Can We Return to the Law, Please? Rethinking the Judicial interpretation of Procedural Rules in the ICC – A Conversation with Judge Tarfusser after the Gbagbo-Blé Goude Appeal Judgment

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[Cuno Jakob Tarfusser served as Judge of the International Criminal Court from 2009 to 2020. During his tenure, he was also its Vice-President and President of the Pre-Trial Division. As Pre-Trial Judge, sitting in both PT Chambers, he was in charge of all situations and cases the Court dealt with.]

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On 31 March 2021, the Appeals Chamber of the International Criminal Court ("ICC") delivered its judgment in the Prosecutor's appeal against the decision of Trial Chamber I of 15 January 2019 (with reasons issued on 16 July 2019), wherein the Trial Chamber acquitted Mr Laurent Gbagbo and Mr Charles Blé Goudé of all charges. The Appeals

Chamber found no error that could have materially affected the decision of the Trial Chamber in relation to both of the Prosecutor's grounds of appeal. Therefore, the Appeals Chamber rejected the Prosecutor's appeal and confirmed the decision of the Trial Chamber.

In this conversation, Giovanni Chiarini interviews Cuno Jakob Tarfusser – former Judge and Second Vice-President of the ICC – on two of the many fragile points that emerge from this appeal judgment, such as the method of judicial interpretation regarding the procedural rules. Specifically, they focus on: 1) the interpretation of "no case to answer"; and 2) the interpretation of the burden of proof.

At the end of this short conversation, we could definitely agree that the manner of judicial interpretation of the procedural rules should strictly conform to the legal framework of the Court. Otherwise, an increasingly intricate and unforeseeable procedure emerges, based on an almost arbitrary discretion of the judges.

– Chiarini: Judge Tarfusser, the Appeals Chamber has written, the institution of "no case to answer" is a common feature of criminal procedural law at international courts and tribunals. (para 105 *Gbagbo*) The procedure is evident in rule 98*bis* of the ICTY and the ICTR Rules, rule 98 of the SCSL, rule 167 of the STL, rule 130 of the KSC and rule 121 of the IRMCT (see fn 208 *Gbagbo*). However, the reasoning of the Appeals Chamber does not convince me, because the Rome Statute does not expressly provide for a "no case to answer" procedure. *Ruto and Sang* was the first time at the ICC where a "no case to answer" motion was assessed (see para. 15). Even in *Ntaganda* the Appeals Chamber said that this procedure is "based on its power to rule on relevant matters pursuant to article 64(6)(f) of the Statute and rule 134(3) of the Rules" (para 44 *Ntaganda*), and also that "A decision on whether or not to conduct a "no case to answer" procedure is thus discretionary in nature and must be exercised on a case-by-case basis in a manner that ensures that the trial proceedings are fair and expeditious pursuant to article 64(2) and 64(3)(a) of the Statute." (para 44 *Ntaganda*). Moreover, it has been observed that "while the Court's legal texts do not explicitly provide for a 'no case to answer' procedure in the trial proceedings before the Court, it nevertheless is permissible." (para 45 *Ntaganda*).

Therefore, can a Court decide to activate a "no case to answer"procedure even though there is not any provision in the Rome Statute? The "no case to answer" procedure is still a subject of discussion in the *Gbagbo* Appeal Judgment, wherein the Chamber observed (para 106) that "The no case to answer procedure is a necessary adjunct to two of the most fundamental principles of criminal law. One is that the defendant enjoys a presumption of innocence. The other is that the burden of proof in displacement of that presumption always rests on the prosecution, to be discharged on a standard of proof beyond reasonable doubt".Thus, if in *Ntaganda* the "no case to answer" was "discretionary in nature", now, after *Gbagbo*, this procedure should also be considered as "necessary adjunct"of the presumption of innocence and the standard of proofbeyond reasonable doubt?This greatly confuses me. In my view, the presumption of innocence and the standard of proof are both autonomous procedural matters, and they are not bound – in theory or in practice – to the "no case to answer" procedure.

– Tarfusser: Let me say at the outset that the judgement of the Appeals Chamber confirming the acquittal by the Trial Chamber of Mr Laurent Gbagbo and Mr Charles Blé Goudé was the only possible decision. Correct not only on the merits, given the "exceptional weakness" of the evidence, but also legally indisputable considering the poorness of the Prosecutor's Appeals Brief. The TC decision to acquit was based on the failure by the OTP to fulfil its burden of proof. Well, the OTP has not challenged the decision on that basis, but only on two very marginal procedural issues, both of which were so flimsy that they should have been dismissed *in limine*:the alleged "violation of the mandatory requirements in article 74(5) of the Statute" by the TC (par. 6) and the alleged failure by the TC "to define or articulate a clear and consistent standard of proof or approach to assess the sufficiency of evidence in the NCTA proceedings" (par. 122).

