

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original:

No: *ICC-01/14-01/18*

Date: 24 July 2024

TRIAL CHAMBER V

Before:

Judge Bertram Schmitt, Presiding Judge

Judge Péter Kovács

Judge Chang-ho Chung

Judge Beti Hohler, Alternate Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAÏSSONA*

PUBLIC

Urgent

Defence request for leave to appeal the “Decision on the Sentencing and Amended Directions on the Conduct of the Proceedings”, ICC-01/14-01/18-2600

Source: Defence of Patrice-Edouard Ngaïssona

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

The Office of the Prosecutor
Mr Karim A. A. Khan KC
Mr Mame Mandiaye Niang
Mr Kweku Vanderpuye

Counsel for the Defence of Mr Ngaïssona
Mr Geert-Jan Alexander Knoops
Ms Marie-Hélène Proulx
Ms Lauriane Vandeler
Ms Antonina Dyk

Counsel for the Defence of Mr Yekatom
Ms Mylène Dimitri
Mr Thomas Hannis
Ms Anta Guissé
Ms Sarah Bafadhel

Legal Representatives of the Victims
Mr Dmytro Suprun
Mr Abdou Dangabo Moussa
Ms Elisabeth Rabesandratana
Mr Yaré Fall
Ms Marie-Edith Douzima-Lawson
Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants
(Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Other
Section

I. INTRODUCTION

1. On 18 July 2024, Trial Chamber V ('Chamber') issued the "Decision on the Sentencing Procedure and Amended Directions on the Conduct of the Proceedings" ('Decision').¹ The Decision marks the first time in the International Criminal Court's ('Court') history that a Trial Chamber has decided to render any potential decision on sentencing under Article 76 of the Rome Statute ('Statute') simultaneously with its judgment under Article 74 of the Statute. The Chamber did so without giving any prior notice to the parties or participants through requesting their views on the matter.
2. The Decision, which drastically departed from well settled jurisprudence regarding the timing of sentencing proceedings, established several deadlines related to such proceedings. This completely unexpected procedural calendar came on the eve of the Defence closing its case, just as it was directing the majority of its resources to drafting the Final Trial Brief, which is, without a doubt, the most significant submission the Defence will render in the course of this three- and half-year trial. Now, the Defence finds itself scrambling to prepare for sentencing proceedings, which just one week ago, it could not have reasonably anticipated would occur, if it all, until at least one year from the date of the Decision.²
3. The impact of the Decision cannot be overstated. The Decision has completely thrown the Defence's resources in disarray. At this advanced stage of the case, the Defence cannot reasonably be expected to manage the preparation for completely unexpected sentencing proceedings while it prepares to conclude Mr Ngaïssona's

¹ ICC-01/14-01/18-2600.

² Given the consistent and longstanding jurisprudence at the Court, the Defence assumed that sentencing proceedings, if any, would be conducted after the Article 74 judgment. Under the current schedule, if all decisions on the Defence's bar tables motions are rendered by the end of August, the Defence was expecting to present closing statements in November 2024 and for an Article 74 Decision to be rendered approximately around September 2025. This prediction is founded on the Chamber Practice Manual providing for Article 74 judgment to be rendered within 10 months after the closing statements. Chamber Practice Manual, para. 88.

case, draft its Final Trial Brief and make closing statements. The lack of adequate time and facilities to prepare for such a significant shift in the Chamber's conduct of proceedings irreparably prejudices Mr Ngaïssona's ability to present evidence and make submissions on sentencing. This has an impact both on the fair and expeditious conduct of the proceedings and ultimately the outcome of the trial.

4. The Defence hereby requests leave to appeal the Decision on two issues, which arise from the Decision, and meet the cumulative criteria specified in Article 82(1)(d) of the Statute. The Defence does so urgently because of the impending judicial recess that is set to begin in two days. If the Chamber renders a decision on the present leave to appeal after the judicial recess, the Defence may be irreparably prejudiced in its ability to prepare Mr Ngaïssona's sentencing proceedings and closing submissions.

II. APPLICABLE LAW

5. Under Article 82(1)(d), a successful request for leave to appeal a decision must satisfy the following cumulative criteria:
 - i. Whether the matter is an 'appealable issue'
 - ii. Whether the issue at hand would significantly affect:
 - a) The fair and expeditious conduct of the proceedings or;
6. The outcome of the trial; and
 - i. Whether in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.³

III. SUBMISSIONS

³ ICC-01/14-01/18-525-Conf, para. 19.

