which means.'[266] The Prosecutor submits, at the outset, that the terms 'impossible' and 'sufficient confidence' taken together signal that the Trial Chamber may have assessed evidence at a standard higher than that set out in Judge Henderson's Reasons.[267]

252. The Prosecutor argues that the Trial Chamber's 'failure to attribute the shelling of Abobo on 17 March 2011 to the FDS/BASA at Camp Commando (Abobo) was another example (and consequence) of its ambiguous approach to assessing the evidence at this stage'. [268] In support of these general allegations, as mentioned above, the Prosecutor submits that the Trial Chamber's error in its approach to assessing the evidence is displayed in its failures to (a) draw reasonable inferences from the evidence, (c) assess expert testimony in a consistent and predictable manner, and (b) properly consider the evidence in its totality and as consistent and corroborated.[269] I shall assess these contentions in turn.

(a) Whether the Trial Chamber failed to draw reasonable inferences from the evidence

253. The Prosecutor submits that the Trial Chamber failed to draw reasonable inferences 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,'[270] and

[265] Judge Tarfusser's Opinion, para 85 (footnotes omitted). Earlier in his opinion, Judge Tarfusser characterised the evidence of witness P-0411, among other expert witnesses, as being 'of little, if any, significance to the charges.' See Judge Tarfusser's Opinion, para 35.
[266] Judge Henderson's Reasons, para 1820.
[267] Prosecutor's Appeal Brief, para 183.
[268] *Ibid*, para 183.
[269] *Ibid*, para 184.
[270] *Ibid*, para 185.

that this was due to its 'overly restrictive and unnecessary' approach.[271] To support this argument, she refers the Appeals Chamber to the testimonies of several witnesses.[272]

254. The Prosecutor refers to prosecution witnesses P-0330, P-0238, and P-0009, who testified that 'BASA had 120mm mortar shells, including in Camp Commando in the days and weeks leading up to the incident.'[273] In addition, the Prosecutor relies on the testimonies of prosecution witnesses P-0226, P-0239 and P-0164.[274] She notes that witness P-0226, a BASA corporal during the post-election crisis, 'who was at Camp Akouédo on the day Abobo market was shelled, heard mortar shells being launched into the middle of the city' and that '[h]e 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.'[275] The Prosecutor further notes that witness 'P-0239, a BASA officer during the post-election violence, saw 120mm mortar shells fired from Camp Commando at areas in Abobo.'[276] The Prosecutor also notes that witness 'P-0164, also a BASA officer, testified that 120mm mortars (at Camp Commando) were aimed towards Abobo' and that 'a relative of his—living in SOS Village—had called him to say that mortar shells had hit the area, and that he (P-0164) confronted those who had fired the shells.'[277] Further, she notes that the expert witness (*i.e.* witness P-0411) 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.'[278]

255. The Prosecutor submits that while the Trial Chamber found that on 17 March 2011 at least four and possibly more explosions struck at least two different locations in Abobo, and acknowledged the possibility that witness P-0239 witnessed only part of the shelling, the Trial Chamber considered witness P-0239's testimony inconsistent with other evidence relating to the shelling on 17 March 2011.[279]

256. The Trial Chamber took issue with a number of aspects of witness P-0239's testimony, finding it inconsistent with the other prosecution evidence relating to the shelling on 17 March 2011.[280] As regards the timing of the firing of the mortars, the Trial Chamber found that witness 'P-0239 had no recollection of the precise date of the incident

[271] *Ibid*, para 187.
[272] *Ibid*, para 186.
[273] *Ibid*.
[274] *Ibid*.
[275] *Ibid*, para 186.
[276] *Ibid*.
[277] *Ibid*.
[278] *Ibid*.
[279] *Ibid*, para 187.
[280] Judge Henderson's Reasons, paras 1808, 1813-1817.

he allegedly witnessed,'[281] and that, according to him, 'he was present in Camp Commando sometime in March where he witnessed two 120mm mortar rounds being fired from the same mortar in short intervals.'[282] The Trial Chamber also found that prosecution witness 'P-0226 stated that the mortars were fired one or two days after the women's march at around 17h00, which would be 4 or 5 March 2011, rather than on 17 March, as alleged by the Prosecutor.'[283]

257. The Trial Chamber also viewed as problematic witness P-0239's statement that 'two shells were fired in short succession.'[284] The Trial Chamber considered that this statement does not match the number of explosions and the different locations hit by the mortar shells, which were relatively far apart.[285] Given the discrepancies between the accounts of P-0239 and P-0226 and that neither of the witnesses recalled the exact date of the events that they described, the Trial Chamber found it difficult to infer whether the two witnesses were actually referring to the same or different situations.[286]

258. The Trial Chamber also questioned witness P-0239's testimony regarding who fired the mortars in light of how other witnesses recounted the same incident.[287] The Trial Chamber noted that witness P-0239 testified that MDL-Chef Brice Kamanan and MDL Pégard, together with a third unidentified brigadier fired the shots,[288] whereas according to witness P-0164, Pégard denied his involvement in firing the mortar as he was *chef de pièce* for the 12.7mm machine gun.[289] Moreover, the Trial Chamber signalled caution regarding reliance on this part of witness P-0164's testimony as it constitutes hearsay.[290] The Trial Chamber also noted that witness P-0226 mentioned that the BASA crew were greeted as heroes upon their return from Camp Commando.[291]

259. It may be noted that the Prosecutor essentially challenges the weighing of the evidence that was before the Trial Chamber. In assessing these arguments, what an appellate court must apply is the standard of reasonableness of factual findings, for the reasons already explained. I note the detailed explanations that the Trial Chamber has provided to justify its assessment of the evidence in relation to this obviously complicated

[281] *Ibid*, para 1817.
[282] *Ibid*, para 1812.
[283] *Ibid*, para 1817.
[284] *Ibid*, para 1814.
[285] *Ibid*, paras 1803, 1814.
[286] *Ibid*, para 1808.
[287] *Ibid*, paras 1816-1818.
[288] *Ibid*, para 1816.
[289] *Ibid*, para 1818.
[290] *Ibid*.
[291] *Ibid*, para 1817.

part of the evidence. The Prosecutor has merely presented a possible alternative interpretation of the evidence. But in doing so, the Prosecutor's submissions do not reveal a compelling view of the Trial Chamber's findings as unreasonable, such that would establish guilt beyond a reasonable doubt. In addition, with regard to the Prosecutor's argument that the Trial Chamber may have assessed evidence at a standard higher than that set out in Judge Henderson's Reasons, as noted in the Appeals Chamber's judgment, it is based on the Prosecutor's incorrect understanding of the standard that Judge Henderson adopted.[292] The Prosecutor's arguments are therefore rejected. They particularly engage the complaint, rejected by the Supreme Court of Canada in *Braich*, that if the trial judge had thought harder about the problems he might have reached a different conclusion.[293]

(b) Whether the Trial Chamber assessed expert evidence inconsistently and unreasonably

260. The Prosecutor argues that the Trial Chamber assessed the evidence of the prosecution expert witness P-0411 inconsistently and unreasonably.[294] In particular, she argues that the Trial Chamber misunderstood the role of the expert evidence and subjected it to an unreasonably higher level of review than is required, and that the two Judges of the majority took different and inconsistent approaches to the expert testimony.[295]

261. It is recalled that the expert's report found that '[g]iven all the examined circumstances surrounding the four impact sites visited it is highly likely that they were subject to attack by a heavy cased high explosive ammunition item and this was most likely a 120mm mortar system variant.'[296] It also concluded that '[i]t is certainly possible to deploy mortar systems from Camp Commando' and that '[t]he areas of SOS village and Siaka Kone Market are well within the minimum and maximum range limitations of most mortar systems.'[297]

262. It is noted that both Judge Henderson and Judge Tarfusser, although expressing themselves differently, ultimately decided not to rely on this expert evidence. Judge Henderson stated that while the expert witness's evidence demonstrated that the physical evidence 'is consistent' with the Prosecutor's submissions that Russian 120mm

[292] See Judgment of the Appeals Chamber, para 338.
[293] *R v Braich*, para 39.
[294] Prosecutor's Appeal Brief, paras 188-193.
[295] *Ibid*.
[296] CIV-OTP-0049-0048, at 0049-0050. See also CIV-OTP-0049-0076, at 0049-0077, para 8.
[297] *Ibid*.

mortar shells were responsible for the 17 March 2011 explosions, 'it does not prove it.'[298] Judge Tarfusser stated that the expert's report would 'remain "inconclusive" both as to the identification of the author(s) of the shot and as the underlying motives.'[299] The expert's report did indeed leave room for other possible causes of explosions at each impact site.[300]

263. It is noted that while one of the Prosecutor's arguments in this example is that the two judges forming the majority adopted different and inconsistent approaches to the expert evidence,[301] she fails to substantiate how Judge Tarfusser's approach materially contradicted Judge Henderson's assessment.

264. It is noted in this regard that it is part of the functions of the trier of fact to assess the credibility or reliability of expert evidence and to determine the probative value to be attributed to such evidence. A fair view of the Trial Chamber's assessment in this case does not bear out the Prosecutor's suggestion that the Trial Chamber required the expert evidence to support the Prosecutor's allegations with 'complete certainty.' The two judges in the majority considered that the expert report, although not contradicting the Prosecutor's thesis that 120mm mortars were responsible for the 17 March 2011 incident, did not prove that thesis. Also, the Trial Chamber assessed witness P-0411's evidence by looking at its probative value, and considered it in light of other evidence on the record. In Judge Henderson Reasons he stated that 'the expert's evidence must not be seen in isolation. Indeed, the conclusions may complement and/or converge with other information that is on the record.'[302] Having conducted such an analysis of the evidence, he concluded that 'no reasonable trial chamber could affirm that 120mm mortars were present at Camp Commando on 17 March 2011.'[303] Similarly, while Judge Tarfusser noted that witness P-0411's evidence is 'intrinsic[ally] inconclusive […],' it appears that he also considered this evidence in the context of other evidence (including witnesses P-0009 and P-0047).[304] In light of the above, I am not persuaded that the Trial Chamber's assessment of the expert evidence was marred by error. I thus consider that the Prosecutor has not established that the Trial Chamber's approach to the expert evidence was unreasonable.

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[298] Judge Henderson's Reasons, para 1806.
[299] Judge Tarfusser's Opinion, para 29.
[300] Judge Henderson's Reasons, para 1806.
[301] Prosecutor's Appeal Brief, paras 188, 191.
[302] Judge Henderson's Reasons, para 1807.
[303] *Ibid*, para 1811.
[304] Judge Tarfusser's Opinion, para 85.

(c) Whether the Trial Chamber failed to appreciate that the evidence was consistent and corroborated

265. The Prosecutor submits that the evidence of prosecution 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.'[305] She submits that the Trial Chamber's approach in relation to certain witnesses' accounts was, however, 'to require that they corroborate *each other's account*.'[306] In doing so, she argues that the Trial Chamber 'unreasonably failed to recognise that similar facts and/or a sequence of separate but linked facts can also constitute corroboration.'[307] To support her argument, the Prosecutor compares the testimonies of witnesses P-0226 and P-0239 regarding the bringing in of the mortars and their location at Camp Commando around early March 2011, and then the testimonies of witnesses P-0164 and P-0226 regarding the presence of 120mm mortars on, and some days prior to, 3 March 2011.[308] The Prosecutor argues that while these accounts are '*prima facie* compatible,' the Trial Chamber unreasonably focused on the divergences regarding the specifics of the incidents.[309]

266. The Trial Chamber noted that witness P-0226 testified that when two 120mm mortars arrived at Camp Commando before the women's march, he helped to set the mortars into battery, and that he heard that the unit bringing in the mortar came straight from BASA.[310] Witness P-0239 testified that on his second mission to Camp Commando, he and his unit first went from BASA to Camp Commando, then were immediately deployed to Dépôt 9 with 120mm mortars, where they set them into battery, and afterwards went back to Camp Commando with the mortars.[311]

267. It is noted that while the Trial Chamber recognised that there was testimonial evidence indicating that BASA had deployed 120mm mortars in Camp Commando in February or March 2011, the Trial Chamber appears to have been troubled by contradictions or discrepancies between the testimonies. In other words, the Trial Chamber noted that 'there are so many different accounts about the circumstances under which 120mm mortars were allegedly deployed at Camp Commando that it is impossible

[305] Prosecutor's Appeal Brief, para 194.
[306] *Ibid*, para 194 (emphases in original).
[307] *Ibid*.
[308] *Ibid*, paras 195-196.
[309] *Ibid*.
[310] Judge Henderson's Reasons, paras 1807-1808.
[311] *Ibid*, para 1808.

to decide which one is accurate.'[312] But, the import of this phenomenon in the context of a criminal case must not be ignored.

268. At the ICC, a criminal trial remains a partisan contest between the Prosecution and the Defence. In order to win that contest, the Prosecution must establish guilt beyond reasonable doubt and must do so during its turn to present its case—when it has the floor of the courtroom to present its most compelling evidence—without the Defence yet called upon to present its own evidence. The judges are impartial and neutral arbiters whose role is to determine whether the Prosecution has established its case beyond reasonable doubt—whenever that question arises for consideration in the case. Judges presiding over a criminal trial are not fact finders in the mode of investigators engaged in a commission of inquiry. It is not the role of judges to navigate through complexities in the manner of discrepancies and inconsistencies within the Prosecution's case—for the overarching purpose of resolving those inconsistencies *within the case for the Prosecution*, and then determine that the case has been established beyond reasonable doubt. It is one thing to say that judges may convict an accused person after resolving discrepancies and inconsistencies *between* evidence presented by the Prosecution and that presented by the Defence. It is quite another matter to say that the judges may convict an accused person after resolving discrepancies and inconsistencies *within* the case for the Prosecution. Doing so comes with a high-risk of perceptions of loss of judicial impartiality, in a manner that redounds in favour of the Prosecution. It is no excuse to say, as the Prosecution does in this case, that the Prosecution case was a complex one. Discrepancies and inconsistencies in the case for the Prosecution—particularly a complex case—are the veritable hallmarks of a sensible view of reasonable doubt. They do not result in a prosecutorial entitlement that imposes upon the trier of fact a correlative obligation to resolve them in favour of the Prosecution. In such an event, the complaint becomes untenable in the mouth of the Prosecution that the findings of the tribunal of fact were unreasonable.

