

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **13 March 2024**

TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
Judge Tomoko Akane
Judge Kimberly Prost

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF

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

Public

with Public Annex A

Urgent Request for Further Information Concerning the Delayed Judgment

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. Through this request, the Defence for Mr Al Hassan seeks the urgent assistance of Trial Chamber X to obtain information directly relevant to Mr Al Hassan's right to know the outcome of his trial and his future. This request is motivated by the Trial Chamber's express commitment to provide such particulars to the parties and the participants.
2. At the start of this year, and subsequent to a three-year trial process and almost seven years of detention, Mr Al Hassan expected to receive a determination on his guilt or innocence on 18 January 2024. In the leadup to that date, the Defence had engaged in careful and sustained consultations to prepare him for this moment. Three days prior, however, the parties and participants received an email notifying them that, for reasons related to Judge Mindua's ill health, the date for the delivery of the judgment had been vacated. Since then, little information has been forthcoming, and the Defence – and in particular Mr Al Hassan – continues to be in the dark as to the expected delivery date.
3. Mr Al Hassan is, understandably, extremely anxious and confused. The Defence is unable to provide him with any reassurance, advice, or guidance as to the circumstances that have led to this unusual situation or when he might reasonably expect to receive a verdict. This lack of clarity and anxiety extends beyond Mr Al Hassan himself, affecting persons impacted by the future verdict, including Mr Al Hassan's family as well as the numerous witnesses and victims who have followed or participated in the proceedings.
4. This situation is not, however, without precedent. International and domestic courts that have dealt with this issue have militated in favour of minimum standards of transparency and effective safeguards to ensure the expeditious conduct of the proceedings. These standards have unfortunately not been met in the present case and, indeed, core questions have arisen in respect of the timing and manner in which the parties were first informed of the Judge Mindua's ill health and the possible implications thereof on the issuance of the judgment. It would also appear from a recent decision that the Chamber has been apprised of neither the specifics of Judge Mindua's health or illness nor the impact thereof on the date of the delivery of the judgement and on the subsequent phases of the proceedings.

5. The Defence fully appreciates the sensitivity of this situation and expresses its sincerest wishes to Judge Mindua for a full and speedy recovery. However, in line with the Chamber's expressed commitment to transparency on issues of fundamental importance to Mr Al Hassan's right to be tried without unreasonable delay, the Defence respectfully requests the Chamber to invite Judge Mindua to provide, on a confidential basis, if necessary, the information set out at paragraph 11 below and to inform the parties and participants accordingly.

II. PROCEDURAL HISTORY

6. On 6 December 2023, the Trial Chamber issued the Order scheduling the delivery of the Trial Judgment for 18 January 2024.¹ The Scheduling Order was signed by all three Trial Chamber judges, creating a reasonable expectation that all three judges agreed that a final judgment was ready to be delivered on this date.
7. On 15 January 2024, the Trial Chamber issued an order vacating the date of the judgment.² The Order to Vacate, which was also signed by all three judges of the Trial Chamber, stated that:³

In light of the current health situation of Judge Antoine Kesia-Mbe Mindua, Presiding Judge of the Chamber, who is temporarily unavailable, the Chamber has no option but to vacate the hearing previously scheduled. The Chamber will convey updated information at the earliest opportunity.

8. On 2 February 2024, the Defence inquired with the Trial Chamber as to the availability of additional information in respect of either the expected date for the delivery of the judgment or, alternatively, any period during which it was not expected to be delivered. On 5 February 2024, the Single Judge directed the parties and participants to raise such issues through a formal filing.

¹ *Al Hassan*, [Order Scheduling Delivery of the Trial Judgment](#), ICC-01/12-01/18-2576, 6 December 2023.

² *Al Hassan*, [Order Vacating the Hearing Scheduled for the Delivery of the Trial Judgment](#), ICC-01/12-01/18-2584, 15 January 2024 (“Order to Vacate”).

³ *Al Hassan*, [Order Vacating the Hearing Scheduled for the Delivery of the Trial Judgment](#), ICC-01/12-01/18-2584, 15 January 2024, para. 2.