7. The Defence requests leave to appeal the Decision on two issues. It submits that: (1) they both affect the fair and expeditious conduct of the proceedings and the outcome of the trial; and (2) to materially advance the proceedings, an immediate resolution by the Appeals Chamber of the two issues is warranted.

A. The Two Issues

8. The Defence respectfully requests the Chamber to grant the Defence's request for leave to appeal on two issues, namely:

First Issue: Whether the Chamber abused its discretion under Article 76 of the Statute, when it decided, without any prior notice to the parties and participants, to render any potential decision on sentencing pursuant to Article 76 of the Statute simultaneously with its judgment under Article 74 of the Statute, and included within the decision a procedural calendar that is untenable considering the Defence's current workload;

Second Issue: Whether the Chamber abused its discretion by imposing a premature and excessive remedy in creating a scheduling order that simultaneously orders the parties to close their cases and prepare sentencing submissions based solely on the potential risk that the judges of the Chamber could be replaced after the delivery of the Article 74 decision.

a. The first issue constitutes an appealable issue pursuant to Article 82(1)(d)

9. For a request for leave to appeal to succeed, each issue must arise from the impugned decision. Additionally, the issues should not be a question over which there is a mere disagreement or conflicting opinion with the Chamber. Rather each issue must be "constituted by a subject the resolution of which is essential for the

determinations of matters arising in the judicial cause under examination”.⁴ As set out below, the first issue meets these requirements.

10. The First Issue arises from the Chamber’s application of Article 76(2) of the Statute, which states in relevant part: “before the completion of the trial, the Trial Chamber may on its own motion and shall at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.” In paragraph 2 of the Decision, the Chamber decided, pursuant to Article 76(2), to render any decision on sentencing simultaneously with its Article 74 decision. The Defence respectfully submits that the Chamber abused its discretion when it decided to render both decisions simultaneously, and when it set a procedural calendar that no diligent defence team representing Mr Ngaïssona could meet. While the Chamber mentioned the requirement to give Mr Ngaïssona notice of this unprecedented change to the sentencing procedure at the Court in paragraph 3, it failed to give due consideration to this requirement. This resulted in the Chamber improperly balancing the interests of justice and interests of expeditiousness of retaining the same composition of the Trial Chamber in the event of a conviction against Mr Ngaïssona’s right to a fair trial.
11. Article 64, which the Decision cites as one of the provisions the Chamber considered in rendering the Decision, states that the Trial Chamber “shall ensure that a trial is fair and expeditious and is conducted *with full respect for the rights of the accused...*” (*emphasis added*). Therefore, while the Chamber has the power to regulate its own proceedings, its discretion is not unfettered. Until 18 July 2024, Mr Ngaïssona had no reason to believe that the Chamber would break with well-established precedent and decide to render a potential sentencing decision

⁴ Ibid., citing DRC Appeals Judgment, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, para. 9.

simultaneously with its Article 74 judgment.⁵ The procedural calendar which flowed from that decision effectively has Mr Ngaïssona prepare both the closing of his case with sentencing proceedings, a scenario that was impossible for the Defence to foresee.

12. Indeed, the Chamber has issued several decisions regarding the conduct of the proceedings, especially in the past several months in order to give the parties proper notice of important procedural milestones such that they have adequate time and facilities to plan accordingly.⁶ The most notable decision with respect to the issue at hand is the “Further Directions on the Conduct of the Proceedings (End of Defence Presentation of Evidence and Closure of Evidence).”⁷ In February 2024, the Chamber decided to set important time limits with respect to the timing of submission of bar table motions, the unsworn statement, as well as the filing of closing briefs and the presentation of closing statements.⁸ The Chamber specifically noted that the moment was appropriate to issue such directions in order to provide the parties and participants with as much time as possible to organize and plan their workload. Nowhere in these directions did the Chamber mention the possibility that the Defence’s preparations of these key milestones could be impacted by the parties’ preparation of sentencing proceedings. Given the Chamber’s silence on the matter, the Defence assumed that the procedural

⁵ ICC-01/04-01/06-2901, paras 1, 11; ICC-01/04-01/07-3484-tENG, paras 1, 23 ; ICC-01/05-01/08-3399, paras 1-2, 7 ; ICC-01/05-01/13-2123-Corr, paras 1, 13; ICC-01/04-02/06-2360, paras 1, 3; ICC-02/04-01/15-1763, paras 1-3; ICC-01/12-01/18-2595, paras 1-2, 8.