269. It is noted that after conducting a detailed examination of the testimonies of prosecution witnesses P-0226, P-0330, P-0239, P-0164, P-0156, and P-0047, the Trial Chamber found that it is not possible to determine whether [the testimony of witnesses P-0226 and P-0239] referred to the same or different situation(s).'[313] It also considered the testimony of witness P-0164, who testified that he saw two 120mm mortars upon his arrival at Camp Commando on 3 March 2011 but that they were not yet set into battery, and that he then received the order to do so, which he executed with the squad leader.[314]

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[313] *Ibid*.
[314] *Ibid*, para 1809.

The Trial Chamber also considered the testimony of prosecution witness P-0156 who denied the presence of 120mm mortars in Camp Commando around that date, as well as that of prosecution witness P-0047 who testified that by 17 March 2011 the 120mm guns had been withdrawn from Camp Commando.[315] Based on the above analysis, the Trial Chamber noted that 'it is difficult to make any determination about whether and, if so, when 120mm mortars arrived in Camp Commando'.[316] It further noted that 'none of the evidence regarding the presence of 120mm mortars at Camp Commando specifically and unequivocally concerns the date of the incident in question that is 17 March 2011—with the exception of [witness] P-0047, who seems to deny their presence on the relevant date,' and accordingly found that 'no reasonable trial chamber could affirm that 120mm mortars were present in Camp Commando on 17 March 2011 […].'[317]

270. I am not persuaded that the Trial Chamber was unreasonable in identifying discrepancies between the witnesses' testimonies regarding, amongst other things, the precise time and location of the presence of 120mm mortars.[318] I am also not persuaded by the Prosecutor's argument that these discrepancies were minor. They relate, amongst other things, to the crucial question of whether the mortars were present at the time and date of their alleged use to attack a civilian population. As a general proposition, it may be reasonable for one Trial Chamber to ignore such discrepancies, with satisfactory explanation. But it is not unreasonable for another Trial Chamber to be troubled by such discrepancies *in the case for the Prosecution*, making it unsafe in their mind to find guilt established beyond reasonable doubt.

271. In light of the foregoing, I am not persuaded that the Prosecutor has established that the Trial Chamber failed to appreciate that the evidence was consistent and corroborated. The Prosecutor's argument is therefore rejected.

3) The Third Example

272. The Prosecutor submits that the Trial Chamber erred in assessing the evidence in relation to Mr Gbagbo's involvement in the shelling in Abobo (late February 2011 and 17 March 2011).[319] She argues that the evidentiary analysis in respect of this example shows that the Trial Chamber failed to assess the evidence as a whole.

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[315] *Ibid*, paras 1809, 1810.
[316] *Ibid*, para 1811.
[317] *Ibid*.
[318] *Ibid*, paras 1808, 1809.
[319] Prosecutor's Appeal Brief, paras 199-213.

(i) Relevant part of the Impugned Decision

273. Judge Henderson made the following observations concerning hearsay evidence:

42. An extraordinary amount of evidence in this case rests upon hearsay, which the Prosecutor submitted on a prodigious scale. The Prosecutor's relaxed approach to its use raises serious questions about her methodology. Indeed, it appears as if the fact that certain evidence may have been largely based on hearsay without the evidential basis to properly evaluate its probative value was not a significant factor in the Prosecutor's selection of evidence submitted for the Chamber's consideration.

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

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

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.[320]

274. In relation to the orders regarding the shelling in Abobo, Judge Henderson made the following findings.

414. The evidence cited by the Prosecutor in support of her argument that Zadi received direct orders from Mr Gbagbo and members of the Inner Circle is also weak. The testimony of P-0330 was cited by the Prosecutor to this end, wherein the witness claimed that he [REDACTED] received orders from the presidency to unload 120mm mortars at Camp Commando. However, the evidence is unpersuasive for two reasons: first, it constitutes hearsay, being merely P-0330's account of what [REDACTED] alleged. In fact, irrespective of whether the witness overheard or participated in the conversation, he did not even perfectly hear what [REDACTED] had said, such that he had to rely on Colonel Doumbia's rendition of the events.

415. Second, it should be noted that even though P-0330 independently heard [REDACTED] refer to 'the presidency,' it is clear from P-0238's testimony (as referred to above) that such a term does

[320] Judge Henderson's Reasons, paras 42-45.

not necessarily refer to the President himself. Thus, even if the order in question had been made, *who* at the presidency made such an order has not been established.[321]

275. Judge Henderson continued:

1345. On this basis, it would be impossible to conclude that the FDS shelled densely populated areas or that its target was the civilian population. The 60mm mortar shell, according to the evidence available, fell in the Banco forest and not in an urban area. Moreover, nowhere in his testimony did General Mangou provide evidence of Mr Gbagbo's involvement in the decision to use of mortar shells during the first military offensive in Abobo.[322]

[…]

1355. There is no evidence indicating that Mr Gbagbo was directly involved in the shelling of Abobo in late February. It is acknowledged that witness P-0239 testified in general terms that the use of a 120mm mortar had to be authorised by a written order from the President. However, this is not sufficient to establish that Mr Gbabgo personally authorised the use of mortars in the context of the two military offensives of 23 and 25 February 2011.

1356. According to General Mangou, the operations of 23 and 25 February were conducted pursuant to the requisition of the armed forces, which, General Mangou maintained, had been issued by Mr Gbagbo on 5 January 2011. General Mangou testified that for this reason he did not need, and indeed did not receive, any instruction or express authorisation from the President to order the firing of the 120mm mortar. There is thus no evidence that could support a finding that Mr Gbagbo ordered or specifically authorised the use of mortars or other heavy weapons in Abobo during the operations of 23 and/or 25 February 2011.

1357. It is not even clear whether or not Mr Gbagbo was made aware that 120mm shells had been used in the second offensive, as alleged by the Prosecutor. When General Mangou was questioned on his report to the President, supposedly made after the 25 February 2011 operation, General Mangou was once again unclear as to which operation he was referring to in his answers. General Mangou stated that he had reported to the Minister of Defence who certainly reported to the President of the Republic. The witness was then asked whether the Minister of Defence was informed that shells had been used. General Mangou responded the following: 'Yes, but not in relation to the MACA-N'Dotré operation. He was informed in relation to the market.' This suggests that Mr Gbagbo was not informed of the use of shells during the second military operation in Abobo.

1358. In an effort to make the witness repeat what he had previously stated during an interview with investigators of the Office of the Prosecutor, the Prosecutor read a previously recorded statement in which General Mangou had confirmed having reported to the President that the roundabout had been liberated and also that the President knew that shells had been used on that occasion. After the Prosecutor had read a long excerpt from his interview into the record, General Mangou confirmed that the answers he had given to the investigators in 2013 were correct.

1359. Although a reasonable trial chamber might conclude, on this basis, that Mr Gbagbo was indeed informed about the use of mortars during operations in Abobo in late February 2011, there is no reliable information about what exactly he was told. In particular, it is entirely unclear

[321] *Ibid*, paras 414-415 (footnotes omitted).
[322] *Ibid*, paras 1343-1345 (footnotes omitted).

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.[323]

276. Judge Henderson further found:

> 1380. When it comes to the alleged shelling of Abobo on 23 and 25 February 2011, the detailed analysis of the evidence upon which the Prosecutor relies has shown that no reasonable trial chamber could come to any definitive conclusions on the basis of multiple contradictions in the testimonies of the relevant witnesses. In particular, there is no support in the evidence for the contention that the FDS deliberately shelled urban areas of Abobo. Even if the contradictions were to be ignored, General Mangou said that on 23 February the FDS shelled the Banco forest and there is no information as to where the shell(s) fired on 25 February 2011 landed. There is also no reliable evidence of civilians being killed or harmed as a result of these shellings.
>
> 1381. Concerning the question of Mr Gbagbo's involvement, the evidence provided by General Mangou was that the President did not instructor authorise the shelling of Abobo at any relevant time. General Mangou's testimony is confusing at best in relation to the reporting to Mr Gbagbo in the aftermath of these operations. Thus, this evidence is not conclusive. Lastly, the suggestion that, after having met with Mr Gbagbo on 24 February 2011, the Chief of Staff authorised the firing of a much greater number of mortar shells in Abobo does not find support in the evidence. The analysis above demonstrates that these allegations stem from the equivocality of General Mangou's testimony on the use of mortars in Abobo during the military offensives of 23 and 25 February 2011.[324]

277. Further below, Judge Henderson observed:

> 1832. Given the conclusions reached above – i.e. that it is not possible to determine with any level of precision or certainty what caused the explosions and that, even if the Prosecutor's version was accepted, this would still not be evidence of an attack that was primarily aimed at a particular group of civilians – it is not necessary to examine the Prosecutor's arguments in relation to who allegedly ordered the firing of the shells. However, out of an abundance of caution, a few brief remarks will be made.
>
> 1833. The Prosecutor argues that 'the […] order on 17 March 2011 must have come from Mr Gabgbo himself.' Acknowledging that there is no direct evidence of such an order – which is explained on the basis that 'this paper trail would have directly implicated Mr Gbagbo and his chain of command in criminal conduct' – the Prosecutor claims that the existence of the order can nevertheless be inferred from 'the totality of [the] circumstances' and points specifically to the following four elements: First, that Mr Gbagbo authorised the use of 120mm mortars in Abidjan during the crisis; second, that General Mangou admitted having authorised the firing of two shells 'in Abidjan'; third, that multiple witnesses indicated that 'the order to fire 120mm mortars from Camp Commando' came from the Presidency; and, fourth, that General Mangou pressured P-0164 to fire a 120mm mortar at another oc[c]assion. The first two elements have been discussed elsewhere in these reasons. However, in relation to the third and fourth points, a few observations are in order.
>
> 1834. First, although it is true that a number of FDS witnesses have claimed that they were told during their training that orders for firing 120mm mortars and other heavy artillery had to come from the President, it is difficult to take this literally. Indeed, it is difficult to see how any armed force would be able to engage in sustained and complex military operations if every time there was a need to use heavy artillery there would be a need to first get prior approval from the head

[323] *Ibid*, paras 1355-1359 (footnotes omitted).
[324] *Ibid*, paras 1380-1381.

of state or government. There is little point in speculating about what the witnesses may have actually been told. It suffices to note that the Chamber has not been presented with evidence of an actual rule or procedure in the FDS that required the President to personally approve every single instance of the use of 120mm mortars. Moreover, General Mangou testified that, since the Army had been requisitioned, there was no need for a specific authorisation to use 120mm mortars. In addition, P-0226 testified that gunners would normally ask for a written confirmation of an order to fire a 120mm mortar in urban areas and that this written confirmation would come from their immediate superior. There is no indication that field commanders needed prior approval from the President, let alone an explanation of how this would work in practice.

1835. In relation to the fourth point, P-0164 claimed that on 5 March 2011 he was pressured by Major Niamké and General Mangou to fire 120mm mortars into Abobo. Although P-0164 claimed that General Mangou told Major Niamké to 'do everything to persuade' P-0164 to execute the order, he also testified, in relation to a question about who issued the order to fire the 120mm shells, that General Mangou was 'not very happy.' This part of P-0164's testimony leaves much to be desired in terms of clarity, but one reasonable interpretation of it is that the Chief of Staff was not pleased with the idea of using 120mm mortars in that part of Abobo. It is worth noting, in this regard, that according to P-0164, Major Niamké had also called General Detoh Letho the highest operational commander in Abobo at the time and an alleged 'inner circle' member who stated that he was not involved in 'their' heavy weapons issue. Although it is difficult to determine the significance of these alleged exchanges, they certainly do not convey the impression that the two most senior 'inner circle' members who were allegedly informed about Major Niamké's intention to shell *Carrefour de la Mairie* and *Carrefour N'Dotré*, were fully behind it.

1836. Significantly, both General Detoh Letho and General Mangou categorically denied that these telephone conversations ever took place. The Prosecutor asks us to ignore this evidence on the basis that it is not credible, but provides no support for this claim, apart from the notional arguments that both officers have an interest in denying involvement in criminal activity and that P-0164's claim is plausible because 'a subordinate has a lawful basis to refuse to follow manifestly unlawful orders – and that a commander's call to the CEMA would be appropriate in that extraordinary instance.' However, given that the Prosecutor has raised the issue of witness credibility, it is permissible to point out, at this stage, that P-0164's own veracity is in doubt. In particular, witness P-0164 stated a number of remarkable things:

1837. First, P-0164 admitted to insubordination, sabotage, espionage, and to having been in contact with officers at the Golf Hotel during the crisis when he was deployed by the FDS. These are all elements that indicate strong potential bias against the accused. Second, he made the incredulous claim that Colonel Dadi sent him on an unspecified mission to Port Bouët II all by himself in civilian clothing, where he ended up helping Ouattara supporters with setting up roadblocks against FDS units. Even more lacking in credulity is P-0164's claim that, after Colonel Dadi had tried to have him killed and after Colonel Dadi probably used a chemical substance to drug his family, he voluntarily returned to the BASA camp in Akouédo in order not to lose his salary and with the intention 'to give [Dadi] the kind of correction or beat him up so badly that he would never forget it.' There are several other areas of concern about P-0164's veracity. However, this is not the occasion to make a fully-fledged credibility assessment. It suffices to say that it is exceedingly hard to imagine any trial chamber attaching significant probative value to the testimony of this witness.

1838. Accordingly, it would not be possible for a reasonable trial chamber to rely on this evidence to conclude that, if 120mm 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, either directly or indirectly.

