Cour Pénale Internationale

International Criminal Court

30 January 2020

Report of the judges of the Court on Managing Transitions in the Judiciary

I. Introduction

1. "Transitions", for purposes of this memorandum, means the process of bringing the service of judges to a close upon the statutory end of their term; as the replacement judges commence their service.

2. A key challenge in the management of transitions in the judiciary is that posed by the end of mandate of one-third of the Court's judges every three years. This necessitates proper management of the circumstances resulting in the continuation in office of a judge who remains at the Court to complete a trial or appeal in accordance with article 36(10) of the Rome Statute, even though her or his mandate has expired.[1] To date, 10 judges have had extensions of mandate under this provision, the duration of which has ranged from several months[2] to several years (i.e. between approximately 1.5 – 4 years).[3] The present report focuses on this issue. It is an issue the current Presidency has taken up on its own to try and resolve – long before its resonance in aspects of the Draft Non-Paper produced by the Bureau of the ASP. By way of the latter, States Parties have identified the possible need to '[d]evelop and implement clear and firm procedures for managing transitions in the judiciary, such as the use of alternate judges, handover strategies etc'.[4]

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[1] Article 36(10) provides: 'Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber'.

[2] Judges Fulford and Odio Benito in *Lubanga*; Judges Monageng and Van den Wyngaert in the *Bemba* final appeal.

[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, see discussion in paragraph 4 below).

[4] Draft Non-Paper on 'Meeting the challenges of today for a stronger Court tomorrow: Matrix over possible areas of strengthening the Court and the Rome Statute System' ('Matrix'), dated 15 July 2019, distributed by the Secretariat of the Assembly of States Parties together with cover letter from the Presidency of the ASP on that date.

3. The judges have developed a number of practices aimed at ensuring that the management of transitions in the judiciary can occur with improved efficiency and predictability. Most recently, the introduction into the Chambers Practical Manual of time limits for the rendering of decisions and judgments at the pre-trial, trial and appeals levels should enhance the degree of predictability of the timing of the final stage of the proceedings: the deliberations and the rendering of decisions and judgments.[5] These time limits were agreed upon by the judges at their judicial retreat of 3-4 October 2019.

4. A further initiative has been agreement to the request of Judge Ozaki, who continued in office under article 36(10) to complete the *Ntaganda* trial, to serve the remainder of her judicial mandate on a non-full-time basis. The Presidency, in consultation with the judges, considered that paragraphs 3-4 of article 35 of the Rome Statute permit arrangements to be put in place whereby a judge may serve on a non-full-time basis, if possible, for purposes of completing proceedings that continue after the expiry of a judge's mandate. The appropriateness of any such non-full-time arrangement must be considered on a case-by-case basis.[6] But such appropriateness should be considered in every case in consultation with the affected judge.

5. More historically, the judges have not sought to expand the scope of article 36(10) of the Rome Statute. For example, in accordance with its literal reading, it is entirely accepted that it has no role to play at the pre-trial level. At the trial level, the Presidency and judges have considered that article 36(10) does not require a judge to remain at the Court for the reparations phase of proceedings, with trial judges on mandates which have been extended under article 36(10) generally completing their mandates following the issuing of the decision on sentencing (where relevant).[7] At the appeals level, to date, it has only been applied once.[8] In addition, the judiciary has consistently prioritised the need for timely completion of trials or appeals.[9].

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[5] ICC-CPI-20191129-PR1502, accessible at https://www.icc-cpi.int/Pages/item.aspx?name=PR1502.

[6] Noting 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. This means that the use of non-full-time arrangements would appear possible only at the request of the judge concerned. On the financial aspect of this issue, noting articles 35(4) and 49 of the Statute, the financial arrangements for a non-full-time judge are those established by the ASP as applicable to non-full-time judges in the Conditions of service and compensation of the judges, see Part III.A.II of ICC-ASP/2/10. Whether or not these conditions will generate significant cost savings for the Court, compared to the regime for compensation of a full-time judge, will depend on the specific circumstances of the judge and the stage of proceedings.