⁶ ICC-01/14-01/18-1897 (informing the Defence four months before the closure of the Prosecution’s case of certain time limits that would apply to the Defence’s presentation of evidence, notably the filing of the Defence list of evidence and witnesses, in addition to the date on which the first Defence witness would begin testifying); ICC-01/14-01/18-2342 (informing the parties two months into the start of the Defence case of the time limits to be imposed on the submission of bar table motions and the filing of closing briefs and the presentation of closing statements); ICC-01/14-01/18-2571 (providing for two alternative schedules regarding hearing the testimony of the last two Defence witnesses and the hearing of Mr Ngaïssona’s statement so as to ensure the expeditiousness of the proceedings).

⁷ ICC-01/14-01/18-2342.

⁸ Ibid.

milestones enumerated within the decision were the only ones it had to prepare as it closed its case.

13. Therefore, the entirety of the Defence's planning and organization of its workload since February 2024 have been premised on this decision. Its internal deadlines regarding Mr Ngaïssona's statement, preparing its bar table motions, and the closing brief have been determined with the time limits the Chamber set in February 2024. The Defence could not have reasonably anticipated that its planning and organization of its current workload should take into account the possibility that the Chamber will entertain sentencing proceedings before issuing its Article 74 judgment. While this possibility may have existed in theory, as the Chamber stated in footnote 5 of the Decision, even the Chamber did not anticipate such proceedings until a few weeks ago. This is implied by the Chamber noting in paragraph 1, the "Decision Replacing Judges in Trial Chamber X"⁹ (*'Ad hoc Presidency Decision'*) issued by the *Ad hoc* Presidency of the Court in *The Prosecutor v. Al Hassan*.
14. Given this procedural backdrop and the Defence's reliance on it, no reasonable trial chamber could conclude that issuing the Decision approximately one month before the Defence closes its case constituted adequate notice of this major procedural change in the sentencing procedure.
15. *First*, the Decision violated the principle of legal certainty by breaking from decades long precedent establishing bifurcated sentencing proceedings.¹⁰ During this trial, the Defence never envisaged the possibility of preparing for potential sentencing proceedings, as such preparations, if necessary, typically commence upon the issuance of the Article 74 judgement. Under the European Convention of

⁹ ICC-01/12-01/18-2596.

¹⁰ ICC-01/04-01/06-2901, paras 1, 11; ICC-01/04-01/07-3484-tENG, paras 1, 23; ICC-01/05-01/08-3399, paras 1-2, 7; ICC-01/05-01/13-2123-Corr, paras 1, 13; ICC-01/04-02/06-2360, paras 1, 3; ICC-02/04-01/15-1763, paras 1-3; ICC-01/12-01/18-2595, paras 1-2, 8.

Human Rights, the need for certainty is an indispensable element of a right to a fair hearing.¹¹ The Chamber in rendering the Decision should have considered that the Defence relied on the Court's past practice of conducting bifurcated sentencing proceedings. To inform the Defence, just one month before the closing of its case, was not sufficient to remedy the Defence's reliance on this practice during the last three years of trial.

16. *Second*, the Chamber did not give the Defence the opportunity to be heard on whether the Chamber should render a potential sentencing decision simultaneously with the Article 74 Decision. The Chamber should have considered the Defence's right to be heard when determining whether it gave the Defence sufficient notice. Consulting with the parties is not necessary for every procedural change regarding the conduct of proceedings. However, there are certain procedures for which the Statute explicitly involves the parties, thereby suggesting that parties do have a right to be heard on these issues.¹² While Article 76(2) mentions the possibility that the trial chamber, on its own motion, may hold a separate sentencing hearing before the completion of the trial, it gives no discretion when one of the parties requests it, stating that the trial chamber in such instances shall holding a hearing. The importance the text of the Statute places on the party's preference in this regard suggests that trial chambers would request the parties' views before deciding to depart from bifurcating sentencing proceedings, which have been the norm at the Court since *The Prosecutor v. Lubanga*.¹³ The Chamber

¹¹ *Borg v. Malta*, App. no. 37537/13 (ECHR, 12 January 2016), para. 107: "One of the fundamental aspects of the rule of law is the principle of legal certainty which, *inter alia*, guarantees a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law"; see also *Brumărescu v. Romania* [GC], App. no. [28342/95](#), (ECHR 1999-VII), para. 61 and *Nejdet Şahin and Perihan Şahin v. Turkey* [GC], App. no. [13279/05](#) (ECHR, 20 October 2011), para. 57.