[…]

1839. Based on the above analysis, it is clear that the available evidence is manifestly inadequate to support the Prosecutor's theory, both in relation to the contextual elements and in relation to who bears responsibility for the harm that was caused by the explosions that occurred in Abobo on 17 March 2011. This does not mean that nothing happened. Indeed, the Chamber has seen a lot of evidence of human and material devastation. However, the evidence would not allow a reasonable trial chamber to determine who was behind the explosions with a sufficient level of specificity or certainty [footnotes omitted].[325]

278. For his part, Judge Tarfusser observed:

d. 17 March 2011–Abobo II

85. As regards the 17 March incident, as stated in the Reasons, the Chamber did see 'a lot of evidence of human and material devastation.' However, this evidence was completely inadequate in pointing to a coherent narrative, even less so as regards the determination of the individual authorship of the events causing such devastation and the legal responsibilities. Suffice it to mention that two crucial insider witnesses, Witnesses P-0009 and P-0047, both stated, on the basis of technical considerations of a military nature, the nature and technical features of the weapon allegedly used for the shelling (more specifically, their range of action and their projected impact), on the one hand, and the geographical respective locations of Camp Commando and the targeted site, on the other hand, would make it impossible to adhere to the narrative according to which the shelling would have originated from Camp Commando in Abobo. All the Prosecutor did to challenge those testimonies was (i) to refer to the expert report of Witness P-0411, whose intrinsic inconclusiveness was referred to earlier; (ii) to caution that P-0009 and P-0047 could not be relied upon as credible in this particular matter since they 'have an interest in minimising their involvement (and that of their subordinates) due to possible criminal responsibility for their conduct in failing to prevent or punish these acts; and (iii) to downplay Witness P-0009's expertise by stating that he 'did not perform any measurements at the scene, nor has he been qualified as an expert in mortars or military engineering.

[…]

113. Likewise ignored remained the following:

[…]

v. Witness P-0009's accurate account of the existence of mortars within the Ivorian army, the fact that the authorisation to use them was implicit in the fact of having requisitioned the Army (who '*vient avec ses moyens*') and the circumstances (limited to two, and with clearly specific and detailed justifications as part of the strategy to dislodge the *Commando Invisible*) he himself had authorised their use, as well as the cautionary considerations which had led him to order their removal;

[…]

vii. the fact that, duly informed (*ex post*) about the use of mortars by the Army, the President would simply, and responsibly, have requested more information as to the details (and the absence of any indication to the effect, and in support of a conclusion, that such use would have been done in compliance with orders from the President which would include a determination to attack the

[325] *Ibid*, paras 1832-1839.

population, or even the disregard for the fate of those who may fall victim to such use) [footnotes omitted].[326]

(ii) Assessment of the Third Example

279. It is noted that the Trial Chamber found that '[a]lthough a reasonable trial chamber might conclude […] that Mr Gbagbo was indeed informed about the use of mortars during operations in Abobo in late February 2011, there is no reliable information about what exactly he was told.'[327] Also, in a different section of Judge Henderson's Reasons, regarding the shelling of Abobo on 17 March 2011, he stated that 'it would not be possible for a reasonable trial chamber to rely on this evidence to conclude that, if 120mm 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, either directly or indirectly.'[328]

280. As concerns this example, the Prosecutor contends that the Trial Chamber did not consider the evidence in its totality and failed to draw reasonable inferences regarding Mr Gbagbo's involvement in the Abobo shelling incidents of February and March 2011.[329] To that effect, she refers to specific parts of the testimony of prosecution witnesses P-0239, P-0330, P-0009, and P-0010, who, in the Prosecutor's view, support the propositions that: (a) Mr Gbagbo had authorised the use of the mortars;[330] (b) the Presidency issued orders to use the 120mm mortars in late February 2011;[331] (iii) Colonel Dadi, a commanding officer, was receiving orders directly from Mr Gbagbo;[332] (iv) Mr Gbagbo's specific authorisation was, in any event, not required because the use of heavy weaponry was implied within Mr Gbagbo's requisition of the armed forces;[333] (v) Mr Gbagbo was informed of the activities of the armed forces in late February 2011 and gave general instructions;[334] and (vi) Mr Gbagbo had knowledge of military affairs.[335] To address these arguments, it is helpful to keep in mind the discrete items of evidence to which the Prosecutor referred and the Trial Chamber's assessment of them. Concerning the evidence as to Mr Gbagbo's authorisation to use heavy weaponry, it is noted that prosecution witness P-0239 testified that before using the weaponry, the artillery, the

[326] Judge Tarfusser's Opinion, paras 85, 113(v), 113(vii).
[327] Judge Henderson's Reasons, para 1359.
[328] *Ibid*, paras 1838.
[329] Prosecutor's Appeal Brief, para 200.
[330] *Ibid*, para 203.
[331] *Ibid*, para 204.
[332] *Ibid*, para 207.
[333] *Ibid*, para 208.
[334] *Ibid*, para 209.
[335] *Ibid*, para 210.

President must give an order in writing and that in training he was told that the president himself needed to give his agreement.[336] However, the Trial Chamber noted that '[t]here is no evidence indicating that Mr Gbagbo was directly involved in the shelling of Abobo in late February.'[337] While the Trial Chamber acknowledged that 'witness P-0239 testified in general terms that the use of a 120mm mortar had to be authorised by a written order from the President,' this testimony is quite simply insufficient 'to establish that Mr Gbagbo personally authorised the use of mortars in the context of the two military offensives of 23 and 25 February 2011.'[338] Notably, the Prosecutor refers to specific evidence of a general practice, namely that the Presidency issued orders to use 120mm mortars in late February 2011. In particular, witness P-0330 testified that '[t]he officer, chief of detachment who wanted to use these 120 millimetres mortars, said that he had received the order from the presidency'.[339] The witness further testified that he 'observed an officer, a chief of detachment, mounting the mortar battery' and that when [REDACTED] asked him, *inter alia*, if he received an order to use such weapon, [REDACTED] and the officer had a discussion where the witness heard the word 'presidency.'[340]

281. The Trial Chamber considered this evidence as 'weak' and 'unpersuasive.'[341] The Trial Chamber considered that it was hearsay and that the witness' reference to the conversation showed that he did not hear clearly what [REDACTED] said.[342] The Trial Chamber further observed that the term 'presidency' 'does not necessarily refer to the President himself.'[343]

282. Witness P-0330 directly saw the chief of the command post ([REDACTED]) approaching a chief of detachment mounting a mortar's battery ([REDACTED]) and heard the word 'presidency' in their conversation about the existence of an order to use the mortar. Moreover, the witness testified that [REDACTED]said that [REDACTED] 'had told him that he received orders from the Presidency.' It is noted that the Trial Chamber disregarded this *viva voce* evidence as 'weak' and 'unpersuasive,' primarily because it constitutes hearsay.

283. While the Prosecutor does not contest that this evidence amounts to hearsay, she does argue that it does not meet Judge Henderson's requirements for hearsay

[336] P-0239, T-167-ENG, p 50, lines 5-23.
[337] Judge Henderson's Reasons, para 1355.
[338] *Ibid*, para 1355.
[339] P-0330, T-69-Red2-ENG, p 6, lines 10-12.
[340] P-0330, T-73-Red2-ENG, p 27, lines 7-17.
[341] Judge Henderson's Reasons, para 414.
[342] *Ibid*, para 414.
[343] *Ibid*, para 414.

evidence. It is noted that Judge Henderson observed that 'in appropriate cases, hearsay evidence may have considerable probative value,'[344] except '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.'[345] In this regard, it is noted that Judge Henderson did not state that hearsay evidence would *necessarily* or *always* have considerable probative value *unless* the evidence in support of a proposition is primarily anonymous hearsay. Thus, I am not persuaded that the Trial Chamber's approach in respect of this particular instance of hearsay evidence was at odds with its earlier stated approach.

284. It is noted that the Trial Chamber deemed as 'hearsay' what prosecution witness P-0330 heard [REDACTED] received orders from 'the Presidency.'[346] It is true that the Trial Chamber did not specify that the order from 'the Presidency' [REDACTED] was either hearsay or anonymous hearsay. It was not necessary for the Trial Chamber to spell out its concerns in those specific terms. What makes the testimony hearsay is that prosecution witness P-0330 was the person testifying about what he *heard* [REDACTED], rather than [REDACTED] giving that testimony himself in a manner that would incriminate the accused—and be subjected to cross-examination. In any event, the Trial Chamber noted that it was not established *who* within the presidency gave the alleged order [REDACTED].[347] It is that deficiency in the testimony that raises the concern about anonymous hearsay. Here, it is noted that, in contrast with the word 'President,' the word 'Presidency' is necessarily a collective noun, which could include not only the President himself but an untold number of additional people.

285. It is noted that, when assessing the 17 March 2011 shelling incident, the Trial Chamber dismissed the testimony of witnesses regarding the need for an order to use mortars because, in its view, 'it is difficult to see how any armed force would be able to engage in sustained and complex military operations if every time there was a need to use heavy artillery there would be a need to first get prior approval from the head of state or government.'[348] It was of the view that '[t]here is little point in speculating about what the witnesses may have actually been told' and that it 'not been presented with evidence of an actual rule or procedure in the FDS that required the President to personally approve every single instance of the use of 120mm mortars.'[349] It further noted that 'General

[344] *Ibid*, para 43.
[345] *Ibid*, para 45.
[346] *Ibid*, para 414.
[347] *Ibid*, para 415.
[348] *Ibid*, para 1834.
[349] *Ibid*.

Mangou [witness P-0009] testified that, since the Army had been requisitioned, there was no need for a specific authorisation to use 120mm mortars' and that witness 'P-0226 testified that gunners would normally ask for a written confirmation of an order to fire a 120mm mortar in urban areas and that this written confirmation would come from their immediate superior.'[350]

286. Regardless of whether or not Mr Gbagbo provided a specific authorisation to use 120mm mortars in Abobo in late February 2011, the Prosecutor, as also acknowledged by the Trial Chamber,[351] submits that Mr Gbagbo's authorisation was in any event not required. Witness P-0009 testified that he authorised the firing of the 120 mm mortar.[352] Referring to the need for authorisation to use this type of mortar, he said that the army was 'acting within the framework of a requisition,' and that they thus 'had the authorisation,' because '[o]nce the army has been requisitioned, the army comes with all its resources.'[353]

287. Also, the Prosecutor submits that the evidence shows that Mr Gbagbo had been kept informed of the activities of the armed forces in late February 2011 and that he gave general instructions. In this regard, witness P-0009 testified that, after having shown Mr Gbagbo a map with the locations where the enemy was situated, and having confirmed that people were still present in the area where the enemies and the friendly troops were positioned, Mr Gbagbo gave the following instruction: 'Make sure that not too many people die.'[354] When the witness was asked whether he had informed Mr Gbagbo that the 60-millimetre mortars had been used, the witness replied that '[t]he minister was informed' and he did not inform Mr Gbagbo personally, 'but certainly the minister would have informed the president of the republic.'[355]

288. It is further noted that, according to the Prosecutor, the Trial Chamber had been presented with evidence about Mr Gbagbo's own knowledge of military affairs. Prosecution witness P-0010 testified that Mr Gbagbo had knowledge of military operations, and that '[h]e always gave instructions as follows: "Hold on to Abobo.

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[350] *Ibid*.
[351] *Ibid*.
[352] P-0009, T-196-Red2-ENG, p 58, lines 6-8, 18-25.
[353] P-0009, T-193-ENG, p 71, line 23 to p 72, line 3; see also P-0009, T-194-ENG, p 78, lines 11-13 ('A. [...] The forces had been requisitioned, and so we were acting pursuant to that requisition. If there had not been a requisition, I would never have deployed the army. We were acting pursuant to a requisition.').
[354] P-0009, T-194-ENG, p 57, lines 12-21. The witness further testified that Mr Gbagbo asked other questions, received answers from different generals, and gave instructions to recover territory and roads he considered 'strategic' (P-0009, T-194-ENG, p 57, line 22 to p 58, line 14).
[355] P-0009, T-196-Red2-ENG, p 43, lines 7-11.

Reinforce your positions. Do whatever you can, but you must keep Abobo".'[356] Witness P-0010 further testified that Mr Gbagbo 'knew about weapons' and about 'the weight of weapons,' '[b]ut he never delved into any details about the military operations.'[357]

289. It may be recalled that the Trial Chamber found, after considering the testimony of witness P-0009 that the requisition of the armed forces implied an authorisation to use heavy weaponry, that there was 'no evidence that could support a finding that Mr Gbagbo ordered or specifically authorised the use of mortars or other heavy weapons in Abobo during the operations of 23 and/or 25 February 2011.'[358] The Trial Chamber further noted that it was 'not even clear whether or not Mr Gbagbo was made aware that 120mm shells had been used in the second offensive,'[359] because witness P-0009 was 'unclear as to which operation he was referring to in his answers,'[360] and when he was asked whether the Ministry of Defence was informed, he said '[y]es, but not in relation to the MACA-N'Dotré operation.'[361] The Trial Chamber considered this as an indication that 'Mr Gbagbo was not informed of the use of shells during the second military operation in Abobo.'[362] The Trial Chamber further noted the excerpt of the witness's previously recorded statement, read by the Prosecutor into the record, and confirmed in court by the witness, where the witness stated that Mr Gbagbo knew that shells had been used on that occasion.[363]

290. Having expressly stated that '[a]lthough a reasonable trial chamber might conclude, on this basis, that Mr Gbagbo was indeed informed about the use of mortars during operations in Abobo in late February 2011,' the Trial Chamber concluded that 'there is no reliable information about what exactly [Mr Gbagbo] was told.'[364] Also, in relation to this latter finding, it considered it '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.'[365] There was no direct evidence before the Trial Chamber that would have rendered its conclusion unreasonable. In particular, the above-mentioned testimony of witness P-0010 regarding instructions concerning Abobo does not establish, beyond reasonable doubt, what Mr Gbagbo knew or did not know concerning the use of the mortars. It is also notable that, while the Trial

[356] P-0010, T-141-Red2-ENG, p 20, lines 5-17.
[357] P-0010, T-141-Red2-ENG, p 20, lines 9-22.
[358] Judge Henderson's Reasons, para 1356.
[359] *Ibid*, para 1357.
[360] *Ibid*.
[361] *Ibid*.
[362] *Ibid*.
[363] *Ibid*, para 1358.
[364] *Ibid*, para 1359.
[365] *Ibid*.

