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Date: **15 July 2024**

TRIAL CHAMBER X

Before: **Judge Kimberly Prost, Presiding**
Judge Tomoko Akane
Judge Keebong Paek

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD

Public

Defence Observations on the Current Composition of Trial Chamber X

Source: **Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud**

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

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I. Introduction

1. The purpose of the present Observations is to secure, alongside Mr Al Hassan's right to an expeditious trial, the *objective* appearance of fair and impartial trial proceedings, which necessarily include the penalty phase. As such, these Observations will address the *potential* impact of the re-composition of the Chamber on Mr Al Hassan's fair trial rights, including:

i. his right to be tried by a regularly constituted Chamber that satisfies the requirements of independence and objective impartiality;

ii. the principle of legal certainty and his right not to be subjected to legal jeopardy twice for the same conduct; and

iii. his right to be tried expeditiously.

2. The unforeseen replacement of Judge Mindua by Judge Paek has also generated uncertainty and delays, which are detrimental to Mr Al Hassan's mental welfare and his right to receive a speedy decision on a matter of fundamental import to both himself and his family.

3. Mitigation in sentencing, while necessary, is not a full cure. The sentencing phase is integrally linked to the Trial Chamber's trial-related deliberations and verdict. The introduction of a new judge at this stage, irrespective of their undoubted competence and professionalism, has the practical effect of Mr Al Hassan being sentenced by a judge who did not actually participate in any part of the trial, including critical evidential deliberations. Due to the secrecy of such deliberations, there is also no transparent case record on which Judge Paek can rely to acquaint himself with that process. It is difficult to see how the continuation of the sentencing proceedings in the absence of Judge Mindua, who presided over Mr Al Hassan's trial from July 2020 until delivery of the judgment on 26 June 2024, could be objectively fair. Since the Chamber has yet to pronounce on how it will address the above issues, the present Observations are without prejudice to Mr Al Hassan's right to seek future relief, depending on the specific modalities adopted for the present phase.[1]

[1] *See* O Triffterer, 'Article 74', Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (2008 2nd ed), p. 1392 ('violations of this high demand on permanent presence during the

II. Procedural History

4. In its pre-trial submissions, the Defence proposed the appointment of an alternative Judge, to avoid risks of delay or disruption in the proceedings.[2] The Prosecution raised this suggestion again in January 2021.[3] These suggestions were not adopted by the Presidency.

5. On 6 December 2023, the Trial Chamber issued the Order scheduling the delivery of the Trial Judgment for 18 January 2024.[4] This Scheduling Order was vacated on 15 January 2024.[5]

6. On 12 February 2024, the Defence and the Legal Representatives for Victims (LRV), on the one hand,[6] and the Prosecution on the other,[7] filed two requests for further information as to the expected date of the judgment. On 4 March 2024,[8] the Single Judge acknowledged the 'valid concerns and queries' of the parties and participants and 'the utmost importance, in the circumstances, and particularly at this stage, for all to receive updated information promptly'.[9] The Single Judge indicated that the judgment would not be issued before the end of March 2024 and underscored its commitment 'to sharing, with the parties and participants, and at the earliest opportunity, any relevant information in its possession'.[10]

7. On 12 March 2024, the newly elected Presidency assigned alternate Judges to Trial Chambers I, V, and VI.[11] No alternate judge was assigned to Trial Chamber X.

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trial can only be compensated for by repetition of those stages at which a respective judge, taking part in finding the decision, was not present; *otherwise his or her absence is a reason for appeal*' (emphasis added). *See also* ECtHR, *Moiseyev v. Russia*, App. No. 62936/00, Judgment, 9 October 2008, para. 183 ('[f]inally, the Court reiterates that the possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for defects that took place in the first-instance proceedings. In the present case it may be assumed that the Supreme Court, sitting as a court of appeal, should have had the power to quash the conviction on the ground of a serious violation of criminal procedure, such as a breach of the rule of immutability of court composition […]. Although the applicant referred to this breach in his statement of appeal, the Supreme Court upheld the conviction and sentence in their entirety. As a consequence, it did not cure the failing in question') (internal citations omitted).

[2] ICC-01/12-01/18-519-Conf-Exp, para. 51. *See also* T-008, p. 58, line 20 – p. 59, line 12.

[3] ICC-01/12-01/18-1258-Conf-Red, para. 28.

[4] Order Scheduling Delivery of the Trial Judgment, ICC-01/12-01/18-2576.

[5] Order Vacating the Hearing Scheduled for the Delivery of the Trial Judgment, ICC-01/12-01/18-2584.

[6] Requête conjointe de la Défense et des représentants légaux des victimes quant à l'obtention d'information relativement à la date de prononce du jugement, ICC-01/12-01/18-2586.

[7] Requête de l'Accusation aux fins d'information concernant la date de prononcé du jugement dans l'affaire Al Hassan, ICC-01/12-01/18-2587.

[8] Decision on Two Requests Concerning the Delivery of the Trial Judgment, ICC-01/12-01/18-2588.

[9] Decision on Two Requests Concerning the Delivery of the Trial Judgment, ICC-01/12-01/18-2588, para. 4.

[10] Decision on Two Requests Concerning the Delivery of the Trial Judgment, ICC-01/12-01/18-2588, para. 6.

[11] Decision assigning judges to divisions and recomposing Chambers, ICC-01/12-01/18-2589.

8. Following an urgent request for further information on 13 March 2024,[12] the Single Judge informed the parties on 2 April 2024 that Judge Mindua had returned to work following sick leave.

9. On 15 April 2024, the Trial Chamber issued a further order, scheduling the Trial Judgment for 26 June 2024.[13] On 25 April 2024, the Trial Chamber clarified that the Chamber had been kept abreast of these matters from 2 January 2024, and further, that Judge Mindua had progressively returned to work, following official medical leave taken as of 11 December 2023.[14]

10. On 26 June 2024, the Trial Chamber issued its Article 74 judgment. The written opinion of Judge Mindua was subsequently transmitted to the parties on 28 June 2024.

11. On 28 June 2024, the Trial Chamber issued a scheduling order for the sentencing phase, which set 28 August 2024 as the date for issuing the decision on sentence.[15]

12. That very same day, the *ad hoc* Presidency issued a decision, replacing Judge Akane and Judge Mindua with Judge Korner and Judge Paek.[16]

13. Following a Prosecution request, the Single Judge first suspended the deadline for submission of evidence and subsequently suspended all sentencing deadlines established on 28 June 2024.[17] The Single Judge further explained that that this measure had been taken 'as a result of the re-composition decided by the Presidency'.[18]

14. On 5 July 2024, the Defence sought clarification as to whether the parties and participants would be afforded an opportunity to be heard on these developments.[19] By email decision, the Single Judge invited the parties and participants to submit such observations by 15 July 2024.