¹² See ICC-02/04-01/15-251, paras 41-43.

¹³ ICC-01/04-01/06-2901, para. 1, 11.

thus violated the Defence's right to be heard and it did not have vital information from the Defence regarding the feasibility of the procedural calendar it had set.

17. Had the Defence been able to make submissions, it would have provided the Chamber with much needed information regarding the infeasibility of the current schedule. The Chamber now expects that the Defence will: (1) prepare for its last witness to testify, (2) close its case, (3) draft and file its remaining Bar Table Motion a week after the testimony of the last witness called by the Defence,¹⁴ (4) draft a 250-page closing brief, and (5) prepare for never anticipated sentencing proceedings, for which the first deadline falls just over one month from the filing of the present leave to appeal.
18. *Third*, the Chamber did not consider that its procedural calendar does not adequately accommodate the logistical and resource constraints, currently faced by the Defence, thereby undermining its ability to bring forth evidence and present submissions relating to sentencing. Indeed, Mr Ngaïssona's rights in this regard have become illusory. The Decision gives the Defence just seven weeks to define the scope of the evidence it will present during sentencing proceedings, gather statements and other material relevant for that purpose, and to disclose such evidence to the Chamber and parties in that time frame.
19. This translates to the Defence having seven weeks to define a strategy for Mr Ngaïssona's potential sentencing in the absence of any certainty as to the crimes and modes of liability he may be found guilty on, and evaluate whether there is sufficient evidence on record that supports this strategy. If there is not, then the Defence must also interview witnesses and organize missions that could involve travel to Bangui or elsewhere. These missions involve thorough preparation in the

¹⁴ ICC-01/14-01/18-2342, para. 6.

form of finding witnesses relevant to sentencing and fully interviewing them and preparing statements, if necessary.

20. It is completely consistent with the principles of due diligence that the Defence has not yet defined a strategy regarding sentencing. Mr Ngaïssona has pled not guilty to all the charges. Given that sentencing proceedings have always been bifurcated at the Court, and the Defence received no notice that the scope of examination of witnesses could relate to sentencing issues, the Defence has focused the entirety of its resources on showing the Prosecution is unable to prove Mr Ngaïssona's guilt beyond a reasonable doubt.¹⁵ Only in the event of a conviction was the Defence going to begin concrete preparations for sentencing. Such submissions and evidence would have been focused on the specific charges and modes of responsibility found by the Trial Chamber to be proved beyond a reasonable doubt.
21. Now that the Trial Chamber has significantly accelerated the sentencing proceedings, Mr Ngaïssona has lost confidence in the trial process. The Decision gives him the appearance that the Chamber is set to convict him, and thus to ensure its current composition, this procedural change had to be made at the eleventh hour.¹⁶ From Mr Ngaïssona's perspective, the Decision is in complete dissonance with Mr Ngaïssona's right to be presumed innocent.
22. Seven weeks to define the Defence's sentencing strategy and define the scope of its evidence is patently insufficient in the context of: (1) the Defence drafting a 250-page Final Trial Brief, which is the most important submission the Defence will

¹⁵ See *contra* ICC-01/04-01/06-1140, para. 32 (informing the parties that the scope of their examination may question witnesses on *inter alia* sentencing issues); ICC-01/04-01/06-2360, para. 38 (informing the parties that the Chamber may hear evidence relevant to sentencing during trial). In the present case, sentencing has never been mentioned by the Chamber in any of its directions on the conduct of proceedings.