Chamber referred to, and relied on, the testimony of witness P-0010 in other instances in Judge Henderson's Reasons,[366] it did not rely on this witness's testimony—regarding the proposition that Mr Gbagbo had given instructions to hold on to Abobo, reinforce positions, and said '[d]o whatever you can, but you must keep Abobo,'[367] —when addressing Mr Gbagbo's implied authorisation to use mortars. Similarly, the Trial Chamber, when addressing the 17 March 2011 incident, appears to have disregarded some of the evidence it had discussed when assessing the February 2011 incidents. Specifically, it disregarded the evidence on the FDS's use of mortars and Mr Gbagbo's military orders,[368] which could have been equally relevant to the shelling incidents of 17 March 2011. However, this does not render the Trial Chamber's conclusion one that no reasonable trier of fact could have reached, given that the evidence was not unequivocal and did not directly relate to the 17 March 2011 incident.

291. Finally, the Prosecutor contends that the Trial Chamber overstated its finding in relation to the 17 March 2011 incident and overemphasised the lack of credibility of witness P-0164.[369] The Trial Chamber considered that the testimony of witness P-0164 was 'lacking in credulity'[370] and that 'it would not be possible for a reasonable trial chamber to rely on this evidence to conclude that, if 120mm 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, either directly or indirectly.'[371] While it may be correct that, even if the Trial Chamber's concerns were founded, there might have been other evidence on the record for a trial chamber to rely on, the Prosecutor has not demonstrated that such evidence was so overwhelming in the case at bar as to render the Trial Chamber's finding to the contrary unreasonable.

292. The conclusions in relation to this example may be summed up as follows: (a) Mr Gbagbo cannot be convicted on the basis of a 'general practice' to the effect that 120mm mortars might not have been used, without authorisation from 'the Presidency' [it is noted that Mr Blé Goudé was not charged in this regard]; (b) the evidence to the effect that 'the Presidency authorised' use of 120mm mortars in late February 2011 appears to be hearsay and, even then, inconclusive. Worse still, the testimony of prosecution witness P-0330 is not only hearsay, it is anonymous hearsay. The witness partly overheard a detachment officer saying to another officer, during a heated exchange,

[366] See e.g. *Ibid*, paras 212, 268, 277, 280, 292, 316-319, 321, 329-333, 360, 369, 430-433, 440, 453, 906, 926, 1091-1092, 1111.
[367] P-0010, T-141-Red2-ENG, p 20, lines 5-17.
[368] Prosecutor's Appeal Brief, para 211.
[369] *Ibid*, para 212.
[370] Judge Henderson's Reasons, para 1837.
[371] *Ibid*, para 1838.

something about 'the Presidency,' when the second officer insisted that the detachment officer must disarm the battery of the 120mm mortar because it engaged the second officer's own responsibility; (c) the reported exchange between the two officers raises serious questions about the reliability of the evidence that 'the Presidency' had authorised use of 120mm mortars on the particular occasion. This is in the sense of whether it was likely that such specific authorisation was given on that particular occasion, without the second officer knowing about it; (d) accepting that the term 'Presidency' would include the President, it would also include a cleaner or security guard who works in the Presidency, depending on the context. It cannot be precluded that in some countries, that term can comprise scores if not hundreds of people; and (e) there is no evidence showing that, to the extent that 'the Presidency' may have authorised use of 120mm mortars in late February 2011, they were to be used against innocent civilians, notwithstanding that this may or may not be an excessive use of force to contend with an armed insurgency. There is evidence to the effect that he reportedly said '[m]ake sure that not too many people die.'

293. In light of the above, I am not persuaded by the Prosecutor's complaint that the Trial Chamber failed to consider the evidence in its totality and to draw reasonable inferences regarding Mr Gbagbo's involvement in the Abobo shelling incidents of February and March 2011. Once more, the complaint failed the *Braich* test.

4) The Fourth Example

294. The Prosecutor submits that the Trial Chamber erred in assessing the evidence in relation to the clashes on the Boulevard Principal (25 February 2011, Yopougon I, second charged incident).[372]

(i) Relevant part of the Impugned Decision

295. The Trial Chamber made the following findings when assessing evidence regarding the clashes that took place on the *Boulevard Principal*, on 25 February 2011, between the youths of Yao Séhi and Doukouré.

296. First, Judge Henderson, while acknowledging that the confrontation between the two groups 'escalated to the point of lethal force being used against civilians,' found that 'it is difficult to construe a clear timeline of the events that supposedly took place on the *Boulevard Principal* on 25 February 2011.'[373] Following his analysis of the testimony of prosecution witnesses P-0436, P-0442, and P-0109,[374] as well as the testimony of witnesses P-0433 and P-0441 to a lesser extent.[375] Judge Henderson found that these witnesses gave contradictory descriptions of individuals whom they said opened fire and threw grenades.[376] Judge Henderson further noted that these witnesses gave contradictory narratives of what happened.[377] In particular, he considered that the testimonies of witnesses P-0436, P-0442, and P-0109 'differ significantly' from one another.[378] Having noted specific incongruences, Judge Henderson concluded:

> 1666. Therefore, while the accounts of P-0436, P-0442 and P-0109 are plausible when seen in isolation, they are incompatible in relation to a number of significant aspects of the narratives they provide. Since their respective accounts cannot all be entirely true at the same time, this raises serious questions about their truthfulness altogether. Considering that only one of the three testimonies can be truthful in its entirety and there is no possibility to determine which one this is, it would be difficult for a reasonable trial chamber to reach any conclusion based on this evidence.[379]

297. Concurring with Judge Henderson, Judge Tarfusser emphasised how the evidence shows the eruption of violent clashes in Yopougon preceded, rather than followed, Mr Blé Goudé speech [whose speech was alleged to have inspired the clashes]:

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[372] Prosecutor's Appeal Brief, paras 214-233.
[373] Judge Henderson's Reasons, para 1636.
[374] *Ibid*, paras 1637, 1639-1653.
[375] *Ibid*, para 1638.
[376] *Ibid*, paras 1654-1655.
[377] *Ibid*, paras 1658-1665.
[378] *Ibid*, 1654.
[379] *Ibid*, para 1666.

83. The Reasons explain in detail the contradictions and omissions flawing the Prosecutor's narrative as to the genesis and developments of the clashes erupted in Yopougon between 25 and 28 February 2011. The episode, with which only Mr Blé Goudé is charged, is indeed emblematic both of many features of the post-electoral crisis as a whole and of the flaws of the Prosecutor's approach to it. The Prosecutor chose to build her narrative on and around the speech held by Mr Blé Goudé at the Baron Bar, and to present the violent events of the day in the neighbourhood as ensuing from it, and in particular from the 'inflammatory rhetoric' which it would have contained. A balanced, objective narrative would have required bearing in mind and acknowledging a number of elements suitable to cast more than one doubt on the Prosecutor's take of the facts, including, in particular, the evidence that the eruption of violent clashes in the neighbourhood preceded, rather than followed, Mr Blé Goudé's speech, and was unrelated to it. As stated in the Reasons, 'there is evidence to suggest that the wave of violence might have been triggered on 25 February by the skirmishes provoked by the burning of buses by pro-Ouattara youth followed by the burning of *gbakas* by the pro-Gbagbo youth in retaliation. According to the evidence, the buses were associated with the pro-Gbagbo camp, while *gbakas* were vehicles associated with Ouattara supporters.' Furthermore, the evidence confirming that the opposite neighbourhoods of Doukoure and Yao Sehi had a history of violent clashes which pre-dated the post-electoral crisis. As illustrated in the Reasons, '[t]here is no evidence to warrant an inference that the Police specifically targeted the part of the population that was perceived to be pro-Ouattara.'[380]

(ii) Assessment of the Fourth Example

298. The Prosecutor's argument is twofold in relation to this example. She argues that the Trial Chamber: (a) unreasonably required witnesses to provide identical accounts for it to consider them as 'true,'; and (b) failed to recognise that testimonies were consistent and corroborated.[381] I address them in turn.

(a) Whether the Trial Chamber unreasonably required witnesses to provide identical accounts for it to consider them as 'true'

299. The Prosecutor argues that the Trial Chamber's '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.'[382] She challenges the inconsistencies that the Trial Chamber found regarding the testimonies of prosecution witnesses P-0109, P-0436, P-0433, and P-0441.[383] The Trial Chamber found that witness P-0109's testimony that the shooting calmed down at around 14h00 is 'difficult to reconcile with [witness] P-0436's narrative according to which lethal weapons were used in the clashes on the *Boulevard Principal* only from around 16h00.'[384] It also noted that witness P-0433 testified that the youth from Yao Séhi and Doukouré threw

[380] Judge Tarfusser's Opinion, para 83.
[381] Prosecutor's Appeal Brief, para 215.
[382] Prosecutor's Appeal Brief, para 224.
[383] *Ibid*, paras 223-227.
[384] Judge Henderson's Reasons, para 1637.

stones at each other from around 9h00 until about 10h00, and that this is at odds with the testimony of witness P-0441, who testified that it was only around 12h00 that he noticed a group of youths from the *parlement*, to which he also referred as militiamen throwing stones [REDACTED].[385]

300. As to the Trial Chamber's finding regarding discrepancies between the testimonies of prosecution witnesses P-0109 and P-0436, the Prosecutor argues that the Trial Chamber 'disregarded, or at least minimised, the ample consistencies between their testimonies.' [386] She further argues that witness P-0109 testified that he left the Lem Mosque area around 17h00, when he heard people shouting 'they're coming,' indicating that 'clashes may have continued into the evening.'[387] According to the Prosecutor, while the Trial Chamber noted this in a footnote, it 'did not appear to accommodate this in its analysis.'[388] Similarly, as for the Trial Chamber's finding regarding the discrepancy as to the time when the clashes started, the Prosecutor argues that, when 'viewed holistically, […] the evidence establishes that clashes commenced in the morning, and thereafter escalated at some point during the day.'[389]

301. As noted above, the Trial Chamber conducted a detailed examination of the relevant testimonies (*i.e.* witnesses P-0109, P-0436, P-0433, and P-0441), and accordingly found that '[t]he analysis of the evidence […] demonstrates that the starting time and duration of the clashes cannot be established with certainty.'[390] Given that it was open to the Trial Chamber, as the tribunal of fact in this case, to evaluate discrepancies and to consider the credibility of the evidence as a whole, it was not unreasonable of the Trial Chamber to assess these witnesses' testimonies, taking such discrepancies into account.

302. Also, the circumstances of this case are such as recommends caution against second-guessing the Trial Chamber in relation to the complex facts, unless it is clear that the Trial Chamber's reasoning is unreasonable. The Trial Chamber did not require that the evidence of witnesses needed to be identical. It is rather that they be consistent. The Trial Chamber found worrying inconsistencies. Two reasons that provoke the Trial Chamber's concerns are these: (a) discrepancies between witnesses raise the question of whether the witnesses were at, or very close to, the location of the events and whether they were true witnesses of the clashes, or whether their memories might have been primed or even derived from local legends; and (b) the obvious reason for the Trial

[385] *Ibid*, para 1638.
[386] Prosecutor's Appeal Brief, para 225.
[387] *Ibid*.
[388] *Ibid*.
[389] Prosecutor's Appeal Brief, para 226.
[390] Judge Henderson's Reasons, para 1639.

Chamber needing to see a clear timeline of the clashes would be to see whether they started before or after Mr Blé Goudé's speech.[391] The Trial Chamber's concern was therefore sensible.

303. Once more, it bears reiterating that it is not the function of ICC judges to ascertain which versions of the evidence are true when the Prosecution calls evidence that is riddled with inconsistencies. To expect such a function from ICC judges betrays a gross misunderstanding of the idea of the separation of prosecutorial functions from those of the judges. It betrays the worry that it is part of the functions of ICC judges to assist the Prosecution to improve their case against the defence. The Prosecution is not free to pile unto the record inconsistent evidence in a case of any complexity, safely expecting that the judges will try and sort out which permutations of such Prosecution evidence would serve the demands of proof beyond reasonable doubt. That may indeed be a proper expectation when the Defence has called evidence that contradicts the Prosecution evidence. However, when the Prosecution evidence is riddled with inconsistencies, there is no legitimate expectation, let alone a requirement, for the Trial Chamber to try and work out which of the Prosecution witnesses is telling the truth. All it means is that the Prosecution has presented the judges with inconsistent stories. Inconsistent stories do not a conviction make. They truly trouble proof beyond reasonable doubt.

(b) Whether the Trial Chamber failed to recognise that the testimonies were consistent and corroborated

304. The Prosecutor argues that, despite 'the similarities and *prima facie* compatibility' of the testimonies of prosecution witnesses P-0109, P-0436, and P-0442, the Trial Chamber incorrectly found that they 'differ significantly' from one another, and therefore failed to recognise that the testimonies were consistent and corroborated.[392] The Prosecutor argues that, while the Trial Chamber found that the testimonies of witnesses P-0436, P-0442, and P-0109 were consistent as to a number of aspects, the Trial Chamber 'unfairly focused on what [witness] P-0109 *did not see*,' namely 'the intervention of the police as described by [witnesses] P-0442 and P-0436' and therefore did not properly take into account the consistent aspects of these testimonies.[393]

[391] See *Ibid*, para 1626 (As the Trial Chamber noted, 'the Prosecutor allege[d] that the clashes happened because Mr Blé Goudé's speech on that day incited animosity against pro-Ouattara civilians' and therefore it was 'important to analyse the evidence that could reveal what triggered the start of the clashes.')
[392] Prosecutor's Appeal Brief, paras 215, 228.
[393] *Ibid*, para 229 (emphasis in original).

