

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/12-01/18**

Date: **28 June 2024**

THE PRESIDENCY

Before:

**Judge Rosario Salvatore Aitala, Acting President
Judge Reine Alapini-Gansou, Acting First Vice-President
Judge Sergio Gerardo Ugalde Godínez, Acting Second Vice-
President**

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF

***THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD***

Public, with two public annexes

Decision Replacing Judges in Trial Chamber X

Decision 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
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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

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Section****Other**

Trial Chamber X

1. The *ad hoc* Presidency of the International Criminal Court (‘Court’) takes note of the Trial Judgment dated 26 June 2024¹ (‘Article 74 Decision’) in which Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud was convicted, by majority, under eight counts of crimes against humanity and war crimes² (including the separate and partly dissenting opinions thereto filed on 26 June 2024³ and 28 June 2024⁴).
2. On 19 June 2024, Judge Tomoko Akane of Trial Chamber X transmitted to her fellow members of the Presidency a request to be excused from that Chamber pursuant to article 41(1) of the Rome Statute, on workload grounds (‘excusal request’).⁵ An *ad hoc* Presidency, consisting of Judge Rosario Salvatore Aitala, Judge Reine Alapini-Gansou and Judge Sergio Gerardo Ugalde Godínez, considered the excusal request and granted it on 28 June 2024.⁶
3. The *ad hoc* Presidency hereby decides that Judge Akane will be replaced in Trial Chamber X by Judge Joanna Korner, as the most senior available judge in the Trial Division, noting also the present workload amongst the judges. In so doing, the *ad hoc* Presidency acknowledges that this will be the first time that a sentencing decision under article 76 of the Rome Statute has been issued by a trial chamber which partially differs in composition from the Chamber which rendered the Article 74 Decision. The *ad hoc* Presidency considers that this remains consistent with the Court’s legal framework for the following reasons.
4. The *ad hoc* Presidency considers that articles 74 and 76 do not preclude the possibility for a trial chamber to be recomposed for the purpose of the sentencing, after a conviction decision has been rendered pursuant to article 74. Article 74(1) of the Rome Statute provides that ‘[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations’ with article 74(2) providing that the decision of the Trial Chamber ‘shall be based on its evaluation of the evidence and the entire proceedings’. The implicit requirement for the presence of the *same* trial judges to

¹ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Trial Judgment, 26 June 2024, ICC-01/12-01/18-2594-Red (‘Trial Judgment’).

² Trial Judgment, para. 1785.

³ Separate and Partly Dissenting Opinion of Judge Tomoko Akane, 26 June 2024, ICC-01/12-01/18-2594-OPI; Separate and Partly Dissenting Opinion of Judge Kimberly Prost, 26 June 2024, ICC-01/12-01/18-2594-OPI2.

⁴ Opinion individuelle et partiellement dissidente du Juge Antoine Kesia-Mbe Mindua, 28 June 2024, ICC-01/12-01/18-2594-OPI3.

⁵ Annex 1.

⁶ Annex 2.

participate at each stage of the trial is connected only to the rendering of the judgment under article 74. The title of article 74 is ‘Requirements *for the decision*’ (emphasis added), which makes clear that the limitation demanding the presence of the same judges is connected to the article 74 decision only.

5. In contrast, article 76 of the Rome Statute concerning ‘Sentencing’ does not contain any equivalent limitations requiring the presence of the same judges. Nothing in article 76 precludes an understanding that the reference to ‘Trial Chamber’ in that article could be understood as referring to the chamber in its composition at any given point of time, with there being no explicit requirement that the trial chamber addressing sentencing be identical in composition to that which handed down the article 74 decision. Sentencing constitutes a separate and distinct procedural step in the trial proceedings at the Court – it does not fall within the scope of the article 74 decision. The detailed substance as to how sentencing is conducted is separately established in article 78, which is located in an entirely different part of the Rome Statute and no longer under the general heading of ‘The Trial’ in part 6.⁷ The structure of the Rome Statute thus makes clear the distinction between ‘Sentencing’ and the stages of the trial and deliberations which result in the issuing of the article 74 decision. This reflects the differing nature of evidence and submissions at the sentencing stage. Of course, article 76 of the Rome Statute does not exclude the possibility of article 74 and 76 decisions being handed down simultaneously, so long as all requirements for the hearing of evidence and submissions relevant to the sentence have been met, in which case the Trial Chamber will necessarily have an identical composition. This, however, has no bearing on the possibility for a trial chamber to be recomposed between the article 74 decision and the article 76 decision where those decisions are rendered separately.
6. In sum, the *ad hoc* Presidency, having closely considered all aspects of the Court’s legal framework, is of the view that the Rome Statute does not require that the trial chamber rendering the article 76 decision be composed identically to the trial chamber which rendered the article 74 decision. This is also consistent with established practice, whereby reparations proceedings have commonly been conducted by different trial chambers or differently composed trial chambers. Accordingly, the Presidency considers that it

⁷ Rule 143 of the Rules of Procedure and Evidence also sets out a distinct procedure which must be followed for any additional hearings on sentencing.

remains consistent with the Court's legal texts for Judge Akane to be replaced by Judge Korner in Trial Chamber X.