¹⁶ The Defence is cognisant of the careful wording of the Decision in which the Chamber expressly emphasized that it issued the Decision without prejudice to the outcome of its decision pursuant to Article 74 of the Statute. Decision, para. 3.

provide the Chamber and (2) the Defence closing its case with the testimony of its last witness and filing of its last bar table motion. The Defence does not have the time to now divert its very limited resources from these crucial tasks to defining a sentencing strategy, which in the case of Mr Ngaïssona will be exceedingly complex if it must be conceived of before the Chamber renders its Article 74 decision. The Prosecution's theory of the case regarding Mr Ngaïssona centres on Mr Ngaïssona being an alleged accessory to the crimes.¹⁷ To establish this link to the alleged crimes, the Prosecution has submitted an extraordinary amount of evidence in this case that remains without precedent, including calling and submitting the prior recorded testimony of 111 witnesses, and submitting 17,000 items of documentary evidence.¹⁸ Additionally, the temporal scope of the relevant evidence the Prosecution submits to establish liability spans two years.¹⁹

23. In the context of this case, not knowing the Chamber's findings of fact before sentencing, forces the Defence to prepare sentencing proceedings that take into account the entirety of the evidentiary record and to make submissions on a vast temporal scope, that may end up being completely irrelevant depending on the Chamber's findings of fact. The Chamber should have taken into account the complexity of the case against Mr Ngaïssona in finding that seven weeks' notice was sufficient for the Defence to prepare sentencing proceedings. As the Prosecution itself underscored, even though there is significant overlap regarding Mr Ngaïssona's and Mr Yekatom's charges, the evidence underpinning the charges, the circumstances, and modes of liability do not overlap between the two accused.²⁰ The Chamber should have taken this factor into account when

¹⁷ ICC-01/14-01/18-2391, para. 18.

¹⁸ ICC-01/14-01/18-2391, para. 8-9, 18.

¹⁹ Ibid., para. 16.

²⁰ Ibid., paras 17-18.

determining that 7 weeks' notice was sufficient for all the parties to devise a sentencing strategy.

24. *Lastly*, it is notable that for three out of those seven weeks, there is a judicial recess.

In these circumstances, the Defence will not be able to organize a mission to Bangui or elsewhere to interview witnesses by the 6 September 2024 deadline established by the Decision. The Court's personnel are all operating at a reduced capacity during this time, and many witnesses may not be available on such short notice, especially in the context of summer holidays. For example, if the Defence wishes to either engage with a psychiatrist to evaluate Mr Ngaïssona or to interview members of his congregation in Bangui, it will be unable to do so.²¹ For missions to be approved, the Registry asks that the Defence make such request four weeks before any such mission takes place, and the mission request must already indicate the precise investigating steps to be undertaken, if it is to be approved. While such requests can exceptionally be approved in less than four weeks, it is premised on the Registry having sufficient personnel to render such approvals. Therefore, the impending summer recess should have been a factor taken into account by the Chamber in the Decision.

25. The Chamber did not consider above mentioned factors when it determined it would render any potential decision under Article 76 simultaneously with its Article 74 judgment. As a result, the Chamber accorded no weight to them when it balanced the interests of expeditiousness against Mr Ngaïssona's right to a fair trial. Expeditiousness appears to be the key factor the Chamber gave any significant weight to. This is evident in the Chamber setting a procedural calendar, which in addition to setting entirely new deadlines regarding sentencing,

²¹ These examples are not based on speculation. Considering the evidence presented at trial, an expert analysis on the suffering Mr Ngaïssona underwent during the conflict may provide potential mitigating information. Witnesses from Mr Ngaïssona's religious community could also shed light on his character and personality, which may be relevant to mitigating circumstances.

amended the conduct of the proceedings regarding closing statements. In paragraph 11 of the Decision, citing the interests of expeditiousness, the Chamber determined that the date of the closing statements would be changed from two weeks after the filing of the Final Trial Brief to a concrete date, namely from 9 to 12 December 2024. The Chamber did not consider that with this change, the Defence would be under tremendous resource constraints as a result of its finalizing of the sentencing submissions, which, as presently scheduled, are due one day after the closing statements conclude, namely 13 December 2024.