305. The Prosecutor further submits that the Trial Chamber failed to recognise when the testimonies may be considered to corroborate each other properly and instead 'incorrectly insisted that every witness should mention the "same facts".'[394] She also argues that the Trial Chamber 'unreasonably escalated an apparent "absence of corroboration" into a full-fledged and insurmountable contradiction or conflict between witness accounts,' since it noted that the testimonies of witnesses P-0436 and P-0442 conflict with one another because 'each mentioned facts that the other did not mention.'[395] In particular, the Prosecutor argues that the Trial Chamber found it 'surprising' or 'not very plausible' that witness P-0442 did not testify to having seen three events referred to by witness P-0436.[396]

306. The Prosecutor also argues that the Trial Chamber unreasonably considered the testimonies of witnesses P-0436 and P-0442 as to how the clashes unfolded as 'substantially different, and accordingly 'incorrectly classified minor variations as "contradictions"'.[397] She notes that while both witnesses 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,' the Trial Chamber 'only focused […] on the precise description of the location of the police, as given by the two witnesses,' and in doing so, 'lost sight of the largely consistent accounts in the two descriptions.'[398] She argues that, for all the reason above, this example illustrates that the Trial Chamber's 'overall approach to assessing evidence at the [no case to answer] stage was deficient and incorrect'.[399]

307. It is recalled that it is in the first place for the trier of fact to assess the credibility of witnesses. Therefore, it is within the function of the Trial Chamber to evaluate inconsistencies that may arise between witnesses' testimonies, in order to consider whether the evidence taken as a whole is credible and reliable.[400] Having regard to the Trial Chamber's reasoning as a whole,[401] it conducted a detailed examination of the testimonies of P-0436, P-0442, and P-0109, and concluded that 'no reasonable trial chamber could conclude that the police targeted the inhabitants of Doukouré on 25 February 2011,'[402] as part of a widespread or systematic attack against a civilian population, 'nor would it be possible to infer that Mr Blé Goudé went to the 16th

[394] *Ibid*, para 230.
[395] Prosecutor's Appeal Brief, para 230, citing Judge Henderson's Reasons, para 1663.
[396] Prosecutor's Appeal Brief, para 231.
[397] *Ibid*, para 232.
[398] *Ibid*.
[399] Prosecutor's Appeal Brief, para 233.
[400] See e.g. ICTR *Ndahimana* AJ, para 93.
[401] Judge Henderson's Reasons, paras 1636-1673.
[402] *Ibid*, para 1674.

arrondissement Police station and instigated the Police officers to attack civilians.'[403] The Trial Chamber was not unreasonable, in my view, in identifying discrepancies between the witnesses' testimonies regarding, amongst other things, how the clashes unfolded and the participation of the Police in the clashes.[404] As noted above, the circumstances of this case are such that recommend caution against second-guessing the Trial Chamber regarding complex facts emerging from a chaotic fact pattern.

308. In light of the foregoing, I am not persuaded by the Prosecutor's argument that the Trial Chamber failed to recognise that the testimonies were consistent and corroborated.

309. It must also be considered that the circumstances, even assuming that they were proven, do not reveal that any of the clashing civilian sides were targeted because they were pro-Ouattara supporters. First, it may be noted that there was a clash that escalated between two groups of youths—from Yao Séhi and Doukouré—who were throwing stones at one another. Second, members of a militia—not members of state security apparatus—introduced grenades into the mêlée.[405] Third, the police arrived to maintain order, they felt compelled to use tear gas, and then escalated their intervention by introducing firearms to contain the situation. While a reasonable question remains as to whether the introduction of firearms was wholly warranted, it is not established beyond reasonable doubt that the use of firearms by the Police was not provoked by the hand grenades that were being used by the militias. Nor is it established beyond reasonable doubt that the Police's use of tear gas and the escalation to firearms was motivated by a policy to attack a civilian population as such. Finally, it is not shown that Mr Blé Goudé's speech was the primary reason for these developments, noting in particular that Côte d'Ivoire was already in the throes of violent unrest at all material times.

5) The Fifth Example

310. The Prosecutor argues that the Trial Chamber erred in assessing the evidence in relation to the rapes committed in connection with the 16-19 December 2010 RTI march (the 'RTI march') (first charged incident) and the 12 April 2011 – Killings and rapes in Yopougon ('Yopougon II') (fifth charged incident).[406]

[403] *Ibid*, para 1674.
[404] *Ibid*, paras 1654-1666.
[405] See *Ibid*, paras 1653, 1661 and 1662.
[406] Prosecutor's Appeal Brief, paras 234-247.

(i) Relevant part of the Impugned Decision

311. In relation to the RTI march, Judge Henderson noted:

1217. Finally, it is noted that in relation to a number of the crimes that were committed there is no obvious connection with the operation to repress the RTI march. This applies, for example, to the instances of rape by FDS members and youths. The Chamber is aware that the Prosecutor cautioned that crimes of sexual violence should not be regarded as opportunistic acts and that rape was a characteristic of the attack by pro-Gbagbo forces against civilians perceived to support Ouattara. However, the evidence she submitted is incapable of supporting this proposition and indeed the Prosecutor makes no serious effort to develop a cogent evidentiary argument in this regard.

1218. In sum, the available evidence does not allow a reasonable trial chamber to conclude that the measures that were put in place to enforce the prohibition of the RTI march were deliberately or obliquely intended to cause violent crimes to be committed against civilian supporters of Mr Ouattara.[407]

[…]

1466. [REDACTED]

1467. On this basis, it can be concluded that [REDACTED] was raped by the '*jeunes*' that were present at the roadblock setup next to the police station. As per [REDACTED], the five women with the victim had also been raped. The perpetrator of [REDACTED] rape had identified the victim as Mr Ouattara's supporter. There is no information about whether these rapes were committed pursuant to an instruction or otherwise agreement between the '*jeunes'* and the FDS authorities. [REDACTED] Police station, there is no evidence that the commission of rape was part of the limited collaboration between them.[408]

[…]

1526. [REDACTED]

1527. [REDACTED]

1528. [REDACTED] testified that, after the encounter with the Police in Williamsville, she started to run and then hid. [REDACTED]

1529. [REDACTED][409]

[…]

1880. […] the Prosecutor is correct [in] stating that there was a pattern whereby youths supporting Mr Gbagbo would check the identity of persons they did not know. There is also evidence that in some cases, some of these individuals would be killed, raped or injured. However, there is no evidence for the proposition that there was a pattern whereby persons of certain

[407] Judge Henderson's Reasons, paras 1217, 1218.
[408] *Ibid*, paras 1466, 1467 (footnotes omitted).
[409] *Ibid*, paras 1526-1529 (footnotes omitted).

ethnic, national, or religious backgrounds would be automatically killed, raped, or injured upon being identified as such.

1881. To the contrary, there is considerable evidence on the record to suggest that, in a large majority of instances, persons would be allowed to continue after having been identified as belonging to one of the groups, albeit sometimes after having been extorted for money or other valuables. In the few instances of violence after identification where the Chamber has been presented with more or less detailed information about what happened, there always seems to have been an additional reason – other than being identified as belonging to a particular group - for why the victim(s) were targeted.

1882. This is much less the case in the instances of rape that have been brought to our attention. Most cases of rape do appear to conform with the claimed pattern, in that the victims were violated after being identified as supporters of Mr Ouattara or as belonging to a particular ethic, national, or religious group without more. However, the question in those instances is whether the identification was the reason for the perpetrators to rape their victims or whether this served merely as a pretext.

1883. In this context, it is necessary to discuss the allegation that Simone Gbagbo issued instructions to rape women taking part in the RTI march. The only evidence for this proposition is the prior recorded testimony of [REDACTED], who claims to have been told this twice by two separate policemen in approximately the same terms. As this constitutes anonymous hearsay and as there is no corroboration, no reasonable trial chamber could conclude solely on the basis of this evidence that there was an instruction, agreement and/or policy to rape female pro-Ouattara demonstrators.[410]

312. In relation to the 12 April 2011 Yopougon II incident, Judge Henderson noted:

1851. In a number of cases, direct testimonial evidence confirmed that pro-Gbagbo individuals killed, raped or injured the victims because their ethnicity was associated with the pro-Ouattara camp. The most significant of these will be discussed below.[411]

[…]

1855. Witnesses [REDACTED] were together [REDACTED] when [REDACTED] men came, forced their way into her house, and raped [REDACTED]. Two of them carried firearms. Witness [REDACTED] stated that she knew the men to be pro-Gbagbo youths because they all wore red bandanas which she said were characteristic of members of a group that the witness had seen training in Yopougon during the post-electoral crisis. Witness [REDACTED] similarly believed that the men were pro-Gbagbo because when they arrived, they had asked [REDACTED] what ethnicity they were. In that regard, she seems to have believed that if she had told the men that she was Guéré instead of Dioula, they would not have [REDACTED].

1856. It is also of note that witness [REDACTED] stated that before she heard the first shots on 12 April 2011, the witness had seen people running and screaming in Dioula that 'they' would kill all the men and they all should run. In a similar vein, witness [REDACTED] testified that they had told her father to flee because men were being killed. [REDACTED]

1857. Moreover, some of the attackers used the assistance of local individuals of Guéré ethnicity to indicate the houses where they knew Dioula civilians resided. Witness [REDACTED] was of the belief that a young Guéré, who had responded to Mr Blé Goudé's call to enlist, had shown the

[410] *Ibid*, paras 1880-1883 (footnotes omitted).
[411] *Ibid*, para 1851.

perpetrators where in Mami Faitai [REDACTED] her family lived. Witness [REDACTED] recognised the voice of one of [REDACTED] the criminals; the witness testified that after they shot dead [REDACTED] heard the person she recognized saying that they were not done yet, after which they searched for [REDACTED], and killed him as well.

1858. Although there is no information as to the precise circumstances of the deaths of all of those who were buried in Mami Faitai and Doukouré in the aftermath of Mr Gbagbo's arrest, the context in which crimes occurred during the charged incident of 11/12 April 2011 must not be overlooked. The evidence mentioned above shows systematic and deliberate targeting of individuals belonging to a specific ethnic group. It is thus possible to infer that many of the victims of murder about whom little or nothing is known met their fate in a similar way as the family members and friends of [REDACTED]. Indeed, as mentioned above, witness [REDACTED], who lived in Mami Faitai, heard pro-Gbagbo elements say on 11 April 2011 that they were going to kill all Dioulas. It would be implausible to argue that it was mere coincidence that on the following day 18 individuals of Dioula ethnicity were buried in a mass grave in the same neighbourhood.

1859. That said, one cannot exclude the possibility that in the midst of the violent commotion created by pro-Gbagbo elements on that day, some of the victims were harmed for reasons other than having been actual or perceived Ouattara supporters. In this regard, it is noted that in two cases the perpetrators were already leaving the house of the victims when they changed their minds and decided to rape or kill. This indicates that their primary objective was not to harm Ouattara supporters. Indeed, it is conceivable that some of the crimes committed in Yopougon on 12 April 2011 were opportunistic in nature, in the sense that the perpetrators took advantage of the general state of lawlessness and defencelessness of the victims.

1860. Without additional information, it is not possible to make a precise determination as to how many of the victims were killed because they were Dioula. 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. It should be stressed, however, that this assumption only concerns the *mens rea* of the physical perpetrators.

1861. There is no indication that perpetrators were acting pursuant to or in furtherance of any sort of policy. Indeed, it is telling that out of all crimes in the Prosecutor's narrative, those pertaining to the 12 April 2011 incident were the least likely to contribute to achieving the purpose of the alleged policy to keep Mr Gbagbo in power at all costs. At that point in time, Mr Gbagbo had already been arrested and the struggle for power was effectively over. To the extent that the available information allows any conclusions in this regard, it appears that the crimes committed in Yopougon on 12 April 2011 were mainly driven by vengeance.

1862. To the extent that it is possible to characterise the crimes committed on 12 April 2011 in Yopougon as displaying a (relatively small) pattern of criminality motivated by ethnic animosity, it stands in stark contrast to the absence of such a discernible pattern with respect to all other incidents. The circumstances that allow an inference to be drawn to the effect that the 70 crimes committed in Yopougon on 12 April 2011 were committed, at least in part, because the victims were Dioula were fundamentally different from the circumstances in which the other victims cited in the Prosecutor's case were killed or injured. Indeed, the crimes committed during the 12 April 2011 incident are distinguishable from the other charged and uncharged incidents precisely because it is possible in this context to observe the large-scale targeting of victims at least in part on the basis of their ethnicity.[412]

[…]

[412] *Ibid*, para 1855-1862 (footnotes omitted).

1884. As noted above, the evidence for Yopougon II indicates to some extent that it is possible to characterise the crimes committed on 12 April 2011 in Yopougon as displaying a pattern of criminality motivated, at least in part, by ethnic animosity. However, given the timing and nature of these events, it is not possible to argue that the crimes committed on 12 April 2011 constitute a pattern from which anything significant in relation to the Common Plan or policy could be inferred.[413]

[…]

1917. Even if the Prosecutor's version of the common plan is accepted, it is still hard to see how committing random violence against innocent civilians would in any way contribute to keeping Mr Gbagbo in power. Given that Mr Gbagbo was already in detention on 12 April 2011, what would have been needed for him to resume his reign was to be liberated and reinstated in power. There is absolutely nothing to indicate that the alleged killings and rapes that occurred in Yopougon on that day could have made even the slightest contribution to that aim.

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 [and,] 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. Instead, the Prosecutor repeatedly states that:

> [T]he evidence shows that already prior to the 2010-2011 post-electoral crisis, proGbagbo forces committed politically motivated crimes against civilians that include the crime of rape, along with murder and other violent crimes. In this context, the Prosecution cautions that crimes of sexual violence should not be treated differently from other violent crimes charged in this case, for instance by regarding them as opportunistic acts unrelated to the prevailing context. Rape was a characteristic of the attack by pro-Gbagbo forces against civilians perceived to support Ouattara and it should be recognised as such.

1919. Seeing that the Prosecutor repeats this same argument six times throughout the Response, one would expect there to be a strong evidential foundation for it, but none is offered. In fact, the Prosecutor does not provide a single reference for the claim that rape was 'characteristic' of the attack by 'pro-Gbagbo forces.' Instead, the Prosecutor seems to include the rape charges in the Common Plan on the basis of the alleged foreseeability that such crimes would be committed in the context of the (para-)military operations that were allegedly part of the plan.