15. On 10 July 2024, the *ad hoc* Presidency issued a decision, revoking the withdrawal of Judge Akane.[20] Trial Chamber X is now composed of Judge Prost (Presiding), Judge Akane and

[12] Submitted by the Defence: ICC-01/12-01/18-2590.
[13] ICC-01/12-01/18-2591.
[14] ICC-01/12-01/18-2592.
[15] ICC-01/12-01/18-2595.
[16] ICC-01/12-01/18-2596.
[17] ICC-01/12-01/18-2600.
[18] ICC-01/12-01/18-2600, para. 8.
[19] ICC-01/12-01/18-2599.
[20] ICC-01/12-01/18-2601.

Judge Paek.

III. Submissions

3.1 Mr Al Hassan's right to be tried by a lawfully constituted Chamber, which satisfies the requirements of independence and objective impartiality

16. The ICC legal framework requires the Trial Chamber to maintain the same composition throughout the trial process. The sentencing phase is an integral part of the trial process, leading to a presumption that the same bench that issued the Article 74 judgment will also hear and determine Mr Al Hassan's sentence. Irrespective as to whether it is legally possible to replace Judge Mindua, the *circumstances* in which he was replaced raise issues concerning the independence of the judiciary and the impartiality of this process. The *ad hoc* procedure applied to the current case fails to adequately safeguard Mr Al Hassan's right to a fair and speedy decision on sentence.

3.1.1. The Trial Chamber has the power and the duty to consider the fair trial consequences of the re-composition of Trial Chamber X

17. The fact that the appointment of Judge Paek stems from a Presidency decision does not prevent this Chamber from determining the lawfulness of the current composition of this Chamber, as part of its overarching obligation to ensure Mr Al Hassan's fair trial rights.[21] The right to be heard by a lawfully constituted bench forms part of the right to a fair and impartial hearing: 'a violation by a tribunal of domestic legal provisions relating to the establishment and competence of judicial organs gives rise to a violation of Article 6 §1',[22] that is, a violation of the right to a fair hearing before an independent and impartial tribunal established by law. The case-specific judicial adoption of new procedural rules both to justify and regulate the current scenario is also inconsistent with fundamental due process norms.[23] Judicial determination as to the lawfulness of the present composition also forms part of the *compétence de la compétence* of the Chamber.[24] As formulated by the ICTR Appeals Chamber, 'anyone exercising a judicial power has the

[21] *Ntaganda*, Appeals Judgment, ICC-01/04-02/06-2666-Red, 30 March 2021, para. 87.
[22] ECtHR, *Biagioli v. San Marino*, App. No. 8162/13, Decision, 8 July 2014, para. 75.
[23] *See*, by analogy, ECtHR: *Coëme and Others v. Belgium*, App. nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment, 18 October 2000, para. 102 ('the primary purpose of procedural rules is to protect the defendant against any abuse of authority and it is therefore the defence which is the most likely to suffer from omissions and lack of clarity in such rules.')
[24] ICC-02/04-01/05-147, paras 22-23; ICC-01/18-143, para. 73.

responsibility and the competence to ensure that he has the power which he is proposing to exercise.'[25]

3.1.2. The ICC Statute and Rules require the Trial Chamber to maintain its composition for the decision on sentence

18. Article 36(1) of the Statute provides that 'a judge assigned to a Trial […] Chamber in accordance with Article 39 *shall* continue in office to complete any trial […] the hearing of which has already commenced before that Chamber.' This provision, read in conjunction with Articles 74 and 76, requires Judge Mindua to continue in office until the issuance of the sentencing judgment.

19. Article 74(1) of the Statute, which is in Part VI ('The Trial'), provides that 'all the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations'. This article gives effect to the principle of immediacy,[26] which mandates that the Chamber must have been *physically* present during the hearing of evidence.[27]

20. Article 76(1), which is also part of Part VI, states that 'in the event of a conviction, the

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[25] *Nyiramasuhuko et al.*, ICTR-98-42-A15*bis*, Decision in the Matter of Proceedings Under Rule 15bis (D), 24 September 2003, para. 11.

[26] *Ntaganda* Appeals Judgment, ICC-01/04-02/06-2666-Red, para. 40: 'As part of that function and in light of the principle of immediacy, the trial chamber has the primary responsibility to determine the reliability and credibility of the evidence received in the course of the trial and then comprehensively assess the weight of the evidence'. See also Dissenting Opinion of Judge Sergio Gerardo Ugalde Godínez, ICC-01/14-01/21-442-Anx1, para. 5: 'This principle presupposes that the presentation of the evidence must occur before the judge or tribunal responsible for issuing the judgment. Its purpose is to establish proximity between the judge or tribunal and the evidence, so that the adjudicator can form an opinion about the value and scope of the evidence that has been presented when determining the accused's responsibility beyond reasonable doubt.'

For the role of the principle of immediacy in the drafting history, see Preparatory Committee on the Establishment of an International Criminal Court, Rules of Procedure: Working Paper, submitted by Argentina, UN Doc. A/AC.249/L.6, 13 August 1996, rules 9 to 13, p. 4: 'Only a Judge who has been present without interruption throughout the trial is in a position to pass judgement in a case. Alternative measures, such as audio and video recordings, cannot substitute for the judge's direct sensory perception of what takes place in the courtroom, and therefore do not constitute justifiable exceptions to the principle in question.'

[27] ICC, Report of the judges of the Court on Managing Transitions in the Judiciary, 30 January 2020, para 15: 'The principal difficulty in effectively using alternate judges is that article 7420 requires that an alternate judge does not simply wait in reserve in case she or he is needed, at which point she or he becomes familiarised with the proceedings, but must be present at all stages of the proceedings. The *travaux préparatoires* reflects a belief that this requires a physical presence.' and fn 21 ('Argentina noting that '[a]lternative measures, such as audio and video recordings, cannot substitute for the judge's direct sensory perception of what takes place in the courtroom', A/AC.249/L.6, 13 August 1996, page 4. The drafting history of rule 39 tends to confirm this purpose, see Preparatory Commission for the International Criminal Court, Working Group on Rules of Procedure and Evidence, Proposal concerning Part 4, Section 2, of the Rules of Procedure and evidence: Inclusion of a new Rule 20 (F): Alternate and substitute Judges, submitted by Denmark, UN Doc. PCNICC/1999/WGRPE(4)/DP.3. 6 August 1999, Comments, para. 1').

Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to sentence'. Due to the correlation between these two articles, both the ICC Presidency and the ICC Chambers have consistently characterised the sentencing phase as comprising as part of the trial phase.