[7] Presidency, 'Decision on conclusion of term of office of Judge Sylvia Steiner', 13 May 2016, ICC-01/05-01/08-3403-AnxI; Presidency, 'Decision on conclusion of term of office of Judges Bruno Cotte and Fatoumata Dembele Diarra', 16 April 2014, ICC-01/04-01/07-3468-AnxI; See also Presidency, 'Decision referring the case of *The Prosecutor v. Thomas Lubanga Dyilo* to Trial Chamber II', 17 March 2015, ICC-01/04-01/06-3131.

[8] The judicial mandates of Judges Monageng and Van den Wyngaert were extended by less than four months in total in order to render the final appeal in *Bemba*, an appeal under article 81 of the Statute, the hearing of which had already begun, see Presidency, 'Notification concerning extension of mandate of judges in the Appeals Chamber', 6 March 2018, ICC-01/05-01/08-3613.

[9] For example, it has been agreed that judges whose mandates have been extended under article 36(10) cannot be assigned any additional judicial work and no longer participate in the decision-making aspects of the plenum of judges, as they must instead focus solely on completion of their trial or appeal.

6. Despite the best efforts of judges, however, significant challenges to ensuring the smooth transitions of judges, particularly in respect of resort to article 36(10), remain.

II. Limitations inherent to the Rome Statute system

The key practical challenge to the avoidance of recourse to article 36(10) is the lack of foreseeability of the length of the trial at the time a trial chamber must be composed

In addition, there are also a range of other limitations in the Rome Statute system:

Article 36(10) is mandatory and operates automatically.

The Rome Statute does not allow trial chambers to be recomposed at will and not at all after the hearing of a case has commenced.

Article 74(1) imposes very strict requirements of presence of trial judges at all stages of the proceedings.

The only practical methods of avoiding any possibility of recourse to article 36(10) would involve the highly inefficient use of judicial resources.

7. It must be acknowledged that the risk of extensions of mandate is one which is inherent to a judicial system where fixed and limited tenure of judges is combined with complex multi-year criminal proceedings. In including article 36(10), the Rome Statute's drafters expressly foresaw the need to ensure that, despite the limited tenure of its judges, the Court would be able to complete trials in a manner in which judicial independence and the rights of accused persons are fully respected.[10]

8. The Court must, of course, seek to minimise the risk of recourse to article 36(10) of the Statute in the first place. The Presidency assigns judges to trial chambers[11] in accordance with the need to balance a range of factors and is fully committed to giving particular consideration to the desirability of avoiding extensions of mandate. Yet, it remains a challenge that the length of trial proceedings at the ICC remains unpredictable – as they are at the *ad hoc* tribunals and in many parts of the world that pride the norm of a fair trial. At the stage of the composition of a trial chamber, it is impossible to foresee the total length of the trial proceedings.[12]

[10] Further, 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.
[11] Pursuant to article 61(11) of the Rome Statute.
[12] Although the new time limits for the rendering of decisions and judgments may contribute to enhanced predictability, this concerns only the final stage of proceedings, not the overall duration of the trial. Whilst it is anticipated that, with continued experience, the Court will continue to improve in this regard, it remains that the substantive and procedural complexity of a given case still cannot be definitively estimated at the time when a trial chamber must be composed

9. Such uncertainty has influenced the Court's practice under article 36(10). The majority of extensions of mandate which have occurred at the trial level to date involved judges who were assigned to the trials which ultimately resulted in their extension of mandate when they had *more than three years* remaining in their judicial mandates.[13]

10. While assigning judges to trials is an important tool, it cannot completely guard against recourse to article 36(10). The Rome Statute system contains a number of limitations which prevent the Court from entirely avoiding recourse to article 36(10). First, article 36(10) creates an automatic and obligatory ('*shall'*) extension of mandate – as soon the hearing of a trial or appeal has already commenced before a Chamber, the extension of any judge assigned to it occurs automatically.[14]

11. Further, the Court's statutory framework:

    - imposes strict requirements concerning the presence of judges at all stages of the trial;[15]
    - does not allow the Presidency to recompose trial chambers at will;[16] and
    - does not allow the composition of a trial chamber to be changed after the hearing of the case has commenced.[17]

12. These various factors create significant limitations on the capacity to manage recourse to article 36(10). 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').