1920. Whereas foreseeability is the correct parameter for this type of situation, it is important not to stretch this concept, lest it becomes meaningless. Indeed, at some level of scale and abstraction, almost everything becomes 'foreseeable' in the sense that there is a possibility that it may occur. 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. The foreseeability of the crime(s) must

[413] *Ibid*, para 1884 (footnotes omitted).

also be clearly linked to the execution of an identifiable aspect of the alleged plan. The mere abstract expectation that at least one out of hundreds or even thousands of individuals involved in a broadly defined plan or operation that is executed over several months in a large geographic area will probably commit a murder or rape clearly does not suffice in this regard.[414]

(ii) Assessment of the Fifth Example

(a) Whether the Trial Chamber incorrectly subjected the allegations of rape to an additional unreasonable and unjustified scrutiny

313. The Prosecutor submits that the Trial Chamber 'erred in law by assessing the sexual violence crimes differently from other violent crimes purely *because* of their sexual component,' and that this error 'further magnified the fact that the Majority had failed to formulate its evidentiary approach before it actually assessed the evidence.'[415] The Prosecutor argues that, as is apparent from its findings, the Trial Chamber 'subjected the allegations of, and evidence on, rapes to an additional and unnecessary level of scrutiny, inconsistent with legal precedent,' without providing any explanation for doing so.[416]

314. The Prosecutor advances two arguments in support of her allegation. Firstly, she notes that the Trial Chamber, in discussing her allegation that Simone Gbagbo had issued instructions to rape women taking part in the RTI march, found that no reasonable trial chamber could conclude based on the Prosecutor's evidence that 'there was an instruction, agreement and/or policy to rape female pro-Ouattara demonstrators.'[417] The Prosecutor argues that this pronouncement discloses an error in the Trial Chamber's reasoning, because the Chamber was not required to find whether there was a separate policy to rape female protestors, but to find 'whether there was a policy to *commit an attack directed against the civilian population*.'[418] Secondly, the Prosecutor submits that, contrary to case law, the Trial Chamber 'additionally and unreasonably required the Prosecution to establish whether the identification of victims as pro-Ouattara supporters was the *reason* for the perpetrators to rape their victims or "whether this served merely as a pretext".'[419]

315. As regards the context in which the said pronouncement (*i.e.* 'there was an instruction, agreement and/or policy to rape female Ouattara demonstrators') was made, it is recalled that the Trial Chamber made the pronouncement as it addressed the

[414] *Ibid*, paras 1917-1920 (footnotes omitted).
[415] Prosecutor's Appeal Brief, para 236 (emphasis in original).
[416] *Ibid*, para 235.
[417] *Ibid*, para 237, referring to Judge Henderson's Reasons, para 1883.
[418] Prosecutor's Appeal Brief, para 237 (emphasis in original).
[419] *Ibid* (emphasis in original).

Prosecutor's allegation that 'Simone Gbagbo issued instructions to rape women taking part in the RTI march.'[420] The Trial Chamber found that since the only evidence indicating that Simone Gbagbo issued instructions to rape women was a prior recorded statement of [REDACTED], which was considered to be anonymous hearsay and uncorroborated, 'no reasonable trial chamber could solely conclude on the basis of this evidence that there was an instruction, agreement, and/or policy to rape female pro-Ouattara demonstrators.'[421]

316. Notably, the Trial Chamber made the concerned pronouncement in the context of assessing the Prosecutor's allegation that Simone Gbagbo issued specific instructions to rape women taking part in the RTI march, and finding that there was no such instruction. It did not state that it would have been necessary for the Prosecutor, as a matter of law, to establish that there was such a specific instruction. Therefore, I am not persuaded that the Trial Chamber subjected rapes to heightened evidentiary requirements.

317. It may be noted, of course, that certain pronouncements of the Trial Chamber appear to engage enquiry into the motives of the perpetrators—namely, whether the identification of victims as pro-Ouattara supporters—was the 'reason' or a mere 'pretext' for the perpetrators to commit rape against their victims.

318. It remains the case, of course, that, in determining whether an individual perpetrator's act is to be characterised as a crime against humanity, motive is largely irrelevant,[422] and, as the Trial Chamber noted, 'the Prosecutor is not required to prove a particular motive on the part of the physical perpetrators.'[423]

319. I am satisfied, however, that the concern of the Trial Chamber was not merely a matter of 'motive' in the same unacceptable sense that 'motive' is irrelevant to criminal conduct. Indeed, when it is shown that someone committed a crime intentionally, his motive for committing the crime becomes irrelevant. In the case of rape, rapists need to be punished for their crimes, regardless of their motive. But there is a different consideration if the inquiry into rape committed during an armed conflict or violent unrest has to look beyond the crime of rape committed by the actual rapist (for which he must be convicted personally). Typically in such cases, the question arises whether the rape (for which the actual rapist remains accountable) was opportunistic rape or whether

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[420] Judge Henderson's Reasons, para 1883.
[421] *Ibid*.
[422] See e.g. Trial Chamber II, *The Prosecutor v. Germain Katanga*, Judgment pursuant to article 74 of the Statute, 7 March 2014, para 1125; *Tadić* Appeal Judgment, paras 268-269.
[423] Judge Henderson's Reasons, para 1389.

the rape served an instrument of policy. The inquiry into whether the rape was used as an instrument of policy is essentially an inquiry into motive. Yet, that particular inquiry into motive serves a certain purpose in international criminal law. That purpose is not to ascertain whether the primary culprit may or may not be punished for his crime—in this case rape. It is rather whether to establish an ulterior purpose for the primary crime, which would then make both the primary perpetrator and someone else guilty of that crime or of another crime such as a crime against humanity.

320. Notably, where rape is an instrument of policy, anyone else associated with the rapist in conceiving of rape as such an instrument of criminal policy would also be criminally responsible for the rape, in addition to the criminal responsibility of the actual rapist. This is particularly so for the masterminds of that policy of rape, though they did not commit the rape themselves. But, it requires concrete evidence—not suppositions—to show that the rape was indeed used as an instrument of the policy. In addition, the proposition must be proved beyond reasonable doubt, for such masterminds and others to be convicted of the rape as a criminal instrument of policy. There is no justice in convicting someone of such criminal conduct, only because rape is an odious crime and an intractable scourge that understandably provokes strong emotive reaction and a wish to punish anyone accused of the crime.

321. The emotive reaction that the charge of rape provokes against accused persons is entirely understandable. This is because rape has remained a real pestilence in the social order since the days when the caveman was the most evolved man.[424] Its intractability is a central reason to persist in efforts to eradicate it, beginning with insisting on accountability and punishment for anyone guilty of the charge. That said, it will not be realistic to insist that policy must be the only explanation for rape during armed conflicts or violent unrests, given that rape has remained a constant problem during peace time. If rape remains such a social pestilence in peace time, it must stand to reason that those inclined to commit it in the first place during peace time would not readily lose that original inclination but would only require an agenda of policy to commit rape. It is that consideration that raises the question whether an actual rapist had exploited the lawless circumstances of an armed conflict or violent unrest to commit rape for his own personal reasons, or whether he truly did so because someone else behind the scenes had put him up to commit rape as a criminal instrument of policy.

322. The Trial Chamber noted that it is 'possible for a perpetrator to act for more than one reason,' and therefore 'the fact that the evidence may indicate that a particular

[424] See, for instance, Randy Thornhill and Craig T Palmer, *A Natural History of Rape: Biological Bases of Sexual Coercion* [MIT Press, 2000]

physical perpetrator may have had personal reasons for engaging in certain criminal conduct does not preclude the possibility that he or she was at the same time aware of the policy and that his or her actions were furthering it.'[425] That observation is correct.

323. The Trial Chamber also observed that 'this cannot be simply assumed to be the case, especially in a case like this, where there is no independent direct evidence showing the existence of the policy.'[426]

324. In this regard, it is recalled that, following the analysis of each of the incidents for which the Prosecutor submitted specific evidence, the Trial Chamber found that '[m]ost cases of rape do appear to conform with the claimed pattern, in that the victims were violated after being identified as supporters of Mr Ouattara or as belonging to a particular ethnic, national, or religious group without more. However, the question in those instances is whether the identification was the reason for the perpetrators to rape their victims or whether this served merely as a pretext'[427] for people who were exploiting the situation of armed conflict or violent unrest in order to commit rape. Hence, although not explicitly stated, the above passage clearly indicates that the Trial Chamber was of the view that the Prosecutor should have established the motives of the perpetrators of rapes in order to prove that those acts were part of a policy to attack a civilian population.

325. It should, however, be noted in this regard that it appears that the Trial Chamber adopted this approach as regards evidence of other crimes as well and not only in relation to the evidence of rapes. For instance, the Trial Chamber, in discussing the alleged killing of Lacina Bakayoko in Avocatier (1st charged incident),[428] referred to prosecution witness P-0588's testimony and noted that, while this testimony 'indicates that the FDS were involved in a law enforcement operation and also fired into the crowd of demonstrators,' the victim's death 'does not appear to have been caused by the FDS but rather a group of individuals, some of whom were in uniforms and others in civilian clothing.'[429] The Trial Chamber further noted that, although '[i]t appears from P-0558's

[425] Judge Henderson's Reasons, para 1390; See *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, (Judgement), 12 June 2002, IT-96-23 & IT-96-23/1-A, [ICTY Appeals Chamber], para 153 (stating 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').
[426] Judge Henderson's Reasons, para 1390.
[427] *Ibid*, para 1882.
[428] *Ibid*, para 1461. The Trial Chamber noted that the Prosecutor alleged that Lacina Bakayoko was shot by uniformed individuals together with youths in civilian clothing. It further noted that the Prosecutor relied on the testimony provided by witness P-0588 which is based on the information provided by his nephew; the witness identified, based on the description given to him by his nephew, that one of the shooter as '[REDACTED]', who, according to P-0588, was known to be an active militia member.
[429] *Ibid*, para 1462.

testimony that at least one of them was a "pro-Gbagbo" militia member,' there is 'no indication as to the motive of the perpetrator,' and therefore, '[o]n the basis of the evidence cited, it can be concluded that Lacina Bakayoko was killed by members of a local militia in Avocatier.'[430] This would indicate that the Trial Chamber required the Prosecutor to establish the motive of the perpetrator in relation to other violent crimes. But this was a function of the requirement that convictions for crimes against humanity require that the acts and omissions of the culprits [which would ordinarily amount to discrete crimes] were part of the widespread or systematic attacks against a civilian population—rather than random or spontaneous violations perpetrated against the victims—which is what makes them crimes against humanity beyond their ordinary nature as discrete crimes.

(b) Whether the Trial Chamber made inconsistent findings in different sections of its reasons and failed to draw reasonable inferences

326. Besides her argument that the Trial Chamber incorrectly adopted a heightened approach in assessing the evidence of rape, the Prosecutor contends that the Trial Chamber speculated that direct perpetrators had identified the victims as pro-Ouattara supporters 'merely as a "pretext" to rape them, and not as the "reason" or "driving influence" for those crimes.'[431] The Prosecutor argues that 'by considering whether the rapes had occurred for any reason other than the victims being identified as pro-Ouattara supporters, [it] went beyond the record of this case in search of an alternative and speculative inference'.[432] In her view, the evidence showed that the victims were raped because they had been identified as pro-Ouattara supporters, and '[e]ven if any additional personal/sexual motive had existed, this would not detract from this reason.'[433] The Prosecutor asserts that the Trial Chamber 'failed to resolve its findings made in different sections of its analysis and to draw reasonable, even inevitable, conclusions.'[434]

327. To support these contentions, the Prosecutor refers to the Trial Chamber's analysis of the testimonies of: (a) witnesses [REDACTED], [REDACTED], and [REDACTED] regarding rapes during the RTI march,[435] and (b) witness [REDACTED] and [REDACTED] regarding rapes during the 12 April 2011 incident.[436] As for the rapes during the RTI

[430] *Ibid*, paras 1462-1463.
[431] Prosecutor's Appeal Brief, para 238.
[432] *Ibid*, para 238.
[433] *Ibid*.
[434] *Ibid*.
[435] *Ibid*, para 239-242.
[436] *Ibid*, para 243-245.

march, the Prosecutor argues that the Trial Chamber's failure to reflect its findings in its analysis demonstrates 'its unreasonable and ambivalent approach when it assessed the evidence.'[437] She argues that, while it is clear from the witness testimonies and the Trial Chamber's own findings that the victims were raped by the perpetrators who considered them to be supporters of Mr Ouattara, the Trial Chamber still inexplicably stated, in different sections, that the rapes had 'no obvious connection with the operation to repress the RTI march' and that the identification may have 'served merely as a pretext.'[438] As for the rapes during the 12 April 2011 incident, the Prosecutor argues that the Trial Chamber 'contradicted its own assessment and findings' by 'analysing the same witness's evidence [(*i.e.* [REDACTED] testimony)] inconsistently,' and therefore unreasonably 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".'[439]

328. The thrust of the Prosecutor's arguments is that the Trial Chamber failed to draw the inferences that 'the victims were raped for the reason that they had been identified as pro-Ouattara supporters'.[440]

329. With regard to the rapes during the RTI march, the Trial Chamber noted [REDACTED] testimony, *inter alia*, that [REDACTED] [441] [REDACTED] [442] [REDACTED] [443] [REDACTED]. [444] The Trial Chamber then concluded, [REDACTED] and that '[t]he perpetrator of [REDACTED] rape had identified the victim as Mr Ouattara's supporter.'[445] It further noted, in a later section, that it could be concluded that 'all six [women] were raped by "*jeunes*"' and that [REDACTED] were suspected by the perpetrators of being supporters of Mr Ouattara.'[446] It is further noted that, in the Trial Chamber's appreciation of the evidence, [REDACTED] testimony was to the effect, amongst other things, that [REDACTED]. [447] Furthermore, the Trial Chamber also noted that [REDACTED] testified, *inter alia*, that [REDACTED].[448]

330. Having noted the above, the Trial Chamber stated, in a different section of its analysis, that 'in relation to a number of the crimes that were committed there is no

[437] *Ibid*, para 242.
[438] *Ibid.*
[439] *Ibid*, para 245, referring to Judge Henderson's Reasons, para 1859.
[440] Prosecutor's Appeal Brief, para 238.
[441] Judge Henderson's Reasons, para 1466.
[442] *Ibid*.
[443] *Ibid*.
[444] *Ibid*.
[445] *Ibid*, para 1467.
[446] *Ibid*, para 1496.
[447] *Ibid*, paras 1528-1529.
[448] *Ibid*, paras 1526-1527.

obvious connection with the operation to repress the RTI march,' and that, while the Prosecutor argues 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,' her evidence is 'incapable of supporting this proposition.'[449] Furthermore, as noted above, the Trial Chamber stated that 'most cases of rape do appear to conform with the claimed pattern, in that the victims were violated after being identified as supporters of Mr Ouattara [...],' '[h]owever, the question in those instances is whether the identification was the reason for the perpetrators to rape their victims or whether this served merely as a pretext.'[450]

331. There is no disputing that the evidence before the Trial Chamber indicated that the victims were raped by the perpetrators after being identified as Mr Ouattara's supporters, and accordingly that they were raped because of being identified as political opponents. This, however, does not establish the guilt of Mr Gbagbo and Mr Blé Goudé beyond reasonable doubt on the charge of rape as a crime against humanity. Since neither Mr Gbagbo nor Mr Blé Goudé were actual perpetrators of rape, concrete proof beyond reasonable doubt is required to show that they had put the actual rapists up to commit the rapes, as a criminal instrument of policy – by encouraging either the rapes specifically or a situation in which the commission of rapes is a foreseeable consequence.