21. Significantly, in the specific context of the composition of Chambers for sentencing, various Judges and Chambers have found (i) that sentencing forms part of the trial phase, and (ii) that the Statute *requires* the Trial Chamber that issued the verdict to remain in the same composition for sentencing. In a memorandum to the Presidency, in his capacity as Presiding Judge for Trial Chamber II, Judge Cotte wrote that:[28]

> I do not wish to continue my service at the Court beyond the sentencing phase, which it is, naturally, incumbent upon the three judges who tried the case to bring it to completion en banc.
>
> […]
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> Likewise, continuation of a judge in his or her position beyond the end of his or her term, as provided for by article 36(10) of the Statute, would appear to apply only to the trial phase, which includes, of course, issuance of any sentence but not the, quite separate, victim reparations phase.

22. The Presidency, in turn, reasoned that:[29]

> Given the limited jurisprudence [on the reparation phase at the Court], the requests of the two Katanga judges, and the lack of express guidance in the Statute and Rules of Procedure and Evidence ('Rules') on the composition of the bench for reparations purposes, it is necessary to consider the governing texts and Court practice to (i) assess any restrictions on the composition of the bench, and (ii) clarify, as necessary, the meaning of the words 'trial' and 'Court' in the relevant provisions of the Statute, to determine whether a bench other than the one that issued the conviction may hear reparations proceedings. As the provisions in articles 74, 75 and 76 each relate to the concluding stages or phases of a case and cross-reference each other in relation to usage of the term 'trial', a brief discussion of the provisions is required before consideration of reparations. Finally, it is necessary to assess the ambit of article 36(10) pursuant to which a judge assigned to the Trial Chamber is to 'continue in office to complete any trial […] the hearing of which has already commenced in that Chamber'.
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> […]

[28] ICC-01/04-01/07-3468-AnxI, para. 1.
[29] ICC-01/04-01/07-3468-AnxI, paras. 5-6 (emphasis added).

> Upon consideration of the governing texts, Court practice, and the theory and conduct of criminal proceedings, the Presidency viewed *the sentencing phase* (article 76) *as part of the trial*.

23. Although the ICC Presidency has assigned new judges to the Trial Chamber for the purpose of assessing reparations, both the Presidency and the Appeals Chamber emphasised the distinct nature of reparations, as reflected by the fact that Article 76 refers to principles established by the 'Court', whereas Articles 74 and 75 reference decisions issued by 'the Trial Chamber'; as such, 'reparations do not need to be addressed by the Trial Chamber that issued the conviction and sentence'.[30]

24. Commentary on the Rome Statute also reflects the understanding that the same bench which issues the verdict will also participate in the sentencing process.[31]

25. In a recent decision on legal aid issued in this very case, the Single Judge referenced the 'sentencing stage, which forms part of the trial proceedings'.[32] This decision followed a train of case law from Trial Chambers, treating the sentencing phase as part of the trial process given its inclusion in Part VI of the Statute. [33] Deviation from this case law would undermine the principle of legal certainty.[34]

26. The close connection between verdict and sentence is also reflected in domestic practice and human rights law. In the United States and commonwealth countries, a judgment is not considered to be 'final' until penalties are decided and attached to the verdict.[35] French courts also

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[30] ICC-01/04-01/06-3129, para. 234;
[31] O. Triffterer, 'Article; 74', Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (Beck/Hart, 2008), p. 1393: 'But the decision and the sentencing process have to be concluded *secretly and in camera* only by those judges attending who are assigned to the case and should not be influenced in any way by consideration of *third* persons'.
[32] ICC-01/12-01/18-2585, para. 13.
[33] ICC-01/05-01/13-2063, para. 11: 'It also disregards the fact that, despite the delivery of the judgment pursuant to Article 74 of the Statute, litigation before the Trial Chamber is still ongoing. Article 76 of the Statute forms an integral part of Part 6 – which governs 'The Trial' - and requires the Chamber, in the event of conviction, to consider the appropriate sentence to be imposed'; para. 13: 'this interpretation does not reflect the fact that sentencing is an integral part of the trial, as evidenced by Part 6 of the Statute itself.' See also ICC-01/04-01/06-2800, paras 45, 47.
[34] ECtHR, *Coëme and Others v. Belgium*, App. nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgment, 18 October 2000, para. 102.
[35] Lloydell Richards v. The Queen Co (Jamaica) [1992] UKPC 28 (19 October 1992). See also Archbold: Criminal Pleading, Evidence and Practice 2003 (Sweet & Maxwell, London, 2003), p. 382, para. 4-141; In the United States, the Supreme Court confirmed that a plea of autrefois convict (that a defendant has been finally convicted for the same conduct in another case) cannot be entertained unless the defendant has been sentenced in that case. Roscoe, Cr. Evid. (8th ed.) 199, cited in Coleman v Tennessee 97 U.S. 509 (24 L.Ed. 1118).

refer to the principle of 'indivisibility' between the sentence and the verdict.[36] Based on an overview of civil law and common law countries and human rights case law, Clooney and Webb write that 'the trial will usually end when the judge or jury deliver their verdict and judgment and, in the case of a guilty verdict, when the defendant is sentenced', and further, that 'despite the fact that many human rights treaties grant rights to defendants that relate to the 'determination of the charges', the sentencing phase is often considered part of the trial by international human rights bodies and many fair trial rights extend to this phase.'[37] The ECtHR has also found that the word 'conviction' (as used in Article 5(1) of the Convention) refers not only to a finding of guilt concerning the offence, but also the imposition of a penalty or measure involving deprivation of liberty.[38]

27. Since Judge Mindua was neither disqualified nor withdrew at his own request, ICC judicial precedent and applicable sources of law suggest that his replacement was *ultra vires*, and contrary to the Rule 38(2) requirement that replacements 'shall take place in accordance with the **pre-established** procedure in the Statute, Rules and Regulations' (emphasis added).