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[13] Judges Fulford, Odio Benito, Diarra, Cotte, Steiner and Ozaki. The exceptions to this practice are Judge Blattmann, who was assigned to the *Lubanga* case two years before his judicial mandate was due to expire and Judge Tarfusser, who was assigned to the *Gbagbo and Blé Goudé* case with two years and three months remaining in his mandate.

[14] As a matter of judicial independence, the speed and length of the ongoing trial or appeal is regulated entirely by the Chamber in question. To date, the only situations in which the Presidency has been asked to play a role has been when there is a need to clarify whether article 36(10) is applicable (e.g. how to understand the meaning of 'the hearing of which has already commenced' in appeals proceedings). For example, this is the context by which the Presidency took the decision referred to at footnote 8 above.

[15] Article 74(1) provides, *inter alia*, that: [a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberation.

[16] See discussion at para. 12 below.

[17] By implication from the requirement in the first sentence of article 74(1) of the Rome Statute.

[18] Such as a successful request for excusal, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence ('Rules') or replacement, pursuant to rule 38 of the Rules, on compelling grounds such as resignation, disqualification, removal from office or death.

Moreover, even when the composition of a chamber *can* be changed, the requirement of presence at all stages of the trial pursuant to article 74 does not allow such change after the hearing has commenced, without the need to restart a trial. The *ad hoc* tribunals did not experience this handicap. A new Judge could be brought into a case without needing to restart a partly-heard trial.

13. In addition, the Rome Statute system also places significant limitations as to which judges may be placed in trial chambers in the first place. Significant is the requirement in article 39(4) of the Rome Statute that 'under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case'. This limits the pool of available judges who may be included in a trial chamber. It is worth noting that, more generally, article 39(4) creates more restrictive conditions for the use of judicial resources than its *ad hoc* tribunal counterparts.[19]

14. To actively guard against possible recourse to article 36(10) of the Rome Statute, the Presidency must avoid placing judges in trial chambers where they are in the final years of their mandate. At any given moment, one third of the Court's judges will have less than three years of their judicial mandate. If, as pointed out in paragraph 9 above, most extensions of mandates to date have involved judges with *more than three years* of their mandates remaining, logically, this may appear to indicate that it is necessary to avoid placing judges in trials for an even longer period of time prior to the end of their mandate (e.g. during the last 3 – 5 years of their mandate). In addition to limiting the number of judges who are available to be placed in trial chambers to dangerously low levels, this creates a considerable risk that judges could be under-utilised for a considerable portion of their judicial mandates. Such outcome is undesirable from a resource-management perspective. Further, once multiple concurrent trials are occurring, there is unlikely to be enough judges available to not assign judges in the last 3 – 5 years of their mandates to trials.

[19] At the ICTY, whereas initially the judge who issued the indictment could not sit in the trial chamber, rule 15(C) of the RPE of the ICTY was later modified to provide that the judge who reviews an indictment shall not be disqualified from sitting in either the Trial Chamber or the Appeals Chamber in that case: 'The Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61, shall not be disqualified for sitting as a member of the Trial Chamber for the trial of that accused. Such a Judge shall also not be disqualified for sitting as a member of the Appeals Chamber to hear any appeal in that case'. There is similarly no prohibition on a judge who reviews an indictment sitting in the trial in the RPE of the IRMCT, see rule 18(C). By way of further example, whereas article 39(4) provides that '[j]udges assigned to the Appeals Division shall serve only in that division', rule 27(C) of the ICTY Rules of Procedure and Evidence provides that '[t]he Presidency may at any time temporarily assign a member of a Trial Chamber or of the Appeals Chamber to another Chamber' (emphasis added).

III. Alternate judges

The Rome Statute's system of alternate judges has a number of significant shortcomings.

By requiring the alternate judge's presence at all stages of proceedings, but specifying that such judge shall not participate, it is simultaneously highly resource-intensive but also inhibits a judge from making a meaningful contribution.

Such inefficiency is compounded by the fact that the Court's available judicial resources, in view of its caseload, rarely makes it viable for the Court to use four judges to do the work of three. Such use of resources is only feasible when the Court has a very low caseload.

In addition, the use of alternate judges, even where viable, does not necessarily prevent recourse to article 36(10), which operates automatically. The Rome Statute system does not allow for a trial chamber to be recomposed after hearing has commenced merely because a reserve judge is available.