26. In support of this unprecedented procedure at the Court, the Chamber cited the Appeals Chamber Judgment in the *The Prosecutor v. Dominic Ongwen*.²² In footnote 5 of the Decision, the Chamber noted that rendering these two decisions simultaneously was a possibility for the Chamber under the Court's legal framework. It was this possibility that was the determining factor in the Chamber's decision to first decide that the Article 74 decision and sentencing decision, if any, would be rendered at the same time, and then to set a procedural calendar for the sentencing proceedings. The reference to the word "possibility" in footnote 5 shows the Chamber's acknowledgment that its decision to render simultaneous Article 74 and 76 decisions and set its subsequent procedural calendar is a discretionary one. Therefore, the Defence's submissions on inadequate notice regarding this major procedural change is not a mere disagreement. The factors the Chamber should have considered in determining whether to render a simultaneous Article 74 and potential Article 76 decisions, and the appropriate procedural calendar to be set for such a procedure lie at the heart of the Chamber's decision.

²² Judgment on the appeal of Mr Dominic Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled Sentence, ICC-02/04-01/15-2023, para. 56.

b. The second issue constitutes an appealable issue pursuant to Article 82(1)(d)

27. The second issue arises from the Chamber's interpretation of the impact of the *Ad hoc* Presidency Decision in the *Al Hassan* case on the proceedings in this case. In particular, the Chamber's finding in paragraph 1 that the *Ad hoc* Presidency Decision has an impact on the future composition of this Chamber, in the event of a conviction. It was this finding that was the basis for the Chamber's decision to break with precedent and to render any potential decision on sentencing simultaneously with its judgement under Article 74, and to set the procedural calendar as outlined in the Decision. The Defence respectfully submits that the Chamber erred in its interpretation of the *Ad hoc* Presidency Decision, which led it to impose a premature and excessive remedy.

28. In paragraph 1 of the Decision, the Chamber noted the conclusions of paragraph 5 and 10 of the *Ad hoc* Presidency Decision and their hypothetical impact on the future composition of this Chamber, in the event of a conviction. In doing so, the Chamber erred in finding that the *Ad hoc* Presidency Decision had any concrete impact on the proceedings in this case. The *Ad hoc* Presidency Decision was issued in a completely different case, replacing the judges of a completely different trial chamber. Under these circumstances, the *Ad hoc* Presidency Decision has no impact whatsoever in the present case. Its impact was strictly confined to the judges of the *Al Hassan* case.

29. At most, the Chamber could have found that the *Ad hoc* Presidency Decision may have a potential impact on the present case. Given this error, the Chamber gave excessive weight to the *Ad Hoc* Presidency Decision, and insufficient or no weight to other considerations, namely (1) Mr Ngaïssona's right to a fair trial, (2) the clear procedural distinctions between the *Al Hassan* case and the present case and (3) the legality of replacing trial judges prior to the issuing of a sentence in the *Al Hassan*

case. With respect to Mr Ngaïssona's right to a fair trial the Defence has already substantiated the violations of Mr Ngaïssona's fair trial rights under Issue 1 of the present application for leave to appeal.

30. With respect to the procedural distinctions between the *Al Hassan* case and the present case, the circumstances under which the Presidency replaced two of the judges in Trial Chamber X are unlikely to occur in the present case. *First*, the Presidency replaced only one judge, namely Judge Mindua in the *Al Hassan* case on the basis of his mandate having ended in March 2024.²³ Here, the mandates of all the judges composing Trial Chamber V ended in March 2024. Judge Akane was initially replaced due to a request for excusal she had made with the Presidency.²⁴ Replacing all the members of a trial chamber because their mandates have already ended is different than replacing just one member of such a chamber on that basis. The impact of not having the benefit of any of the judges who participated in the Article 74 deliberations was not addressed by the *Ad Hoc* Presidency Decision since it was outside its scope. Additionally, while not expressly stated, a relevant factor that likely influenced the *Ad Hoc* Presidency, as mentioned by the Defence for Mr Al Hassan,²⁵ was that Judge Mindua had health concerns that delayed the issuing the Article 74 Decision in the *Al Hassan* case by more than five months.²⁶ No procedural delays have thus been caused by unforeseen circumstances occurring in the lives of the members of this Chamber. The Chamber should have taken these considerations into account when assessing whether the risk of replacement would ever materialize in the present case.

²³ *Ad Hoc* Presidency Decision, paras 5, 10.

²⁴ *Ad Hoc* Presidency Decision, para. 2. Judge Akane later withdrew her request for excusal upon learning of the unavailability of Judge Korner, which was granted by the Presidency. ICC-01/12-01/18-2601.