9. On 12 February 2024, the Defence and the Legal Representatives for Victims (LRV), on the one hand,⁴ and the Prosecution on the other,⁵ filed two requests for further information as to the expected date of the judgment.
10. In a carefully worded decision issued on 4 March 2024,⁶ 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”.⁷ The Single Judge further stated that although “[b]est efforts have been made to obtain such information with as much detail as possible [...] Judge Mindua remains generally unavailable such that the other judges of the Chamber have had only limited communication with him over the past four weeks.”⁸ The Single Judge advised the parties and participants that: (i) Judge’s Mindua’s ongoing health situation continues to render him unavailable for the purposes of issuing the judgment, and (ii) the Single Judge is unable to provide a precise time or estimate as to when the judgment would be issued.⁹ The Single Judge did, however, indicate 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
11. At present, the following information remains unavailable to the Defence:
- a. The date on and from which Judge Mindua started to experience health issues that impacted his ability to participate in either the proceedings, the deliberations, or both;
 - b. If and when these health issues and restrictions were communicated to either Judge Prost or Judge Akane, or, alternatively, to the Presidency;

⁴ *Al Hassan*, [Requête conjointe de la Défense et des représentants légaux des victimes quant à l’obtention d’information relativement à la date de prononcé du jugement](#), ICC-01/12-01/18-2586, 12 February 2024.

⁵ *Al Hassan*, [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, 13 February 2024.

⁶ *Al Hassan*, [Decision on Two Requests Concerning the Delivery of the Trial Judgment](#), ICC-01/12-01/18-2588, 4 March 2024 (“Decision of the Single Judge”).

⁷ *Al Hassan*, [Decision on Two Requests Concerning the Delivery of the Trial Judgment](#), ICC-01/12-01/18-2588, 4 March 2024, para. 4.

⁸ *Al Hassan*, [Decision on Two Requests Concerning the Delivery of the Trial Judgment](#), ICC-01/12-01/18-2588, 4 March 2024, para. 4.

⁹ *Al Hassan*, [Decision on Two Requests Concerning the Delivery of the Trial Judgment](#), ICC-01/12-01/18-2588, 4 March 2024, para. 5.

¹⁰ *Al Hassan*, [Decision on Two Requests Concerning the Delivery of the Trial Judgment](#), ICC-01/12-01/18-2588, 4 March 2024, para. 6.

- c. The extent to which the illness impacted Judge Mindua’s ability to participate in the proceedings, the deliberations, or both;
 - d. Whether the illness is of a temporary or permanent nature; and
 - e. The likely prognosis.
12. In contradistinction, on 11 March 2024, *Radio France Internationale* published an article concerning the Al Hassan case which states that:¹¹

Contacté par RFI, le juge congolais affirme que, depuis octobre, son état de santé ne lui permet plus de travailler sur ce jugement. Il a néanmoins indiqué qu’il pourrait prochainement reprendre et remettre un jugement au mois de juin.

III. SUBMISSIONS

13. Rule 35 of the Rules of Procedure and Evidence requires Judges to proactively notify the Presidency of any issues that could impact on their qualification to sit as a judge in proceedings. Disclosure comprises a critical safeguard that enables the Presidency and Chamber hearing the case to take necessary measures to safeguard the rights of the accused, as required under Article 64(2) of the Statute.¹²
14. The ICTY and ICTR have similarly recognized the necessity of overriding considerations of medical privacy where the information in question is of direct relevance to the Chamber’s ability to resume the proceedings.¹³ A core consideration

¹¹ Annex A: Radio France Internationale, S. Maupas, [CPI: le verdict du procès de l'ex-commissaire de la police islamique de Tombouctou reporté](#) (11 March 2024).

¹² The obligation on the part of judges to disclose information concerning physical or mental competence is also enshrined in several international standards and legal precedents. *See e.g.* [Code of Conduct for the Judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal](#), Article 3: “Judges must inform the presiding judge of their Tribunal should they suffer from an illness or other condition that might threaten the performance of their duties”. *See also* ICTR, *Karemera et al.*, ICTR-98-44-AR15bis.2, [Reasons for Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera’s Motion for Leave to Consider New Material](#), 22 October 2004, para. 67 (“[t]he particular circumstances involved here include, in addition to the admitted association and cohabitation, the fact that Judge Vaz did not disclose these facts until Defence counsel expressly raised this matter in court”). *See also* ICC [Code of Judicial Ethics](#), Article 5(1): “Judges shall conduct themselves with probity and integrity in accordance with their office, thereby enhancing public confidence in the judiciary”.