7. The *ad hoc* Presidency, after having considered Judge Akane's excusal request, decided *proprio motu* to also consider an additional matter in connection with the composition of Trial Chamber X. The *ad hoc* Presidency notes that it may exercise a range of responsibilities in connection with the constitution of chambers. Article 61(11) of the Rome Statute provides that the Presidency may constitute trial chambers, a function which implies a capacity to re-constitute such trial chambers as necessary. In addition, article 38(3)(a) of the Rome Statute provides that the Presidency is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor. The Presidency is also responsible for the replacement of judges, pursuant to regulation 15 of the Regulations of the Court. Accordingly, the *ad hoc* Presidency considers that it may replace judges and/or reconstitute chambers, in accordance with the Court's legal texts, for objective and justified reasons as provided in rule 38 of the Rules of Procedure and Evidence, including those connected to the proper administration of the Court. Accordingly, independent of the excusal request, the *ad hoc* Presidency considered that it should also consider another matter in connection with the composition of Trial Chamber X.
8. The *ad hoc* Presidency notes that the ordinary mandate of nine years of Judge Antoine Kesia-Mbe Mindua finished on 10 March 2024 and that he continued in office in connection with the *Al Hassan* case in accordance with article 36(10) of the Rome Statute. Article 36(10) provides that a judge continues in office to 'complete any trial'. The *ad hoc* Presidency considers that it must ensure clarity as to when this completion of the trial occurs.
9. Pursuant to article 36(9) of the Rome Statute, a judge shall ordinarily hold office for a term of nine years. As an exception to the general rule that a judge of the Court serves only for nine years, the *ad hoc* Presidency considers that article 36(10) should be narrowly construed. The exception in article 36(10) is grounded in whether a hearing has already commenced, thus its rationale is grounded in the principle that the judges who decide a case should be those who have seen and heard all the evidence. The *ad hoc* Presidency considers that this underlying purpose has been entirely fulfilled once the article 74 decision has been rendered. During sentencing, the trial chamber may hear

additional evidence or submissions and, in practice, often bases itself on findings in the article 74 decision. The evidence and submissions that the trial chamber must take into account under article 76(1), would be part of the trial record and be accessible to a recomposed trial chamber for its determination of the appropriate sentence. The scope of evidence and submissions relevant to the sentence is likely to be limited in nature and could be re-heard, in part or in full, if a trial chamber considers that this is necessary. In sum, the consideration of evidence for the purpose of sentencing differs from that which occurs in connection with the article 74 decision and does not require the same approach to the principle of orality.

10. Accordingly, the *ad hoc* Presidency considers that, for the purposes of the operation of article 36(10) at trial level, the trial may be understood as having been completed with the article 74 decision. Of course, in circumstances where a trial chamber decides to render the article 74 and article 76 decision simultaneously, as outlined at paragraph 5 above, this timing of the article 74 and article 76 decisions would necessarily coincide. Noting the circumstances of the *Al Hassan* case, in which the Article 74 Decision has been rendered but an article 76 decision will follow at a later date, the *ad hoc* Presidency considers, therefore, that the last day of the mandate of Judge Mindua shall be 28 June 2024.
11. The *ad hoc* Presidency therefore considers that a judge serving on an extended mandate under article 36(10) constitutes an objective and justified reason for replacing that judge in a trial chamber after the article 74 decision has been rendered, noting that this is equally consistent with the Presidency's responsibility to ensure the proper administration of the Court, both in terms of the efficiency and effectiveness of the organisation of the judiciary, the proper management of judicial workloads and the need to take steps to mitigate the significant financial impact of such mandate extensions.
12. Accordingly, the *ad hoc* Presidency, noting that other available trial judges already called to full-time service are either serving in multiple chambers or presiding over active trials, hereby decides that Judge Mindua will be replaced in Trial Chamber X by Judge Keebong Paek. The *ad hoc* Presidency considers that the placement of Judge Paek in Trial Chamber X ensures that trial judges are used for trial functions to the extent possible, in addition to best ensuring the even distribution of workload amongst judges and better serving the interests of geographic representation. The Presidency may therefore revise

the date of commencement of full-time service of Judge Paek from 19 August 2024 to an earlier date if necessary, in consultation with Judge Paek and Trial Chamber X.

13. Trial Chamber X shall henceforth be composed as follows:

Judge Kimberley Prost

Judge Joanna Korner

Judge Keebong Paek

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



Judge Rosario Salvatore Aitala
Acting President

Dated this 28 June 2024

At The Hague, The Netherlands