3.1.3. The circumstances in which Judge Mindua was replaced raises objective concerns regarding judicial independence and the impartiality of the process

28. The decision on Judge Mindua's replacement was issued on the same day as was issued his written opinion acquitting Mr Al Hassan in full. Whereas Judge Akane initially requested to be withdrawn from this case, there is no indication that Judge Mindua had sought his own

[36] Cour de Cassation, criminelle, Chambre criminelle, 9 mars 2016, 15-83.927, Publié au bulletin; Cour de Cassation, Chambre criminelle, du 10 juillet 1996, 95-83.450, Publié au bulletin The Accused was found guilty of violences aggravées by the cour d'assises and sentenced to, inter alia, a term of imprisonment, partly suspended. There was an appeal against the lawfulness of the suspended sentence, which led the Cour de Cassation to find an error in the sentence. It held '[q]u'en raison de l'indivisibilité entre la déclaration de culpabilité et la décision sur la peine, la cassation doit être totale', and therefore annulled the whole judgment ('en toutes ses dispositions') and referred the case back to the cour d'assises, so that it may be tried again in accordance with the law. In the '[a]nalyse', it is repeated that '[e]n raison du principe de l'indivisibilité des décisions sur la culpabilité et sur la peine prononcées par la cour d'assises, la cassation est totale et doit être prononcée avec renvoi devant une autre cour d'assises'. See also Cour de Cassation, Chambre criminelle, du 4 mai 1979, 78-93.408.

[37] A Clooney, P Webb, The Right to a Fair Trial in International Law , (Oxford University Press, 2021) Introduction, Section 4.3. *See also* fn 223, citing: 'HRC, Rodríguez Orejuela v. Colombia (Comm. no. 848/1999), 23 July 2002, §7.3. See also HRC, Becerra Barney v. Colombia (Comm. no. 1298/2004) 11 July 2006, §7.2; ECtHR, Easterbrook v. United Kingdom (App no. 48015/99), 12 June 2003, §26; ECtHR, Eckle v. Germany (App. no. 8130/78), 15 July 1982, §77; IACtHR, Reverón Trujillo v. Venezuela (Series C, no. 197), 30 June 2009, §68; IACtHR, Constitutional Court v. Peru (Series C, no. 71), 31 January 2001, §71; CCJ, Nervais v. The Queen [2018] CCJ 19 (AJ), 27 June 2018, §49 (…)".

[38] ECtHR, *Van Droogenbroeck v. Belgium*, App. No. 7906/77, Judgment, 24 June 1982, para. 35.

withdrawal. His removal in the absence of a request or consent raises issues concerning judicial independence. As stated in a January 2020 report authored by the ICC judiciary,

> [n]oting the paramount importance of judicial independence, as protected by article 40(1) of the Rome Statute, the status of a judge should not ordinarily be changed within the duration of her or his judicial mandate without consent.[39]

29. Although Rule 140*ter* was adopted to enable trial proceedings to continue with an alternate judge should one of the judges be unable to continue,[40] the *ad hoc* Presidency did not invoke these provisions due to their finding that the sentencing phase is not part of the trial proceedings.[41]

30. Consequently, unless remedial steps are taken, Mr Al Hassan has been prejudiced through the *de facto* application of Rule 140 *ter*, without the procedural safeguards that attach, specifically:

i. Mr Al Hassan's consent as to the replacement of Judge Mindua has not been sought;

ii. There has been no judicial determination by Judge Prost and Judge Akane that it is in the interests of justice to continue the proceedings with a substitute judge, rather than Judge Mindua; and

iii. It is unclear whether Judge Paek has been requested to certify that he has familiarised himself with the case file, prior to joining the Chamber or issuing substantive decisions.

31. Even if the Chamber were to find that that the Presidency's determination concerning the lawfulness of Judge Mindua's replacement is either correct or shielded from review by the Trial Chamber, the Trial Chamber has a residual obligation under Articles 64(2) and 67(1) to consider the *effects* of this decision on the fairness and impartiality of the ongoing process.[42] This is consistent with ICTR appellate case law that the proper avenue for the defendant to be heard in

[39] ICC, 'Report of the judges of the Court on Managing Transitions in the Judiciary', 30 January 2020, fn. 6.
[40] ICC-ASP/22/Res.1, para. 2.
[41] ICC-01/12-01/18-2596, para. 6. In the event that the Presidency or Trial Chamber were to determine that Rule 140*ter* could be applicable, the Defence should be afforded a separate right to be heard as concerns whether this constitutes a retrospective application of a rule to an ongoing case and whether it is likely to cause detriment to the rights of Mr Al Hassan: ICC-01/09-01/11-2024 para. 2.
[42] *Ntaganda*, Appeals Judgment, ICC-01/04-02/06-2666-Red, 30 March 2021, para. 87.

relation to a change in judicial composition is before the Trial Chamber and not the Presidency.[43] The parties bear no burden of proving either fairness or unfairness in relation to the continuation of the proceedings with a new judge.[44]

32. The European Court of Human Rights (ECtHR) has affirmed in this regard that changes in judicial composition can violate the right to be tried before a fair, impartial, and independent tribunal of fact.[45] In *Moiseyev v. Russia*, the ECtHR considered a scenario where domestic authorities had changed the composition of the Trial Chamber, in violation of domestic provisions concerning the immutability of the court composition. In that case, the absence of any avenue for the impacted defendant to be heard or to obtain judicial review of the decisions on replacement, coupled with the lack of foreseeability as concerns the application of the law, gave rise to an objective appearance of arbitrariness, undermining the independent and impartiality of the Court.[46] Similarly, when considering the replacement of the domestic Presiding Judge in *Barberà, Messegué and Jabardo v. Spain*,[47] the ECtHR placed weight on the complexity of the evidential record inherited by the new judge, along with the fact that the defendant had not been afforded a prior opportunity to be heard.

33. Apart from issues stemming from the objective appearance of interference with judicial independence, the ECtHR has also referenced the impact of changes in judicial composition on the 'principle of immediacy'. The right is thus not confined to the trial judgment itself; it attaches to any first instance proceedings, which concern judicial determinations on the credibility or demeanor of witness testimony.[48] What matters is the substantive content of the phase and implications for the accused, and not the formal label.

34. In *Cerovšek and Božičnik v. Slovenia*, the ECtHR found that the right to a fair trial had

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[43] *Karemera et al.*, ICTR-98-44-ar15bis.3, Decision on Appeals Pursuant to Rule 15 bis., 20 April 2007, para. 33.
[44] See, by analogy, *Karemera et al.*, ICTR-98-44-ar15bis.2, Decision on Substitute Judge and New Material, 22 October 2004, para 52: 'The parties have a right to be heard before the decision is made,124 but they bear no burden of proving that continuing or not continuing the proceedings would better serve the interests of justice. Accordingly, it would constitute an error on the part of the remaining Judges to take into account that Defence submissions have not demonstrated that re-starting the trial would serve the interests of justice'.
[45] ECtHR, *Biagioli v. San Marino*, App. No. 8162/13, Decision, 8 July 2014, paras 71-75.
[46] ECtHR, *Moiseyev v. Russia*, App. No. 62936/00, Judgment, 9 October 2008, paras 175-184.
[47] ECtHR, *Barberà, Messegué and Jabardo v. Spain*, App no. 10590/83, Judgment, 6 December 1988, paras 71-72.
[48] ECtHR, *Orhan Şahin v. Türkiye*, App. No. 48309/17, Judgment, 12 March 2024, para. 48: 'The principle of immediacy is an important guarantee in *criminal proceedings* in which the observations made by the court about the demeanour and credibility of a witness may have important consequences for the accused' (emphasis added).

been violated where the reasons for the verdict and sentence were provided by a different judge than that who had heard the evidence at trial. The replacement judge's reliance on a written record did *not* adequately protect the applicant's fair trial rights, because the initial verdict[49]

> was not based on documents only. In particular, Judge A.K. heard the applicants during the trial, examined a number of witnesses and must have formed an opinion as to their credibility. She must also have made an assessment of the elements of the alleged offences, including the subjective element, namely the applicants' intention to commit them, for which the direct hearing of the applicants was particularly relevant (…).