¹³ *Karemera et al.*, [Decision on Motion for Disclosure of Medical Information and for Extension of Time](#), ICTR-98-44-T, 28 August 2009, paras 6-17.

is that the “accused as well as the Prosecution obviously have a direct interest in whether, when and how the proceedings continue”.¹⁴

15. Despite rejecting a Defence request for disclosure of medical records in *Gbagbo*, the Presidency underscored that it had “at all relevant times [been] kept abreast of the medical condition of Judge Kaul up to his resignation from the Court” and that, based on the disclosed information, “it was absolutely clear to all concerned that the mental capacity of the judge was unimpaired up to the time of his resignation from the Court”.¹⁵
16. In the present case, it would appear that the Chamber has not been kept abreast as concerns Judge Mindua’s health, and that it does not have at its disposal the relevant or sufficient information to render informed decisions as concerns the continuation of the proceedings. The Defence notes, however, that Judge Mindua has himself committed to keeping the parties and participants apprised of the evolving situation, indicating in the 15 January Order to Vacate that he would convey updated information at the earliest opportunity. As such, the Defence now seeks access to this information in light of Judge Mindua’s own willingness keep the parties apprised and in the knowledge that he maintains the prerogative to waive the confidentiality of his own medical records.
17. While Judge Mindua’s voluntary assurances obviate the need to seek an order for production or disclosure, the Defence considers it helpful to set out submissions as concerns the relevance of the requested information to Mr Al Hassan’s rights:
 - a. to be tried by a competent and regularly constituted trial chamber, composed of three judges;
 - b. to be tried without unreasonable delay; and
 - c. to be tried by an independent and impartial trial chamber.
18. The Defence further reserves the right to file a formal application for such information in the event that Judge Mindua declines or fails to provide this information on a voluntary basis.

¹⁴ *Karemera et al.*, ICTR-98-44-T, [Decision on Motion for Disclosure of Medical Information and for Extension of Time](#), 28 August 2009, paras 6-17.

¹⁵ *Gbagbo*, [Decision on the Application of the Defence for Mr Gbagbo of 23 September 2014](#), ICC-02/11-01/11-690, 7 October 2014, para. 28.

- a. *Mr Al Hassan's right to be tried by a competent and regularly constituted trial chamber*
19. The right to a fair trial includes the right to a competent and regularly constituted chamber.¹⁶ The surety of a competent and regularly constituted tribunal is required to ensure and maintain public confidence in the judiciary and in the tribunal to carry out its functions. As a fair trial safeguard, this right applies to all stages of the proceedings,¹⁷ including the deliberations process.
20. Although not expressly included in fair trial rights delineated by Article 67 of the Rome Statute, the right to a regularly constituted and competent trial chamber finds support throughout the ICC legal framework, including various provisions of the Rome Statute and the Rules. Article 64(2) of the Statute specifies that the Trial Chamber has an obligation to ensure that a trial is fair and expeditious and conducted with full respect for the rights of the accused while Article 39(2)(b)(iii) provides that “[t]he functions of the Trial Chamber shall be carried out by three judges of the Trial Division”. Although Rule 132 of the ICC Rules of Procedure and Evidence was amended in 2012 to incorporate the possibility of designating a Single Judge to conduct trial preparation, the Single Judge may not “render decisions which significantly affect the rights of the accused or which touch upon central legal and factual issues in the case”.¹⁸ Earlier case law also affirms that Article 39(2)(b)(iii) prohibits the Trial Chamber from conducting trial hearings in the absence of one of the three judges.¹⁹
21. In terms of competence, Article 40(3) of the Statute requires Judges to serve on a full-time basis at the seat of the Court. This mandatory obligation includes an implicit requirement that judges must be capable of participating in proceedings at the seat of the Court on a full-time basis. There is a direct link between the health of a judge and

¹⁶ See e.g. UNGA, *International Covenant on Civil and Political Rights*, 999 UNTS 171, 16 December 1966, Article 41(1): “in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

¹⁷ [Lubanga, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19\(2\)\(a\) of the Statute of 3 October 2006](#), ICC-01/04-01/06-772, 14 December 2006, para. 37 (“First and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety” (footnote omitted)).