²⁵ ICC-01/12-01/18-2607, para. 44.

²⁶ ICC-01/14-01/18-2588, paras 4-5.

31. Regarding the legality of the *Ad Hoc* Presidency Decision, the Chamber should have considered that the *Al Hassan* Defence has raised the issue of whether it is in accordance with the Statute to replace a trial chamber judge on the basis of his mandate expiring during the sentencing proceedings.²⁷ Trial Chamber X has yet to rule on whether it is properly constituted.²⁸ In a separate opinion regarding this legal issue raised by the Defence, Judge Prost reasoned that she would have referred the Defence's observations to the Presidency since there is clear precedent at the Court that sentencing does constitute part of the trial phase of the proceedings.²⁹ Therefore, Judge Prost shared the concerns of the Defence that Article 74(1) of the Statute could have been potentially violated when the Presidency replaced Judge Mindua on the basis of his mandate ending in March 2024. The Chamber should have considered the tenuous legal foundation upon which the *Ad Hoc* Presidency replaced Judge Mindua in the *Al Hassan* case before changing the entire sentencing procedure on this basis.

32. Had the Chamber correctly anticipated the replacement of its judges as a remote possibility rather than a certainty, in the event it proceeded with bifurcated Article 74 and Article 76 proceedings, it would have considered these distinctions between the *Al Hassan* case and the present case. It would have determined that rendering a potential Article 76 decision simultaneously with the Article 74 decision would be unduly prejudicial to Mr Ngaïssona's rights to adequate time and facilities to prepare his case based on a mere risk that the members of the Chamber could be replaced. The Chamber thus imposed a premature remedy, which led it to further

²⁷ ICC-01/12-01/18-2607.

²⁸ ICC-01/12-01/18-2618 (noting the concerns raised by the Defence, and determining to assess the fairness of the proceedings and the impact on Mr Al Hassan's rights on an ongoing basis throughout the sentencing procedure, under its competency). It is unclear whether Trial Chamber X will rule on the issue of whether it is properly constituted given that it does not have the competency to review the Presidency Decision.

²⁹ ICC-01/12-01/18-2618-OPI, para. 3, footnote 3.

set a procedural calendar that is impossible for the Defence to abide by given its current logistical and resource constraints.

33. By failing to address the *Ad Hoc* Presidency Decision as a possibility rather than a certainty, the Chamber gave undue weight to the sentencing procedure in the current *Al Hassan* case. This error arises from paragraph 1 of the Decision and is the basis for the Chamber departing from conducting bifurcated Article 74 and Article 76 proceedings.

B. The two issues at hand significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial

34. Under Article 82(1)(d) the issues at hand must either significantly affect the fair and expeditiousness conduct of the proceedings or the outcome of trial. Here, the issues raised by the Decision significantly affect both fair and expeditious conduct of the proceedings and the outcome of the trial.

35. The Defence has grouped the two issues under its assessment of whether they significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial. The Chamber's resolution of these two issues had an essential role in the Chamber finding that it was appropriate at this advanced stage of the case to render a potential sentencing decision simultaneously with the Chamber's Article 74 decision. Additionally, the Chamber set a procedural calendar which obliges the Defence to prepare both closing its case and potential sentencing proceedings simultaneously. Deciding one month before the Defence closes its case to completely depart from well-established precedent at the Court to conduct bifurcated sentencing proceedings significantly affects the fairness and potentially the length of the proceedings.

36. As substantiated above the Decision has unexpectedly thrown the Defence's planning and organization in complete disarray resulting in a violation of Mr

Ngaïssona's right to adequate time and facilities to prepare his defence under Article 67(1)(b). Due to the lack of proper notice of the Chamber's decision, the Defence is unable due to current resource and logistical constraints to meet the Chamber's current deadlines. This inability will lead the Defence to ask for extensions of time that account for the significant workload the Defence currently faces with closing its case and preparing its Final Trial Brief, resulting in further delays in the proceedings.