While I do not even touch upon the first ground of appeal because the accusation that judges have violated the law is in itself disqualifying for those who even suggest it. I well do on the second ground by saying that I have always fought very hard against this very nebulous "no case to answer" procedure as a judicial procedure applicable in the trials before the ICC. This is not due to an abstract prejudice, but simply because the Rome Statute does not mention or provide for a "no case to answer" proceedings. It is my very firm belief that no judge is allowed to "create" procedural rules, by borrowing them from other national or international legal frameworks. Even less is it allowed to create them based on the phantomatic – also unwritten and unregulated – "inherent powers". Judges have to stick to the law! This said, and moving from an abstract and dogmatic to a very pragmatic and effectiveness-oriented level, it goes without saying that during the course of proceedings judges (let's remember, professional judges, not a jury, not lay judges) listen, discuss, evaluate, and make up their mind on the development of the trial on a rolling basis. It is therefore normal that, by the end of the submission of the evidence by the Prosecutor at the latest, when all purportedly "inculpatory" evidence has been presented, judges ask themselves if it is necessary to continue with the trial or to end it with an acquittal, if the evidence presented by the Prosecutor was so flawed that a conviction would be impossible. What would be the necessity in terms of efficiency, of effectiveness of the trial, in terms of the right of the accused to a fair and expeditious trial, to continue it by hearing exculpatory evidence, if the Prosecutor has failed to submit sufficient inculpatory evidence as to the criminal responsibility of the defendants for the crimes charged? Well, the answer is none. Hence, the only solution, for judges faced with evidence which might be, well, massive in numbers but "exceptionally weak" in quality, is to acquit the defendants, by applying article 74. No need to "create" a procedure such as the "no case to answer". In the same vein, I also reject the tedious argument raised by the OTP on appeal, according to which the Trial Chamber "apparently had not yet completed the necessary process of making its findings on the evidence and reaching all its conclusions".

– Chiarini: Thank you for your clarification. Let me add some points. The "no case to answer" procedure has no place in the legal framework of the Court and is unnecessary, and there is only one evidentiary standard, and there is only one way to end trial proceedings. This standard is set forth in article 66(3): "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt". In your

opinion dated 16 July 2019, you have described this issue in one sentence: "when asked by the Presiding Judge, 'Where do you find in the structure of the Statute the procedure for a no case to answer?', the Deputy Prosecutor could not but answer: 'Well, you don't'"(para 66). What is your opinion on the relation between "no case to answer" and the standard of proof (if there is any)?

– Tarfusser: None, given that I flatly reject the "no case to answer" procedure. As far as the "standard of proof" issue is concerned, I must say that it haunted me during my almost eleven years of service as an ICC judge. In the second ground of appeal, the OTP submitted that the Trial Chamber "failed to define or articulate a clear and consistent standard of proof or approach to assess the sufficiency of evidence in the NCTA proceedings" (Prosecutor's Appeal Brief, par. 122). Well, leaving aside the reference to the "no case to answer stage", which I do not recognize for the reasons said, this ground of appeal astonished me because it suggests that it is possible for judges to establish standards of proof. Well, given that all persons participating in a trial at the ICC are professional lawyers, they all should know that it is the Rome Statute establishing the standards of proof in relation to the different stages of the proceedings. Namely, (i) the "reasonable basis to proceed" (art. 15(3)-(4) and 53(1)-(a) RS) for the investigative phase; (ii) the "reasonable ground to believe" (art. 58(1)(a) RS) for the warrant of arrest; (iii) the "substantial grounds to believe" (art. 61(5)-(7) RS) for the confirmation of the charges; (iv) the "beyond reasonable doubt" (art. 66(3) RS) for the judgment. No additional, intermediate, hybrid, 'imported', or evidentiary standard is needed, and none should be allowed. No space for judges to "create", or as the OTP says, to "articulate" and "define" standards of proof other than those established by the law. Full stop.

– Chiarini: Dear Judge Tarfusser, we are coming to the end of our conversation. I believe that, at least, we should also ask ourselves what is the threshold and what are the limits of judicial interpretation. Is it at all acceptable that judges can create procedural rules based on their discretion? Is this a consequence of the different legal cultures, or just a lack of respect for procedural matters?

– Tarfusser: I should be clear by now that it is my firm conviction that the solution to each procedural and substantive issue is to be searched – and found – in the law, first and foremost in the legal framework of the Court, as opposed to the subjective and creative imagination of the judges. The ICC statutory legal framework is comprehensive enough so as to give ample possibility for solving legal problems through legal interpretation. No need for this continuous flourishing of judicial creations *ultra legem* (if not *contra legem)* which I consider inappropriate, out of place, and dangerous. The "no case to answer" is just one out of many similarly dangerous examples, each of them as extravagant as damaging. I am referring, for example, to the decisions of "stay of proceedings" (*Lubanga*), to "vacate the case" (*Ruto and Sang*), to the imposition of the so-called IDAC – in-depth-analysis-chart as the only (!) legitimate way for a party to present their evidence to the Chamber, to the request to take "decision of mistrial" and other similar *florilegium*. None of these exist in the law of the ICC, and yet they have taken up, and continue to take up, a lot of space before the ICC and account for a non-negligible part of the "hard work" some ICC people take unique pride in relentlessly boasting – or

complaining, depending on the audience – about. This said, and answering your questions, I think it is indeed unacceptable that Judges “create” procedural rules based on their discretion and that it is high time to stop this exercise and to go back to basic and solid legal interpretation. On the question if “judicial creativity” is attributable to the different legal cultures of the judges and/or to the lack of respect to the procedure, I am not in a position to give a final answer, although I think it is a little of both. For sure, it is a fact that the majority of the judges elected to serve the Court (as well as the overwhelming majority of legal officers) have never put foot into a court of law before coming to the ICC. Thus, they are not familiar with the criminal law and even less with the criminal procedure. However, the most dangerous trait that characterizes all judges is their egomania, which becomes particularly apparent in this run to give the imprinting to creative solutions and to go to extraordinary lengths just for the sake of expressing personal opinions, none of which has the slightest impact on the judicial fate of a case and is likely to be forgotten soon.