35. The Court also found that the retirement of the initial judge did not justify a replacement at this stage:

> The date of her retirement must have been known to Judge A.K. in advance. It should therefore in principle have been possible to take measures either for her to finish the applicants' cases alone or to involve another judge at an early stage in the proceeding.[50]

36. In the context of transmitting a verdict back to the Trial Chamber to issue a new sentence, both the ICTY and ICC Appeals Chambers have recognised that practical reasons attached to the assessment of evidence militate in favour of referring the case back to the original Chamber, particularly when requested to do so by the impacted defendant. Thus, in *Bemba et al*, the Appeals Chamber remanded the case back to the *same Chamber* to issue a new sentence, taking into account the express request from two defendants to be heard by the same bench.[51] These proposals were in turn motivated by the original Chamber's 'intimate knowledge of the facts'.[52] Similarly in *Tadic*, following the Appeals Chamber's decision to remit the issue of sentence back to the Trial Chamber, both parties agreed that the case should be remitted to the same Chamber (barring the fact that one judge had already departed from the ICTY).[53] The ECtHR has also recognised that the principle

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[49] 68939/12 68949/12, para. 42. See also ECtHR, *Svanidze v. Georgia*, App. No. 37809/08, Judgment, 25 July 2019, paras 34-38.
[50] 68939/12 68949/12, para. 44.
[51] ICC-01/05-01/13-2276-Red, paras 361-362.
[52] ICC-01/05-01/13-2201-Red, para. 131.
[53] *Tadic*, Transcript 30 August 1999, pp. 672 line 20-673 line 8 (OTP submissions): 'To undertake the determination of an appropriate sentence in the present case, the sentencing authority must consider all the relevant evidence and determine what aggravating and mitigating factors are present. That fact raises the issue of whether the interests of justice and the rights of the convicted person are not better served by having the trier of fact determine the appropriate sentence. The Trial Chamber was the trier of fact, with direct knowledge of the evidence in the case and direct observation of the witnesses and victims. Members of the Trial Chamber also have the benefit of their full reasoning and determination with respect to the case and the original sentence imposed.'

of immediacy extends beyond the issue of replacement of judges in one specific phase: the Court has applied it, for example, in relation to 'a change in the composition of the trial court as part of the ordinary appeal and remittal process'.[54]

37. Domestic precedent also supports maintaining continuity of judicial composition for the sentencing phase to avoid an appearance of judicial interference. As explained by the Canadian Supreme Court in *R v MacDougall:*[55]

> This means that the task of deciding all the issues on the case, including sentencing, falls to that judge and no other. The removal of a judge from an unconcluded case has the potential to interfere with the independence of the judiciary and the right of an accused to a fair trial. Absent compelling reasons, it would be improper for Crown counsel to apply to remove a judge seized of the case. To do so might create a perception that the Crown was interfering with the right of the judge to independently judge all the issues in the case. It might also create a perception of unfairness to the accused. For example, a trial judge may make comments in the course of a trial that lead the Crown to speculate that he or she is sympathetic to the accused. If the Crown were to apply to have the judge removed prior to sentence absent a compelling reason, the perception might be that the Crown did so to obtain a judge less sympathetic to the accused.

38. In terms of the application of the above principles to the current case, the sentencing phase is not a discrete or isolated evidential process, which can be separated from the trial proceedings. Article 76(1) of the Statute *requires* the Trial Chamber to 'take into account the evidence presented and submissions made during the trial that are relevant to the sentence'. Trial Chamber X recognised this close connection to the trial record and related deliberations in its decision concerning the sentencing process.[56]

39. There are also legal and evidential considerations for applying the principle of immediacy to the present sentencing phase. Although the Trial Judgment sets out detailed findings concerning the Chamber's evaluation of evidence and findings of fact, any further findings on aggravating or mitigating factors may depend on an appreciation of evidence or matters, which are *not* canvassed by the Judgment itself. Specifically, in line with the submission system of evidence, the Chamber did not issue reasons concerning the admission of individual items of evidence submitted from the

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[54] ECtHR, *Famulyuk v Ukraine*, App. No. 30180/11, Decision, 26 March 2019, para. 36.
[55] *R v MacDougall*, [1998] 3 SCR 45, para. 51.
[56] ICC-01/12-01/18-2595 para. 2. See also para. 4: 'Given the abundance of evidence of potential relevance to the sentence already on the record, as well as the Chamber's relevant findings in its judgment under Article 74 of the Statute, the Chamber expects that any additional evidence, especially viva voce witnesses, will be very limited.'

bar table. In practice, this means that the newly appointed Judge does not have a clear record of the Majority's position on weight or probative value of a wide swathe of evidential items that were found to be relevant to the issues under consideration by the Trial Chamber. The Trial Chamber's judgment, whether majority or minority, also relies heavily on its holistic assessment of evidence submitted into the case file, a formula which leaves both the parties and the newly appointed Judge in the dark as concerns the specific evidential items or testimony that were considered in reaching such determinations.

40. Reliance on the findings in the judgment is also not necessarily an adequate safeguard. Only findings that are indispensable to a conviction must satisfy the threshold of beyond reasonable doubt.[57] It is therefore possible that there is an array of factual findings in the judgment, which fall beneath this threshold, and which cannot, therefore, be safely relied upon as aggravating factors.[58] If the current Chamber were to rely on facts that were not essential to establish the elements of the offences or mode of liability, the Chamber would need to make its own assessment as to whether the evidential foundation set out in the judgment meets the threshold of beyond reasonable doubt. In practice, this means that unless Judge Paek watches every single video of trial testimony, only two Judges will be positioned to make such determinations on the basis of what they saw and heard at trial.