(c) An Alternative View of Criminal Responsibility

332. That said, the fact that opportunism might serve as the explanation for sexual violence during armed conflict or violent unrest, ought not to exonerate the defendant in the circumstances of a particular case, such as this, entirely of all criminal responsibility.

333. It is recalled that the Prosecution had complained that the Trial Chamber majority had wrongly treated the incidences of sexual violence differently from other incidences of attacks against a civilian population as a widespread or systematic attack against a civilian population. This complaint rests mainly on the rational supports outlined in the following paragraphs.

334. That '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".'[451] According to the Prosecution, the Chamber 'was asked to find whether there was a policy *to commit an attack directed against the civilian*

[449] *Ibid*, para 1217.
[450] *Ibid*, para 1882.
[451] Prosecutor's Appeal Brief, para 237 (emphasis in original).

population—whether such an attack may have involved rape or other crimes such as murder, other inhumane acts and/or persecution.'[452] That being the case, it was irrelevant to consider, as the Trial Chamber did, whether identifying the ethnicity of the victims, or their political leanings as pro-Ouattara, served as a 'pretext' for sexual violence crimes or as its 'driving influence.'[453] Nor was it correct of the Trial Chamber to allow the question of personal motives of the rapists—even as opportunistic—to detract from considering 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 or a "pretext".'[454] Notably, 'a personal or sexual motive does not preclude findings that there was intent to commit a crime or a policy to attack civilians.'[455]

The Continuing Shortcomings of the Prosecution's Case

335. Up to a point, there is merit in these arguments. It is true that the course of conduct that constitutes an attack against a civilian population can comprise varying acts or omissions or both. And in their various ways, they can combine to meet the requirement of widespread or systematic attacks against a civilian population.

336. That understanding, however, does not make up for the shortcomings in the Prosecution's case. The first problem for the Prosecution is that there is a difference between establishing a background incidence of widespread or systematic attacks against a civilian population as a general proposition (albeit a prerequisite element of crimes against humanity); as opposed to holding a defendant criminally responsible on a personal basis for any instance of such an attack. The criminal responsibility of a defendant depends on his or her own personal culpability for the impugned conduct—assessed for him or her along the usual dual axes of *actus reus* (the unlawful act or omission) and *mens rea* (the intent to engage in the unlawful act or omission).

337. In international criminal law, a defendant may not be held individually responsible on a charge of a crime against humanity only on the basis of an assessment that *other people* committed widespread or systematic attacks against a civilian population. From this perspective, conviction requires two things. The first is certainly the proof of a pattern of widespread or systematic attacks against a civilian population. But, beyond that, the Prosecution must also establish that the defendant's own conduct—his or her own unlawful act or omission coupled with the requisite mental element—

[452] *Ibid* (emphasis in original).
[453] *Ibid*, para 238.
[454] *Ibid*, para 237.
[455] *Ibid*.

formed *part of* that overarching pattern of widespread or systematic attacks against a civilian population.

338. That being the case, it was necessary for the Prosecution in this case to lead evidence showing beyond reasonable doubt that Mr Gbagbo and Mr Blé Goudé were criminally implicated personally—as a matter of their own *actus reus* and *mens rea*—in the impugned acts of sexual violence that had been committed against women. This is in the sense that, although they were not the actual perpetrators of the rapes, they were nevertheless personally implicated in the rapes by evidence beyond reasonable doubt. In the circumstances, the Prosecution appears to have misunderstood the whole point of the Trial Chamber's findings about the failure of the evidence in that regard. That misunderstanding is evident in the Prosecution's insistence on appeal, as is clear from their arguments summarised above, that the evidence shows that the general pattern of widespread or systematic attacks included attacks in the nature of sexual violence. But, the Prosecution failed entirely to engage on appeal the difficulty preoccupying the Trial Chamber. That difficulty is that the evidence did not criminally implicate any of the respondents *personally*—as a matter of his own *actus reus* and *mens rea*—in the rapes that had been committed against women.

339. The second problem confronting the Prosecution's case stems from lack of zeal in pressing their case along the lines of superior responsibility as a mode of liability in this case. Certainly, the criminal responsibility of an accused person for a crime against humanity—as a matter of his or her own *actus reus* and *mens rea*—can take the form of the failure to take reasonable measures to prevent or punish the crime in question as required by article 28 of the Statute. In my view, this is a potent channel of criminal responsibility for superiors especially in relation to sexual violence against women during armed conflict or violent unrest.

340. Indeed, the mere fact that even opportunism presents a high-risk for sexual violence during armed conflict or violent unrest should engage an expectation of criminal responsibility to prevent and punish it. In my view, the incidence of rapes is so pervasive in armed conflicts that *judicial notice* ought to be taken of it, as *a matter of evidence* in the particular case. As such, the case for the Prosecution should comprise a clear and deliberate strategy in that direction—with clear notice to the defence—with the view to enhancing the obligations of superiors in every case to demonstrate what measures they put in place to prevent sexual violence or punish subordinates who commit them under the guise of opportunism.

341. But, such a clear and deliberate prosecutorial strategy—with clear notice to the defence—should include not only an insistent reflection of that strategy in the

indictment and the trial generally, but also a prompt motion for judicial notice as indicated above in any event, notwithstanding that the Prosecution may still lead evidence that directly links the sexual violence to the accused.

342. In this case, however, the trial did not proceed along those lines. Indeed, the Prosecution did not even engage the theory of superior responsibility at all in the conduct of this appeal.

343. The effect of that is then to leave the operative thrust of criminal responsibility of each respondent to drive or collapse the Prosecution case almost entirely on the theory that the defendant's own *actus reus* and *mens rea* directly linked him beyond reasonable doubt to the acts of sexual violence committed against women. The Trial Chamber saw no evidence of that direct linkage.[456] I'm not persuaded that the Trial Chamber's finding was unreasonable in that respect.

(d) Whether the Trial Chamber applied its evidentiary approach inconsistently

(i) Anonymous hearsay

344. The Prosecutor argues that the Trial Chamber's characterisation of [REDACTED] prior recorded testimony as 'anonymous hearsay' demonstrates its inconsistent evidentiary approach, arguing that the identity of the source is 'not completely unknown' because [REDACTED] mentioned some identifying characteristics of the [REDACTED].[457] The Prosecutor recalls that [REDACTED].[458] She further recalls the Trial Chamber's holding that since this was anonymous hearsay, and there was no corroboration of [REDACTED] testimony, 'no reasonable trial chamber could conclude solely on the basis of this evidence that there was an instruction, agreement, and/or policy to rape female pro-Ouattara demonstrators.'[459]

345. Although the Prosecutor argues that the Trial Chamber's characterisation as 'anonymous hearsay' demonstrates an inconsistent approach to assessing the evidence, she does not explain how or why this so, and appears to be primarily disagreeing with the Trial Chamber's use of the word 'anonymous.' Accordingly, I do not find that the Trial Chamber's approach was unreasonable.

[456] See e.g. Judge Henderson's Reasons, paras 1215, 1216, 1918-1920,
[457] Prosecutor's Appeal Brief, para 246.
[458] Judge Henderson's Reasons, paras 1528, 1529.
[459] *Ibid*, para 1883.

(ii) Corroboration

346. The Prosecutor also suggests that the Trial Chamber erred in stating that there was 'no corroboration' for [REDACTED] (namely, that Simone Gbagbo issued instructions to rape women taking part in the RTI march) in 'approximately the same terms.'[460] However, corroboration occurs when two pieces of evidence independently confirm the same fact. In the instant case, it is recalled that [REDACTED] is the only witness to give evidence of Simone Gbagbo's instruction to rape women taking part in the RTI march and there is no other, independent evidence confirming this fact.[461]

347. Additionally, there is insufficient evidence that ties the rapes to the defendants in the case. The evidence seeking to connect the rapes to Simone Gbagbo has the following problems. First, it cannot come in through unsworn witness statements received through Rule 68 of the Rules—in order to impute criminal conduct to the defendants; and, secondly, it cannot be evidence against the defendants in this case. While I acknowledge the Prosecutor's argument regarding the 'inner circle',[462] Mrs Gbagbo and Mr Gbagbo are two different individuals and, the evidence does not warrant the imputation of the alleged acts and conducts of the former as the acts and conducts of the latter.[463]

348. In light of the above, I find that the Trial Chamber's approach was reasonable.

6) The Sixth Example

349. The Prosecutor submits that the Trial Chamber erred in assessing the evidence concerning the overall pattern of crimes against 'an unnecessary and unsupported empirical benchmark'.[464]

(i) Relevant part of the Impugned Decision

350. The Trial Chamber observed that '[i]n support of the allegations that there was a course of conduct involving multiple commission of acts under article 7(1), that these acts were directed against a civilian population, that there was a policy/common plan to commit these acts, and that they were committed in a widespread or systematic manner,

[460] Prosecutor's Appeal Brief, para 247.
[461] Judge Henderson's Reasons, para 1883.
[462] *Ibid*, para 95-117.
[463] See in this sense, *Ibid*, para 165.
[464] Prosecutor's Appeal Brief, p 120, Heading IV.B.4.vi., and paras 248-252.

the Prosecutor has presented evidence concerning such acts through the five charged incidents as well as "20 other incidents"'[465] resulting in a total of 528 victims.[466] It noted that according to the Prosecutor, in all cases the perpetrators of the crimes were so-called 'pro-Gbagbo forces' and the victims thereof were 'civilians perceived as Ouattara supporters.'[467] The Trial Chamber further observed that, in the Prosecutor's view, each of the 528 cases could be categorised based on at least one of the four 'evidentiary factors': (a) '[t]he crimes were committed in the context of political demonstrations or in and around political parties' premises in Abidjan'; (b) '[t]he crimes were committed during attacks on neighbourhoods where inhabitants were perceived as Ouattara supporters'; (c) '[t]he crimes were committed following identification checks, particularly at roadblocks'; and (d) '[t]he crimes were committed by shelling or indiscriminate fire in areas densely populated by perceived Ouattara supporters.'[468]

351. Following the analysis of each of the incidents for which the Prosecutor submitted specific evidence[469] and the existence of the alleged four 'evidentiary factors of the alleged pattern,'[470] the Trial Chamber concluded that 'although the Prosecutor's listing of a number of incidents in four different categories is not *per se* inaccurate, this is not sufficient to prove the existence of meaningful patterns' from which it would be possible to infer the alleged common plan or policy.[471] It noted that '[b]y limiting herself to looking only at instances that complied with the so-called "evidentiary factors," the Prosecutor artificially reduced the scope of her inquiry. This made the finding of "patterns" both a self-fulfilling prophecy and largely meaningless.'[472] The Trial Chamber then made the following pronouncements regarding the existence of the alleged overall pattern of attacks against the civilian population:

> 1888. In addition to the evidentiary considerations outlined above, it is important to underline another fundamental weakness of the Prosecutor's arguments in relation to the existence of patterns of criminality. The main flaw in the Prosecutor's argument is that no attempt has been made to demonstrate that the 24 incidents she relies upon to prove the existence of a pattern are representative of what happened in Abidjan during the post-election crisis. Anyone can claim the existence of a pattern by cherry-picking examples that fit preconceived characteristics and ignoring all other information that does not conform. The burden is upon the Prosecutor to show how and why she selected the incidents relied upon in her Response.
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> 1889. Considering the duration of the post-election crisis and the size of Abidjan, it is impossible to assume that the incidents relied upon by the Prosecutor were the only occasions during which

[465] Judge Henderson's Reasons, para 1383.
[466] *Ibid*, para 1384.
[467] *Ibid*, para 1385.
[468] *Ibid*, para 1385.
[469] *Ibid*, paras 1405-1872.
[470] *Ibid*, paras 1873-1887.
[471] *Ibid*, para 1887.
[472] *Ibid*.

the different constituents from the so-called pro-Gbagbo forces came into contact with the civilian pro-Ouattara population. This is critical, because, in the absence of evidence about how the 'pro-Gbagbo forces' interacted with the pro-Ouattara population in general, it is impossible to determine whether the incidents constitute a representative sample of a wider pattern or whether they are really exceptions. For example, the Prosecutor alleges a pattern of targeting civilians belonging to a number of religious, national or ethnic groups at roadblocks manned by groups sympathetic to Mr Gbagbo. However, in total, the Prosecutor provides evidence only in relation to a limited number of incidents where crimes were committed at roadblocks following identification. Even assuming that the evidence was of sufficient probative value to accept all the Prosecutor's allegations about what happened during these incidents, this would never be sufficient to find the existence of a pattern. This is because there must have been countless instances every day where civilians belonging to the relevant groups crossed the roadblocks. Without any information about how they fared, it is simply impossible to know whether the examples of the Prosecutor are representative of what happened in most or at least many cases, or whether they actually constituted the exception rather than the rule.