¹⁸ [ICC Rules of Procedure and Evidence](#), Rule 132 *bis* (6).

¹⁹ [Lubanga, Decision on whether two judges alone may hold a hearing and Recommendations to the Presidency on whether an alternate judge should be assigned for the trial](#), ICC-01/04-01/06-1349, 22 May 2008, para. 12.

their capacity to perform their duties in a competent manner. Commentaries to the Rome Statute reflect the understanding that the drafters contemplated ill-health as one of the grounds for disqualification/termination of office.²⁰ This is also envisaged in the UN Basic Principles on the Independence of the Judiciary.²¹ Indeed, according to ASP documents, in 2007 “a judge was found by the Court to be unable to perform his duties due to permanent ill-health or disability”.²² The Bangalore Principles of Judicial Conduct, which serve as a guiding reference for the ICC Code of Judicial Ethics,²³ envisage that judicial competency may be compromised if a judge is mentally or physically impaired.²⁴ Indeed, after an assessment of domestic law, the ICTY Appeals Chamber found that issues impacting the ability of a judge to follow or appreciate the evidence were directly relevant to the right to be tried before a competent Chamber.²⁵

22. Given the fundamental importance of the right to a competent chamber, the Trial Chamber has a corresponding duty to ensure that any issues impacting this right are fully set out in the judicial record.

b. *Mr Al Hassan’s right to be tried without unreasonable delay*

23. Article 67(1)(c) of the Statute sets out the right to be tried without undue delay. Rule 142 of the Rules of Procedure and Evidence further requires the Chamber to conclude deliberations and render the verdict on the trial proceedings in a reasonable time. In the event of a conviction, the right to a speedy trial extends to the right to an expeditious sentencing process in recognition of

²⁰ Y McDermott, ‘[Article 46’ \(General Remarks\)](#)’, 30 June 2016; D. Tolbert and B. Benoit, "Removal from Office" in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*: 2nd ed, Beck (2008), p.1006.

²¹ [United Nations Basic Principles on the Independence of the Judiciary](#), Principle 18 (“Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.”). See [ICC Code of Judicial Ethics](#), Preamble for its applicability to ICC judges.

²² ICC ASP, [Request for the Inclusion of an Additional Item in the Agenda of the Resumed Sixth Session of the Assembly, ICC-ASP/6/INF.6](#), p. 1

²³ [ICC Code of Judicial Ethics](#), Preamble: “[h]aving regard to the United Nations Basic Principles on the Independence of the Judiciary (1985) and other international and national rules and standards relating to judicial conduct”.

²⁴ UNDOC, [Commentary on the Bangalore Principles of Judicial Conduct](#), September 2007, para. 192 (“Competence in the performance of judicial duties requires legal knowledge, skill, thoroughness and preparation. A judge’s professional competence should be evident in the discharge of his or her duties. Judicial competence may be diminished and compromised when a judge is debilitated by drugs or alcohol, or is otherwise mentally or physical impaired.”).

²⁵ *Delalic et al*, IT-96-21-A, [Appeals Judgment](#), 20 February 2001, para. 630

[t]he 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.²⁶

24. There is a strong judicial policy to maintain high standards of judicial conduct in the administration of justice and the efficient disposal of proceedings. ICC Judges, for example, have determined that “the written decision under Article 74 of the Statute shall be delivered within 10 months from the date the closing statements end”.²⁷ Notably, any extension of this deadline “must be limited to exceptional circumstances and be explained in detail in a public decision”.²⁸ These principles reflect both the strict emphasis on diligence underpinning the Statute²⁹ and internationally recognized principles of human rights law;³⁰ a failure to respect this right at all stages of the proceedings gives rise to an enforceable right to an effective remedy.³¹
25. Similarly, the ICC Code of Judicial Ethics requires judges to act diligently in the exercise of their duties and to devote their professional activities to those duties.³² The Code further specifies that judges “shall perform all judicial duties properly and expeditiously” and “Judges shall deliver their decisions and any other rulings without

²⁶ *R. v. MacDougall*, [1998] Supreme Court of Canada 1; [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.