37. Moreover, while rendering a potential sentencing decision simultaneously with an Article 74 decision appears to serve the interests of expeditiousness since the potential sentencing decision will be rendered earlier than in bifurcated proceedings, the sentencing procedure, itself, will be prolonged due to the lack foreseeability as to the facts upon which the Chamber will enter a possible conviction. The Defence will be forced to contend with an unprecedented amount of evidence in this case and foresee a conviction on each mode of liability and for both the crimes charged in and around Bangui and Bossangoa. This will lead to subsequent delays and unfocused submissions by the parties on issues that may not be of relevance at all depending on the Chamber's Article 74 decision.

38. Additionally, both issues significantly affect the outcome of the trial under Article 82(1)(d). The Appeals Chamber has found that this prong of the Article 82(1)(d) requires the Chamber to "ponder the possible implications of a given issue being wrongly decided on the outcome of the case".³⁰ Both issues concern the Defence's ability to effectively close its case and avail itself of its right to make potential sentencing submissions. Given the current procedural calendar, the Defence's ability to make cogent and persuasive closing submissions in the form of the Final Trial Brief and closing statement has been compromised. The Defence has no additional resources to spare for the preparation of a potential sentencing at this

³⁰ ICC-01/04-168, para. 13.

stage. If it is forced to do so, it will have to divert those resources from the drafting of the Final Trial Brief and the closing statement, resulting in less persuasive and potentially incomplete submissions. Moreover, as substantiated above, the seven-week time frame provided to the Defence to define its sentencing strategy and submit its evidence is such that its right to make effective sentencing submissions has been rendered illusory. In the event an Appeals Chamber would find that sentencing is part of the trial proceedings, this inability to effectively exercise Mr Ngaïssona's right to make submissions and present evidence on sentencing would also affect the outcome of the trial.

C. An immediate resolution of the two issues by the Appeals Chamber would materially advance the proceedings.

39. The Article 82(1)(d) requirement that the issue materially advance the proceedings through immediate resolution by the Appeals Chamber ensures that the proceedings follow the right course through an authoritative determination by the Appeals Chamber.³¹ Such an authoritative determination removes doubts about the correctness of a decision or maps out a course of action along the right lines.³²

40. The Decision marks the first time in the Court's history that a Trial Chamber has ever decided to issue a potential Article 76 Decision simultaneously with its Article 74 Decision. Whether the Chamber exercised its discretion correctly in coming to this determination is essential to determining whether Mr Ngaïssona's fair trial rights have been irreparably compromised. The Decision will have long lasting impacts on the Defence's ability to make effective closing submissions. Moreover, it has irrefutably changed the anticipated course of sentencing proceedings. Before last week, the Defence never anticipated preparing for every eventuality regarding the crimes charged and modes of liability during sentencing. Rather, the Defence

³¹ ICC-01/04-168, para. 15.

³² Ibid.

anticipated providing focused and precise submissions on the facts the Trial Chamber found to be proven beyond a reasonable doubt in its Article 74 decision, if any. Such a broadened scope of the sentencing procedure coincides with the Chamber providing the Defence with only a few weeks to prepare for it. Whether the Trial Chamber has provided the Defence with sufficient time to prepare for sentencing is an issue that could, if decided wrongly, rupture the entire trial process and Mr Ngaïssona's fundamental fair trial rights.

41. The stage of the proceedings should not be considered in the Chamber's determination of the present application of leave to appeal. Indeed, if the Chamber were to grant leave to appeal, the Appeals Judgment would be rendered while the Chamber was still deliberating the Article 74 judgment,³³ leaving it time in the event the Decision is upheld, to amend the current procedural calendar and still render its potential Article 76 decision simultaneously with its Article 74 Decision. Regardless of the timing, the Defence submits it is never too late for appellate intervention to ensure that the proceedings follow the right course, and that the whole trial is not undermined due to one erroneous decision.

IV. RELIEF SOUGHT

42. For the foregoing reasons, the Defence respectfully requests the Chamber to

- GRANT the Defence's request for leave to appeal the Decision on the two abovementioned issues pursuant to Article 82 (1)(d) of the Statute.

Respectfully submitted,

³³ The Defence anticipates that the Chamber will render its Article 74 Decision in accordance with the Chamber Practice Manual, which states that it should be rendered within 10 months of the closing statement. In the event the procedural calendar stays in place, this would mean that the Article 74 Decision would be rendered sometime in October 2025. Chamber Practice Manual, para. 88.



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 24 July 2024

At The Hague, the Netherlands.