3.1.4. The ad hoc *procedure applied to the current case fails to adequately safeguard Mr Al Hassan's right to a fair and speedy decision on sentence*

41. The current observations do not fully satisfy Mr Al Hassan's right to be heard in relation to the threshold question, which is whether is in the interests of justice to continue with a replacement judge rather than Judge Mindua.

42. *First*, this Chamber does not have the power to reverse the *ad hoc* Presidency's determination concerning the replacement of Judge Mindua and the termination of his appointment. The right to be heard is rendered illusory if the Defence arguments have no capacity to impact the *status quo.*

[57] ICC-01/05-01/13-2275-Red, para. 96: 'In this regard, it must be borne in mind that the Trial Chamber is required to make findings of fact to the standard of proof of "beyond reasonable doubt" only in relation to those facts that correspond to "the elements of the crime and mode of liability of the accused as charged"'.
[58] ICC-01/04-01/06-3122, paras 17 and 93.

43. *Second*, the Defence does not appear to be privy to the full array of considerations underpinning the replacement decision. The *ad hoc* Presidency references administrative considerations regarding the efficiency of retaining a Judge past the expiration of their mandate. It is, however, difficult to reconcile the weight placed on such a consideration with the wealth of precedent in which the appointment of Trial Judges was extended many months, if not years, beyond the initial date of expiration.[59] The adoption of exceptions for some cases and not others can give rise to an appearance that there has been an arbitrary application of the law.

44. Financial costs also do not satisfy the threshold for taking the significant step of replacing a Presiding Judge,[60] particularly as it is more economically efficient to utilise Judges with existing familiarity with the case file.[61] Other steps can also be taken to mitigate costs associated with the prolongation of Judge Mindua's appointment (e.g. the deferred commencement or part-time appointment of other Judges). Conversely, if Judge Mindua's replacement was motivated by or attributable to ill-health, then the existence of such reasons should be disclosed in a transparent manner to the parties, due to the potential bearing on the right to be tried by a competent Chamber.[62] Such reasons are also germane to Mr Al Hassan's ability to formulate an informed position as concerns the fair trial implications of replacing Judge Mindua with another Judge at this point of the proceedings, for example, by reference to the potential delays occasioned by health issues as compared the time required for a new judge to meaningfully acquaint themselves with

[59] *See* 'Report of the judges of the Court on Managing Transitions in the Judiciary', 30 January 2020, fn 3: 'Judge Blattmann in Lubanga continued in office for almost 3.5 years, Judges Diarra and Cotte in Katanga continued in office for just over 2 years and Judge Steiner in Bemba continued in office for just over 4 years. Most recently, the extension of mandate of Judge Tarfusser lasted almost 17 months and Judge Ozaki's extension in Ntaganda was 20 months (albeit on a non-full-time basis for some of this period'.

[60] Report of the judges of the Court on Managing Transitions in the Judiciary', 30 January 2020, para 12: 'The Presidency may only change the composition of a chamber in limited cases,18 which do not extend to replacing a judge due to a budgetary preference for an alternative composition. Nor is it clear that the Presidency has the power to remove or replace a judge who does not seek to be excused, with interference with a Chamber on a non-consensual basis being inconsistent with judicial independence. Moreover, since article 36(10) makes an extension of mandate both mandatory and entirely ordinary, the need to avoid a continuation in office under article 36(10) would not appear an objective reason to justify the exercise of the replacement power in rule 38 of the Rules of Procedure and Evidence ('Rules').'

[61] Report of the judges of the Court on Managing Transitions in the Judiciary', 30 January 2020, fn 10: 'article 36(10)'s existence is also likely grounded in efficiency. Where a trial or appeal is at an advanced stage, it is more efficient and resource-effective for it to be completed by the judges who have been working on the case, even at additional cost to the Court, rather than be recommenced.'

[62] *See* ICC-01/12-01/18-2590, paras 13-15 (re right to be informed of health issues impacting the proceedings); 19-21 (concerning the right to be tried by a competent Chamber, which encompasses health issues impacting the ability of a Judge to issue a reasoned opinion).

the case file.

45. *Third*, since the current replacement occurred outside the ambit of specific article or rule, there is a lack of clarity as concerning whether any, and if so, which procedural safeguards apply to the current situation. The absence of procedural certainty means that Mr Al Hassan has been required to formulate an opinion as concerns the impact of Judge Mindua's replacement on his rights, in a vacuum.

3.2 The principle of legal certainty and Mr Al Hassan's right not to be subjected to legal jeopardy twice for the same conduct

46. The Article 74 judgment is a complex mosaic of interlinked findings, derived from the specific positions taken by each individual Judge. The 'Majority' opinion is partly composed of joint findings of Judge Akane and Judge Prost concerning Mr Al Hassan's individual responsibility – resulting in convictions – and Judge Akane's dissenting opinion combined with Judge Mindua's full acquittal, resulting in acquittals. The replacement of Judge Mindua with a new Judge has the potential to change the factual matrix underpinning any future sentencing judgment.

47. In his Separate Opinion, Judge Mindua found that Mr Al Hassan had a complete defence to the charged allegations vis-à-vis duress and mistake of law. The fact that Judge Mindua's opinion constituted a dissent in relation to the convictions does not minimise the relevance or importance of his findings.[63] Further to Rule 142(2)(a) of the Rules of Procedure and Evidence, Judge Mindua's findings are directly relevant to the Chamber's consideration of mitigating circumstances, falling short of the threshold for exclusion of criminal responsibility. The existence of a dissent also promotes 'judicial dialogue' among the Chamber in relation to the issues discussed therein and can assist in appellate proceedings.[64]

48. Judge Mindua's absence from the sentencing process raising fundamental questions as concerns the status of his findings for sentencing. In *Seselj*, which involved the replacement of a judge during the deliberations phase, the Appeal Chamber placed weight on the avowal by the

[63] MICT, *Ngirabatware*, MICT-12-29-R, Order to the Government of Tile Republic of Turkey for Tile Release of Judge Aydin Sefa Akay, 31 January 2017, para. 13: 'Judge Akay's views on this case matter to our solemn deliberations, and, in the present circumstances, decisions on the merits of this case cannot be taken even should they hold the support of a majority of the remaining judges.'
[64] Third Judicial Seminar on the International Criminal Court, pp. 7-8.

substitute Judge (Judge Niang) that he would review all prior decisions concerning the admission of evidence and state expressly whether such decisions aligned with his own position or not.[65] If, in the present case, Judge Paek's opinion were to align with either Judge Prost or Judge Akane or to otherwise differ from the existing judicial positions on any facts that relate to the charges, Mr Al Hassan will effectively receive a 'new' verdict on such facts, which, in practical effect, erases and replaces the findings of Judge Mindua. Some degree of judicial deviation is also inevitable. As set out above, notwithstanding the length of the judgment, certain findings can be interpreted in different ways, or given more or less weight depending on the Judges' perspectives concerning the weight and reliability of the evidence underpinning such findings.

