

SEPARATE OPINION OF JUDGE KIMBERLY PROST

1. The Chamber has issued the present decision setting new dates for the sentencing calendar in these proceedings. In my view, however, as it is the Trial Chamber which is responsible at all times to ensure the fairness and integrity of the proceedings as prescribed by Article 64(2) of the Statute I believe the decision should have also contained some discussion of the observations made by the Defence and the LRVs¹ (respectively the ‘Defence Observations’ and the ‘LRVs Observations’) regarding the impact of the re-composition of this Chamber on this case. In light of that obligation I set out below my views on this matter.

I. THE RE-COMPOSITION OF THE CHAMBER

2. In my view there are two interrelated issues arising from the re-composition of the Chamber by the Presidency, as reflected in the Defence Observations. These are: (i) the compatibility of the re-composition with the Court’s legal framework; and (ii) the impact of this re-composition on the fair and expeditious conduct of the sentencing procedure in this case. I will address these in turn.

1. The re-composition of the Chamber

3. As the Chamber noted, the Defence has raised extensive arguments concerning the compatibility of Judge Mindua’s replacement with the Court’s legal framework.² I have considered those arguments and I share some of the legal concerns expressed.³

¹ Defence Observations on the Current Composition of Trial Chamber X, ICC-01/12-01/18-2607; Observations des Représentants légaux des victimes (ICC01/12-01/18-2599), ICC-01/12-01/18-2608, *referring to* Decision Replacing Judges in Trial Chamber X, ICC-01/12-01/18-2596, and its annexes (ICC-01/12-01/18-2596-Anx1 and ICC-01/12-01/18-2596-Anx2) (the ‘Presidency Decision’).

² Defence Observations, ICC-01/12-01/18-2607, paras 18-27. As noted above, the LRVs have also raised questions regarding fair trial guarantees (LRVs Observations, ICC-01/12-01/18-2608, paras 6, 11-12).

³ In particular, I note that the Presidency’s decision to replace Judge Mindua was based on the fact that his ordinary mandate had finished in March 2024 and that he continued in office in connection with this case in accordance with Article 36(10) of the Statute (*see* Presidency Decision, ICC-01/12-01/18-2596, para. 8). I recall that pursuant to this provision, a judge assigned to a trial chamber in accordance with Article 39 of the Statute shall continue in office to complete any ‘trial’ the hearing of which has already commenced, notwithstanding Article 36(9) of the Statute which limit the judges’ mandates to a term of nine years (*see also* the French version of Article 36(10) of the Statute which provides that ‘un juge affecté à une Chambre de première instance [...] conformément à l’article 39, qui a commencé à connaître devant cette chambre d’une affaire en première instance [...], *reste en fonctions* jusqu’à la conclusion de cette affaire’ (emphasis added)). Contrary to the reasoning in the Presidency Decision (Presidency Decision, ICC-01/12-01/18-2596, paras 8-11. *See also* paras 4-6), the position of chambers of this Court and, until now, the Presidency, has been that the sentencing phase is part of the ‘trial’ including for the purposes of Article 36(10) (as distinct from the reparations phase) (*see e.g.* The Presidency, *The Prosecutor v.*

4. With respect to this issue however, I am fully mindful of the fact that the Chamber does not have any competency under the Court's legal framework to review the Presidency Decision. At the same time, in my view, the Chamber must consider any and all issues which could potentially have an impact on the proceedings in relation to fundamental precepts, particularly when arguments are raised by a party to the proceedings, and should adopt any measures it considers appropriate in response.
5. Accordingly, and noting that the Presidency has the power to reconsider its own decisions, including where new arguments are raised,⁴ I would have referred the Defence and LRVs Observations to the Presidency for its information and for the Presidency to take what action, if any, it may consider appropriate. I would have done so in pursuance of the Chamber's paramount responsibility to ensure the fair conduct, and the integrity, of the present proceedings.

2. The impact of the re-composition on the fair and expeditious conduct of the sentencing procedure

6. With respect to fairness, as stated by the Chamber, it will continue to ensure the fairness of the proceedings throughout the sentencing phase. In that respect I note the specific arguments raised by the Defence in its Observations and the need to protect the integrity of the sentencing procedure in this case.
7. In addition to the general assurances provided by the Chamber I would have noted that the specific points raised by the Defence as to possible fairness implications arising from re-composition would be taken into account by the Chamber and addressed as appropriate and if necessary through its procedures or in its ultimate Sentencing decision.

Germain Katanga, Annex I to Decision replacing two judges in Trial Chamber II, 16 April 2014, ICC-01/04-01/07-3468-AnxI, paras 5-6; Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on Defence Request to Review and Vary the Registry's Scope of Legal Assistance Decision, 25 November 2016, ICC-01/05-01/13-2063, paras 11, 13). I also note the Defence submission that the close connection between verdict and sentence in a trial is also reflected in domestic law and the case law of the ECtHR (*see* Defence Observations, ICC-01/12-01/18-2607, para. 26, citing to domestic practice in the United States, commonwealth countries and France and ECtHR, *Van Droogenbroeck v. Belgium*, App. No. 7906/77, Judgment, 24 June 1982, para. 35).

⁴ *See e.g.* The Presidency, *The Prosecutor v. Germain Katanga*, Decision on 'Defence Application for Reconsideration of the Presidency "Decision pursuant to article 108(1) of the Rome Statute"' (ICC-01/04-01/07-3821-Red), 26 June 2019, ICC-01/04-01/07-3833.

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

A handwritten signature in black ink, appearing to read 'K. Prost', is centered on the page. The signature is written in a cursive, flowing style.

Judge Kimberly Prost, Single Judge

Dated this Tuesday, 23 July 2024

At The Hague, The Netherlands