²⁷ *Chambers Practice Manual*, 2023, para. 88.

²⁸ *Chambers Practice Manual*, 2023, para. 87.

²⁹ *Katanga and Ngudjolo*, *Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled ‘Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings’*, ICC-01/04-01/07-2259, 12 July 2010, para. 39.

³⁰ ECHR, *Taavitsainen v. Finland*, *Application No. 25597/07*, 8 March 2010, paras 29-37.

³¹ ECHR, *Cocchiarella v. Italy*, *Application No. 64886/01*, 29 March 2006, para. 77; *Beck v. Norway*, *Application No. 26390/95*, 26 September 2001, paras. 27-28; *Scordino v Italy*, *Application No. 36813/97*, 29 March 2006, paras. 184-188.

³² Article 7(1), *ICC Code of Judicial Ethics* (ICC-BD/02-03-22).

undue delay.”³³ These considerations are of heightened importance where the defendant has been deprived of his liberty since March 2017. Where illness has a negative impact on the judge’s ability to fulfil his or her duties of diligence, the judge in question has a positive obligation to “seek medical assistance and, if that does not help, to withdraw from the case”.³⁴

26. Indeed, the ECtHR has found that special diligence is required in the conduct of criminal court proceedings.³⁵ The right to be tried within a reasonable time and without undue delay especially applies to persons deprived of their liberty who, in the absence of conviction in a judicial procedure, still benefit from the presumption of innocence.³⁶ Provisionally detained persons are entitled to their case being given priority.³⁷

27. For the purposes of the present application, it is not necessary for the Chamber to rule on the predicate question as to whether there has been unreasonable delay. This application merely seeks access to information that would allow the Chamber, parties, and participants to assess the ramifications of Judge Mindua’s health on the length and efficacy of the deliberations process as well as the consequences, if any, on any hearings or proceedings subsequent to the issuance of the trial judgment.

c. Al Hassan’s right to an independent and impartial trial chamber

28. Public confidence in an independent and impartial judiciary extends to issues concerning the health of the judges and their ability to follow and evaluate evidence during trial proceedings.³⁸ This principle continues to apply in the deliberations phase.

³³ Article 7(3) and (4), [ICC Code of Judicial Ethics](#) (ICC-BD/02-03-22)

³⁴ *Delalic et al.*, IT-96-21-A, [Appeals Judgment](#), 20 February 2001, para 629.

³⁵ ECHR, *Sizov v. Russia*, Judgment, [Application No 58104/08](#), 25 July 2012, para. 64; ECHR, *Grishin v. Russia*, Judgment, [Application No 14807/08](#), 24 July 2012, para. 182; ECHR, *Jablonski v. Poland*, Judgment, [Application No 33492/96](#), 21 December 2000, para. 102; ECHR, *Abdoella v. Netherlands*, Judgment, [Application No 12728/87](#), 25 November 1992, para. 24.

³⁶ Art 5(3) ECHR; ECHR, *Suslov v. Russia*, Judgment, [Application No 2366/07](#), 29 May 2012, para. 93; ECHR, *Stögmüller v. Austria*, Judgment, [Application No 1602/62](#), 10 November 1969, paras 4-5 (pg. 35).

³⁷ ECtHR, *Wemhoff v. Germany*, Judgment, [Application No 2122/64](#), 27 June 1968, para. 17.