49. As set out in section 3.1, the risk of 'double jeopardy' is avoided at the domestic level by treating the sentencing phase as part of the trial. This has also been the case in past ICC cases, where sentencing has been considered part of the 'trial' and heard by the same judicial panel. In the present case, the creation of a separate first instance fact-finding phase with a new judge gives rise to the very real risk that Mr Al Hassan will be judged twice (first by Judge Mindua, and then by Judge Paek) for the same conduct. The prejudice would be particularly aggravated if Judge Paek were to rely as aggravation on any of the factual circumstances concerning the treatment of women in Timbuktu or actions of *Hesbah*, which fall within the scope of the acquittals decided jointly by Judge Mindua and Judge Akane.

3.3 Mr Al Hassan's right to be tried expeditiously

50. Mr Al Hassan's right to protection against undue delay applies in full force to the sentencing phase and furthermore, must be interpreted and applied in a manner which is consistent with internationally recognised human rights law. Delays occasioned by financial considerations are 'undue' and, when unmitigated, must be addressed through an appropriate remedy at the sentencing phase.

51. In the Defence's Urgent Request for Further Information Concerning the Delayed Judgment, the right to a speedy sentencing process is underscored as part of the overarching right

[65] ICTY, *Šešelj*, IT-03-67-AR15bis, Decision on Appeals against Decision on Continuation of Proceedings, 6 June 2014, para 58. See also para. 57, relying on the continuing Judges' promise to restart deliberations (disregarding any deliberations based on consultations with Judge Harhoff).

to expeditious proceedings,[66] noting that:

> The fact of conviction inevitably carries with it stress, stigma and opprobrium that render the convicted person's life more anxious and less secure. For this the law offers no recourse. But undue delay in getting on with sentencing may exacerbate these sequelae. Anxiety about the eventual punishment pending sentencing is normal and unavoidable. But when sentencing is unduly delayed, this anxiety may be suffered for a longer period of time than justified. Equally seriously, the delay may prevent the convicted person from beginning the process of rebuilding his or her life, whether in a prison or in the community. Not only is the person's present liberty curtailed; but he or she lives with the knowledge that it may further be curtailed and in a more permanent way upon sentencing. The person lives in suspense, uncertain of his or her fate, unable to get on with his or her life, and faced with all of the stress and anxiety that this entails. [67]

52. While it is not possible to predict the extent of likely delay occasioned by the replacement of Judge Mindua, this development already led to a situation where, 'as a result of the re-composition decided by the Presidency, the Chamber [was] forced to reconsider and amend the calendar set in the First decision on the sentencing procedure'.[68] The original date of 28 August 2024 for issuing the sentencing decision has now been vacated, even though this date was selected after 'bearing in mind the delays in the delivery of the trial judgment'.[69]

53. Apart from the need to review new sentencing evidence, considering the Trial Judgment's heavy reliance on the testimony of P-0150, P-0065, and Mr Al Hassan's statements, it is likely that Judge Paek would need to closely study this evidence, to familiarise himself with the underlying foundation of the Trial Chamber's findings. P-0150's testimony runs to 2460 pages and 33 days of testimony, entailing approximately 145 hours of video recordings. Since the Trial Chamber found P-0150 to be credible on some issues and less so on others,[70] his demeanour while providing responses is critical to a proper appreciation as concerns the credibility and weight to be afforded

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[66] ICC-01/12-01/18-2590 para 23.
[67] R. v. MacDougall, [1998] Supreme Court of Canada l; [1998] 3 SCR 45; [1998] 56 CRR (2d) 189, para. 34. See also S v Jacobs, S v Swart, S v Damon, S v Jas, S v Klaasen, S v Swanepoel, S v Xhantibe (C1191-13; B927-14; 526-14; 14-17; 682-16; 1907-16; 310-17) [2017] ZAWCHC 82; 2017 (2) SACR 546 (WCC), 16 August 2017, para. 21.
[68] ICC-01/12-01/18-2600, para. 8.
[69] ICC-01/12-01/18-2600, para. 8.
[70] Trial Judgment, ICC-01/12-01/18-2594-Red, paras 77 (noting the need for caution); 205, In terms of divergent approaches in the bench, whereas Judge Akane relied on P-0150's evidence to support the finding that acts of rape were not pat of the common purpose, Judges Prost and Mindua did not. See also Trial Judgment, footnote 1358.

to specific responses.[71] Judge Paek would therefore need to watch the videos of his evidence, in their entirety. P-0065's testimony is 954 pages, amounting to 14 days of testimony and approximately 60 hours of recordings. The statements of Mr Al Hassan, in French and Arabic, are over 1700 pages. In addition, Judge Paek would need to review the Trial Judgment and separate opinions (942 pages). Even a *de minimis* review of the case file would thus entail several weeks if not months of preliminary preparation.[72] Mr Al Hassan also should not be placed in the inimical position of choosing between being sentenced by a Chamber, which is fully apprised of the evidential record, and his right to receive a speedy decision as concerns the penalty, which will determine his future and that of his family. A fair trial requires the Chamber either to find a way to satisfy both rights or, provide an effective remedy for any delays required to satisfy the overarching right to a fair hearing.[73]

54. Through the application of internationally recognised human rights law,[74] the defendant's protection against unreasonable delay is not confined to delays occasioned by the actions of the Prosecution.[75] Logistics and financial considerations also should not prevail over fundamental fair trial considerations, and '[i]n the same vein, […] organisational hurdles and lack of resources cannot reasonably justify the prolongation of proceedings that had already been significantly

[71] ICTR, *Nyiramasuhuko et al.*, ICTR-98-42-A15bis, Decision in the Matter of Proceedings Under Rule 15bis (D), 24 September 2003, para. 30. *See also* Dissenting Opinion of Judge Hunt, paras 25-26; ICTR *Karemera et al.*, ICTR-98-44-AR15bis, Decision on Substitute Judge and New Material, 22 October 2004, para. 60: "The Tribunal has repeatedly emphasized the importance of observing the demeanour of witnesses and, indeed, it is this first-hand observation which is the basis for the Appeals Chamber's deference to the factual findings of Trial Chamber". *See also* ECtHR, *Cutean v. Romania*, App. No. 53150/12, Judgment, 2 December 2014, para 61: where the Court found that a review based on transcripts may suffice "where the credibility of the witness concerned is not in issue".

[72] The Defence is listing these evidential items for illustrative purposes: it does not accept that a review of this sample would satisfy Mr Al Hassan's right to be sentenced by a competent Chamber.