1890. Since the policy relates to an alleged attack against a civilian population in the sense of article 7(2)(a) of the Statute, only those instances where article 7(1) crimes were allegedly committed can be considered for the existence of the relevant pattern(s). Instances where other behaviour vis-à-vis pro-Ouattara civilians is evidenced, such as extortion, stealing, or less serious forms of physical ill-treatment, may be relevant for determining the existence of discriminatory intent and potentially persecution. However, the fact that sums of money may have been or were extorted from many people to cross roadblocks does not qualify as relevant evidence in support of the existence of a policy to kill, rape, and/or injure civilians.

1891. It should be noted also that, in order to establish the existence of a pattern covering a prolonged period and a large area, what matters is not so much the total number of victims as the number of incidents. For example, when during a singular attack on a particular location three people are killed and seven injured, however tragic this is, this would only count as one instance for the purposes of the existence of a pattern of physical violence. If, on the other hand, there are ten different incidents where a single individual is killed or injured, this counts as ten instances of a potential pattern.

1892. Based on these considerations, it is absolutely clear that, even if all of the Prosecutor's allegations concerning the charged and uncharged incidents were accepted at face value, still no reasonable trial chamber could find that there existed a veritable pattern of criminal conduct that could support an inference that a policy to commit such crimes must have been in place. Indeed, according to the Prosecutor, the relevant period lasted 137 days and the relevant location was Abidjan. According to the Prosecutor, Abobo alone held 1.5 million inhabitants and the entire city's population probably totalled more than 4 million. The Prosecutor did not provide any information as to how many of these belonged to the relevant categories according to her case theory, but it is probably safe to assume that there were at least 1 million Muslims, northerners and foreigners combined. On the side of the alleged perpetrators, it is also not entirely clear how many members of the different regular and irregular forces were in Abidjan at the time, nor what their respective weaponry was. Nevertheless, it is beyond doubt that there were several thousand armed individuals in Abidjan during the relevant period. According to the Prosecutor, all these individuals belonged to organisations that were controlled by the accused. These thousands of so-called 'pro-Gbgabo forces' had ample opportunity to commit violent crimes against the relevant civilian population(s) of Abidjan. Yet, even if the Prosecutor's alleged total number of victims (528) was fully accepted and were all counted as single incidents, this would still only represent 0.052% of the relevant potential victim population.

1893. Although telling, this number is not necessarily determinative. What matters is how often the 'pro-Gbagbo' forces complied with the alleged policy when they had the chance to do so. Given

the scarcity of the evidence in this regard, it is impossible to make any empirical findings on this point. Nevertheless, assuming that out of the thousands of pro-Gbagbo forces that were present in Abidjan during the post-electoral crisis, on any given day, 75 of them had an opportunity to harm at least one suspected Ouattara supporter, this would still mean that there were more than 10,000 such opportunities throughout the relevant time-period. If the Prosecutor's alleged total number of 528 victims was fully accepted and were all counted as single incidents, this would mean that in only slightly more than 5% of cases where a pro-Gbagbo force member had an opportunity to implement the policy, they actually did so. In reality, the percentage was probably much lower still.

1894. The point here is not that there is a minimum threshold in terms of the implementation rate of the alleged policy. Nor is there any issue of principle with the idea that a policy can be inferred from its alleged implementation. The point is purely an evidentiary one. In this case, the Prosecutor is asking us to infer the existence of the Common Plan/policy, inter alia, from the claimed pattern of crimes. This is not a viable inference when the 'pro-Gbagbo forces' ignored the alleged policy more than 90% of the time. This is especially the case when those forces were, as alleged by the Prosecutor, an 'organised and hierarchical apparatus of power' that was characterised by automatic compliance with superior orders.

1895. Again, this is not a matter of reducing the legal definition of an attack against a civilian population to a specific ratio. This would clearly be inappropriate. However, it would equally be irresponsible to ignore basic realities. No reasonable trial chamber could conclude on the basis of these numbers that there was an attack against a civilian population in Abidjan during the post-election crisis. And it is even less possible to infer that there was a Common Plan, much less an actual policy, to commit killings and rapes on this basis.

1896. This conclusion in no way diminishes the scale of suffering that was endured by the civilian population. However, grave though the excesses of the 'pro-Gbagbo forces' may have been, based on the evidence that was presented to the Chamber, it is no possible to characterise them as a deliberate attack against a civilian population.[473]

(ii) Assessment of the Sixth Example

352. The Prosecutor's contention is that the Trial Chamber adopted 'an overly rigid approach (requiring empirical precision) to determine the overall pattern of criminality';[474] and, that it speculated beyond the evidence on the record and took untested factors into account in its analysis.[475]

353. Regarding the context in which the numbers in question were mentioned, it is noted that following the analysis of the alleged four 'evidentiary factors' and concluding that none of them 'sufficiently proved the existence of meaningful patterns.'[476] The Trial Chamber further observed that '[i]n addition to the evidentiary considerations outlined above, [...] [t]he main flaw in the Prosecutor's argument [in relation to the existence of

[473] *Ibid*, paras 1888-1896 {footnotes omitted}.
[474] Prosecutor's Appeal Brief, para 248.
[475] *Ibid*, paras 250-252.
[476] Judge Henderson's Reasons, paras 1873-1887.

patterns of criminality] is that no attempt has been made to demonstrate that the 24 incidents she relies upon to prove the existence of a pattern are representative of what happened in Abidjan during the post-election crisis.'[477] The Trial Chamber noted that '[c]onsidering the duration of the post-election crisis and the size of Abidjan, it is impossible to assume that the incidents relied upon by the Prosecutor were the only occasions during which the different constituents from the so-called pro-Gbagbo forces came into contact with the civilian pro-Ouattara population.'[478] According to the Trial Chamber, '[t]his is critical, because, in the absence of evidence about how the "pro-Gbagbo forces" interacted with the pro-Ouattara population in general, it is impossible to determine whether the incidents constitute a representative sample of a wider pattern or whether they are really exceptions.'[479] Following these considerations, the Trial Chamber made a series of pronouncements which are pointed out by the Prosecutor.

354. Three amongst the Prosecutor's complaints were that the Trial Chamber assumed that: (a) the population of Abidjan 'probably totalled more than 4 million people,' that (b) 'there were at least 1 million Muslims, northerners and foreigners combined' (according to the Prosecutor, these are 'some of the identified categories of perceived pro-Ouattara supporters'[480]); and (c) 'there were several thousand armed individuals in Abidjan during the relevant period'.[481] But, it must be observed, as also noted by the Prosecutor, that there is no evidence on record in support of those numbers and hypotheses. In this regard, it appears that the Trial Chamber's purpose in referring to the above numbers was to show that even assuming the Prosecutor's alleged total number of victims (*i.e.* 528[482]) was fully accepted and were all counted as single incidents, it would 'only represent 0.052% of the relevant potential victim population' (*i.e.* 1 million). This also appears to lack support in the evidence. The Trial Chamber further noted that this number was not 'necessarily determinative', and that '[w]hat matters is how often the "pro-Gbagbo" forces complied with the alleged policy when they had the chance to do so. Given the scarcity of the evidence in this regard, it is impossible to make any empirical findings on this point.'[483]

355. As regards the Prosecutor's submission that the Trial Chamber assumed that 'out of the thousands of pro-Gbagbo forces that were present in Abidjan' at the time, 'on any given day, 75 of them had an opportunity to harm at least one suspected Ouattara

[477] *Ibid*, para 1888.
[478] *Ibid*, para 1889.
[479] *Ibid*.
[480] Prosecutor's Appeal Brief, para 251.
[481] Judge Henderson's Reasons, para 1892.
[482] *Ibid*, para 1384.
[483] *Ibid*, para 1893.

supporter,' and further assumed that 'there were more than 10,000 such opportunities throughout the relevant time-period' (*i.e.* 137 days),[484] it may be observed, as the Trial Chamber explicitly stated in a footnote, that the numbers in question were based on 'educated guesswork and mere assumptions'[485] and thus were not supported by the evidence on the record. It appears that the Trial Chamber, by referring to the above numbers and calculations, intended to state that, even assuming the Prosecutor's alleged total number of victims (*i.e.* 528) was fully accepted and were all counted as single incidents, 'this would mean that in only slightly more than 5% of cases where a pro-Gbagbo force member had an opportunity to implement the policy, they actually did so.'[486] As for the Prosecutor's further complaint (that the Trial Chamber stated that it is not viable to infer the existence of the common plan or policy from the claimed pattern of crimes, especially when the pro-Gbagbo forces 'ignored the alleged policy more than 90% of the time'[487]), it should also be noted that such a number lacks support in the evidence on the record.

356. In light of the foregoing, it appears that the numbers or estimates included in the Trial Chamber's reasoning did not find support in the case record, and it is not clear how the Trial Chamber came up with these numbers. It is noted that '[t]he Court may base its decision only on evidence submitted and discussed before it at the trial,'[488] and thus should not rely on any information or speculation that is not supported by the evidence on the record.

357. That said, however, it may be noted that the Trial Chamber's use of the numbers was merely to clarify that 'even if all of the Prosecutor's allegations concerning the charged and uncharged incidents were accepted at face value,' it is still not possible to find the existence of a veritable pattern from which a common plan or policy could be inferred.[489] Also, the Trial Chamber noted that it did not seek to 'reduc[e] the legal definition of an attack against a civilian population to a specific ratio,'[490] but to illustrate

[484] *Ibid*, (The Trial Chamber notes that, 'according to the Prosecutor, the relevant period lasted 137 days'. Although the Trial Chamber cited no reference thereof, such number can be found in paragraph 419 of the Prosecution's Response to Defence No Case to Answer Motions, 10 September 2018)
[485] Judge Henderson's Reasons, footnote 4223 (stating, *inter alia*, that, '[i]t is fully recognised that the numbers used are based on educated guesswork and mere assumptions'.).
[486] *Ibid,* para 1893.
[487] Prosecutor's Appeal Brief, para 251.
[488] See Article 74(2) of the Statute.
[489] Judge Henderson's Reasons, para 1892.
[490] *Ibid,* para 1895.

the 'fundamental weaknesses' of the Prosecutor's evidence by resorting to the numbers in question.[491]

358. Furthermore, it may be observed that while the Trial Chamber referred to the numbers that were based on its 'educated guesswork and mere assumptions,'[492] it did not rely on those when conducting its pattern analysis. Rather, it is recalled that, prior to referring to the numbers and estimates mentioned above, the Trial Chamber reached its conclusion on the alleged pattern of crimes by analysing the incidents for which the Prosecutor submitted specific evidence[493] and the four 'evidentiary factors.'[494] Only after the completion of these 'evidentiary considerations,'[495] did the Trial Chamber refer to the numbers in question. It is observed that the Trial Chamber stated at the beginning of this reasoning that '[i]n addition to the evidentiary considerations outlined above, it is important to underline another fundamental weakness of the Prosecutor's arguments in relation to the existence of patterns of criminality.'[496] It is therefore considered that, contrary to the Prosecutor's contention, the Trial Chamber did not consider extraneous and untested factors in its pattern analysis. Accordingly, the Prosecutor failed to demonstrate any error.

359. Even assuming that the Trial Chamber erred in referring to these numbers, the Prosecutor fails to show how it would demonstrate that the Trial Chamber had not directed itself to the evidentiary approach it would apply before it assessed the evidence at the no case to answer stage, or how the error had a material impact on the Trial Chamber's decision to acquit the two accused.[497]

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[491] *Ibid,* para 1888 (The Trial Chamber noted that '[i]n addition to the evidentiary considerations outlined above, it is important to underline another fundamental weakness of the Prosecutor's arguments in relation to the existence of patterns of criminality').
[492] *Ibid*, footnote 4223.
[493] *Ibid*, paras 1405-1872.
[494] *Ibid*, paras 1873-1887.
[495] *Ibid*, para 1888
[496] *Ibid*, para 1888. In the same paragraph, the Trial Chamber added: 'The main flaw in the Prosecutor's argument is that no attempt has been made to demonstrate that the 24 incidents she relies upon to prove the existence of a pattern are representative of what happened in Abidjan during the post-election crisis. Anyone can claim the existence of a pattern by cherry-picking examples that fit preconceived characteristics and ignoring all other information that does not conform. The burden is upon the Prosecutor to show how and why she selected the incidents relied upon in her Response.'
[497] It should be noted that, on this point, the case at hand was different from the ICTY *Gotovina* case (*Prosecutor v. Ante Gotovina and Mladen Markač* (Appeal Judgement), 16 November 2012, IT-06-90-A, [ICTY Appeals Chamber], paras 52-67), where the ICTY Appeals Chamber, at paragraph 55, noted that the Trial Chamber concluded that a reasonable interpretation of the evidence was that 'those artillery projectiles which impacted within a distance of 200 metres of identified artillery target were deliberately fired at that artillery target.' However, the Appeals Chamber, at paragraph 64, found that 'the Trial Chamber failed to provide a reasoned opinion in deriving the 200 Metre Standard, a core component of its Impact Analysis'.

CONCLUSION

360. The foregoing discussions engage some matters of law that it would be helpful to give some thought to as the Court's jurisprudence develops, especially in relation to the interpretation of the Rome Statute in the relevant respects; as well as on questions of assessment of evidence as contested in this appeal. Despite the importance that I ascribe to the views expressed in this opinion, I share in the judgment of the Majority as indicated in that judgment.

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

Chile Eboe-Osuji
Judge

Dated this 31th day of March 2021
At The Hague, The Netherlands