³⁸ See e.g. the High Court of Australia, *Cesan v The Queen*; *Mas Rivadavia v The Queen* [2008] HCA 52 (6 November 2008), paras 71-72: “The somewhat elusive criterion of ‘public confidence’ is in some cases, such as the appearance of bias, subsumed in what a fair and reasonable observer would think. The courts nevertheless depend in a real sense upon public confidence in the judicial system to maintain their authority. The maintenance of that authority depends, inter alia, upon that element of the judicial process which requires that parties before the court be given and be seen to be given a fair hearing. It is necessary to a fair hearing that the court be attentive to the evidence presented by the

As underlined by the Presidency in *Ntaganda*, “in the present circumstances, where the decision under article 74 is yet to be rendered, there may be particularly close scrutiny from the Court’s observers, to issues of independence”.³⁹ As such, while the content of deliberations is confidential, the existence of deliberations and the procedures by which they are conducted are not. Judges may also waive the confidentiality of deliberations in order to address matters already in the public record.⁴⁰ Conversely, if confidentiality is invoked to preclude the disclosure of information that may reveal a procedural irregularity, the appearance of impartiality of the entire Chamber can be adversely impacted.⁴¹

IV. CONCLUSION AND RELIEF SOUGHT

29. When the Defence received the order vacating the date of the judgment, it expected that a new date would be finalized in the coming days. Weeks, and now months, have elapsed. While it is possible that the present application might be rendered moot by Judge Mindua’s immediate return to office, future delays cannot be discounted. Critically, the Defence has absolutely no information or foundation on which to provide an informed opinion to Mr Al Hassan. A wait-and-see approach is not sustainable at this juncture.

parties and to the submissions which they make. The appearance of unfairness in a trial can constitute a ‘miscarriage of justice’ within the ordinary meaning of that term. The appearance of a court not attending to the evidence and arguments of the parties and control of the conduct of the proceedings is an appearance which would ordinarily suggest to a fair and reasonable observer that the judicial process is not being followed. That is not to say that every minor distraction, inattention, sign of fatigue or even momentary sleepiness constitutes a failure of the judicial function. The courts are human institutions operated by human beings and there must be a margin of appreciation for human limitations. Otherwise the judicial system would be rendered unworkable by the imposition of unachievable standards. Nevertheless, it would be an unnecessarily narrow view of the judicial duty to say that appeal courts are to judge such lapses solely by reference to their effects upon the outcome of the case. In so saying, it must be accepted that the question will ordinarily fall for consideration in the application of statutory language, in this case the common form provision for criminal appeals reflected in s 6(1) of the *Criminal Appeal Act*.”

³⁹ *Ntaganda*, Decision on your request of 18 February 2019, [ICC-01/04-02/06-2326-Anx1](#), 19 March 2019, para. 6.

⁴⁰ *Brima et al*, Dissenting Opinion of Judge Doherty in [Decision on Brima-Kamara application for leave to appeal from decision on the re-appointment of Kevin Metzger and Wilbert Harris as lead counsel](#), SCSL-04-16-T, 5 August 2005, p. 1. See also Separate Opinion of Judge King, *Prosecutor v. Charles Taylor*, [Decision on Charles Ghankay Taylor’s motion for partial voluntary withdrawal or disqualification of Appeals Chamber Judges](#), SCSL-03-01-A-1323, 13 September 2012, paras 5-8, describing procedural irregularities occurring during the deliberation process.

⁴¹ ECHR, *Morice v. France*, Judgment, Application No. [29369/10](#), 23 April 2015, para. 89; ECHR, *Otegi Mondragon & Ors v. Spain*, Judgment, Application No. [4184/15](#), 6 November 2018, para. 67.

30. Accordingly, for the reasons set out above, the Defence respectfully requests the Trial Chamber to invite Judge Mindua to provide the parties and participants (on a confidential basis if necessary) the following information:
- a. The date on and from which Judge Mindua started to experience health issues that impacted his ability to participate in either the proceedings, the deliberations, or both;
 - b. If and when these health issues and restrictions were communicated to either Judge Prost or Judge Akane, or otherwise to the Presidency;
 - c. The extent to which the illness impacted Judge Mindua's ability to participate in deliberations;
 - d. Whether the illness is of a temporary or permanent nature; and
 - e. The likely prognosis.



Melinda Taylor
Counsel for Mr Al Hassan

Dated this 13th Day of March 2024
At The Hague, The Netherlands