[73] *Nyiramasuhuko et al.*, ICTR Appeals Chamber Decision in the Matter of Proceedings Under Rule 15bis (D), para. 24: 'The Appeals Chamber accepts that as between a speedy trial and an equitable trial preference should be given to the latter'. See also dissenting Opinion of Judge Hunt, para 16: 'The interests of justice cannot be served when the accused is denied a fair trial'.

[74] Article 21(3) of the Statute.

[75] *Bemba et al.*, Judgment on the appeals against Pre Trial Chamber II's decisions regarding interim release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, ICC-01/05-01/13-969, 29 May 2015, para. 43; *Bemba et al.* Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled 'Decision on 'Mr Bemba's Request for provisional release', ICC-01/05-01/13-970, 29 May 2015, para. 23; *Bemba et al.*, Decision on Mr Bemba's Application for Release, ICC-01/05-01/13-2291, 12 June 2018, para. 16.

delayed'.[76]

55. The ECtHR has further found that the fact that delays are attributable to changes in judicial composition and the related need for the new judge to acquaint themselves with the case 'cannot exonerate the State, which is responsible for ensuring that the administration of justice is properly organised'.[77] It is, moreover, significant that the stated reasons for Judge Mindua's replacement do not fall within the accepted categories set out in Rule 38 RPE, as reflected by the opinion – voiced by ICC judges in January 2020 – that the expiration of a judge's mandate would not fall within the category of cases justifying replacement given that the judge is theoretically available upon extension.[78] The consequent delays in the current case cannot be characterised as reasonable in circumstances where a cogent justification has not been disclosed to the parties.

56. Irrespective of the outcome of the sentence, the previous and current delays have prejudiced Mr Al Hassan's rights. Twice, critical dates for the trial judgment and then decision on sentence were set and then suspended *sine die*. Mr Al Hassan and his family have experienced considerable stress and anxiety due to these developments and the related uncertainty concerning the trial judgment date and now the schedule for the sentencing verdict. Mr Al Hassan has already been detained at the ICC for 6 years and 4 months, following 11 months detention in Mali. From a practical perspective, he cannot enjoy the benefit of any sentence lower than this time-period, even if one were to be formally issued. This *fait accompli* risks predetermining the length of the sentence.[79]

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[76] *Nyiramasuhuko et al.* Appeals Judgment, 14 December 2015, para 376. *See also* HRC, *Lubuto v. Zambia* (Communication No. 373/89, Views of 31 October 1995), para. 7.3 concerning the fact that financial considerations cannot justify undue delays in criminal proceedings.
[77] ECtHR, *Lechner & Hess v Austria*, App. No. 9316/81 , Judgment, 23 April 1987, para 58.
[78] Report of the judges of the Court on Managing Transitions in the Judiciary', 30 January 2020, fn. 24, "Rule 38, which addresses the replacement of judges for 'objective and justified reasons' could potentially be used by analogy to replace a judge whose mandate has expired by an available alternate judge, however, it could equally be argued that such replacement would be contrary to the presumption of continuity contained in article 36(10), as well as it being plausible that replacement in circumstances where the original judge remains technically available is fundamentally different in nature from the examples of 'objective and justified reasons' for replacement set out in rule 38(1) and may be an infringement of judicial independence (see also discussion at paragraph 12 above)."
[79] Lengthy pre-trial detention undermines the presumption of innocence because it creates a perception of guilt that anticipates and influences the actual sentence: IACtHR, *Acosta-Calderón v. Ecuador*, Judgment 24 June 2005, para. 111; *Letellier v France* (ECHR) Application no.12369/86, para. 51. As observed by Judge Morrison and Van den Wyngaert, excessive detention creates a "perverse incentive for the Trial Chamber to arrive at a conviction in order to 'justify' the extended detention" [Separate Opinion, Bemba Main Case Appeals Judgment, para. 73.] The same logic applies to sentencing determinations.

3.4 Mr Al Hassan has the Right to an Effective Remedy

57. The current case must be distinguished from circumstances in which an alternate judge, who has followed the process in its entirety, places a judge who has been withdrawn for good cause. Here, the Presiding Judge has been replaced, just shy of the end of the trial process, for logistical reasons with a new Judge who has no prior knowledge of the case. Without Judge Mindua, it is impossible to reconstitute this Chamber in a holistic manner for the purpose of issuing a sentencing verdict that follows seamlessly from the Trial Judgment itself. There has been a rupture to the trial process and to Mr Al Hassan's fundamental fair trial rights. Whether the threshold for an abuse of process or mistrial has been met will depend on the extent to which the current Trial Chamber has the competence to reverse the *status quo*.[80] Without prejudice to its right to further develop such arguments in the context of sentencing submissions, the continuation of the proceedings with a substitute Judge at the very least warrant sentencing credit/mitigation.[81]

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Lead Counsel for Mr Al Hassan

Respectfully submitted this 15th day of July, 2024
At The Hague, The Netherlands

[80] *See* **USA**, McAllen v Souza (1937) 24 CA2d 247, 250, where the death of a judge before final verdict resulted in a mistrial; *State v. Boykin*, 255 N.C. 432 (1961) (mistrial based on illness of judge) ("[i]t goes without saying that a superior court trial cannot go on without a presiding judge"); *State v. Humbles*, 241 N.C. 47, 84 S.E.2d 264 (1954) ("[w]e conclude that the trial judge in cases less than capital may, in the exercise of sound discretion, order a mistrial before verdict, without the consent of defendant, for physical necessity such as the incapacitating illness of judge, juror or material witness, and for 'necessity of doing justice'"); *State v. Battle*, 267 N.C. 513 (1966) (mistrial ordered on illness of defense attorney); North Carolina Penal Code, G.S. 15A-1224, a mistrial may be declared based on the absence, illness, disability, or death of the presiding trial judge. In exceptional circumstances, a mistrial may be declared in a judge-alone trial as late as the post-conviction, pre-sentence stage, even if an appeal has been commenced. *See* **Canada**, R v Mack, 2002 BCCA 278 at para 37; R v MacDonald, 1991 CanLII 2424 (NS CA), [1991] CarswellNS 265, 107 NSR (2d) 374; R v Drysdale, 2011 ONSC 5451 at paras 12-15.

[81] ICC-01/04-01/06-2901 para 91 (co-operation in the face of delays); ICTY, *Šešelj*, IT-03-67-T, Decision on Continuation of Proceedings, Concurring Opinion of Judge Antonetti, 13 December 2013, pgs 37-38; R v Mills (Kenneth Anthony) v HM Advocate (No 2) [2002] UKPC D2 (22 July 2002).