15. The principal difficulty in effectively using alternate judges is that article 74[20] 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.[21] This means that the capacity of an alternate judge to undertake other judicial work simultaneously is seriously affected. Assigning four judges to complete work which could otherwise be completed by three, poses significant challenges from a resource perspective. While the assignment of alternate

[20] The applicable legal framework provides as follows:
Article 74 provides that '[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberation. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending'.
Rule 39 of the Rules of Procedure and Evidence provides that '[w]here an alternate judge has been assigned by the Presidency to a Trial Chamber pursuant to article 74, paragraph 1, he or she shall sit through all proceedings and deliberations of the case, but may not take any part therein and shall not exercise any of the functions of the members of the Trial Chamber hearing the case, unless and until he or she is required to replace a member of the Trial Chamber if that member is unable to continue attending. Alternate judges shall be designated in accordance with a procedure pre-established by the Court'.
Regulation 16 of the Regulations of the Court provides that 'alternate judges may be designated by the Presidency, on a case-by-case basis, first taking into account the availability of judges from the Trial Division and thereafter from the Pre-Trial Division'.

[21] See e.g. 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.

judges may be possible where the Court has only 1-2 trials ongoing, it rapidly becomes a mathematical impossibility as the Court's caseload increases.[22]

16. In addition to being resource-intensive, the alternate judge model in the Rome Statute system is also unduly dismissive of the contribution which an alternate judge may make to a trial, even without being part of the formal decision-making process. This is a point of distinction between the Rome Statute system and that of the *ad hoc* tribunals, with the latter's system of reserve judges placing only the restriction that a reserve judge may not vote during deliberations, thus enabling such reserve judge to have a wider scope of participation.[23]

17. Even if an alternate judge is in place, the Presidency cannot simply remove a judge from a trial chamber and replace her or him with the alternate judge at will. As discussed at paragraphs 10 and 12 above, extensions of judges in ongoing trials under article 36(10) occur automatically. Even where an alternate judge is available, an automatic extension of a serving judge at the end of her or his mandate under article 36(10) would still occur, as there is no indication in the Statute that article 36(10) ceases to apply where there is an alternate judge available to 'take over' from the judge whose mandate is ending.[24] The only procedure currently available by which the alternate judge mechanism could unequivocally be used to prevent an article 36(10) extension, is if a judge whose mandate is complete, or will soon be complete, makes a request to be excused from the case, which is granted by the Presidency, with the alternate judge then stepping in as a replacement.[25]

18. In sum, the requirement of presence at each stage of the trial in article 74, together with the limitations on the role to be played by the alternate judge in rule 39, create an alternate judge mechanism which is extremely resource-intensive yet still significantly under-utilises judicial expertise and experience. In addition, it still seems unlikely to offer a means of avoiding recourse to article 36(10), given that it is not clear that re-composition of a Chamber in an ongoing case can be done at will even where an alternate judge is available.[26]

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[22] While it could be argued that alternate judges may not be needed for all trials, it is impossible to know, at the stage when a trial chamber is composed, in which trial a judge may ultimately become incapacitated, thus warranting the designation of an alternate.

[23] Indeed, increased active participation is implicit in the specification that an ICTY reserve judge may pose questions, see ICTY, Rules of Procedure and Evidence, IT/32/Rev.50, rule 15*ter*.

[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).

[25] There is precedent for such excusal requests being made by judges approaching the extension of their mandate, for example Judge Diarra in *Banda*, ICC-02/05-03/09-308-Anx2.

[26] This impracticability is further increased by regulation 16 of the Regulations of the Court which provides that alternate judges may be designated by the Presidency, first taking into account the availability of judges from the Trial Division and thereafter from the Pre-Trial Division. This procedure requires that judges in the Trial

IV. Substitute judges

The shortcomings of the Rome Statute's alternate judge mechanism mean that there is currently no means of addressing the inevitable situation of a judge becoming unavailable to complete a trial, the hearing of which has commenced. This gap in the Court's regime should be considered by States Parties.

19. The judges observe that, in contrast to the Rome Statute system, the *ad hoc* tribunals developed, over time, a multi-faceted range of possibilities for addressing various types of absences of judges, many of which currently have no equivalent within the Rome Statute system.[27] Of particular interest is the possibility of a substitute judge being assigned to a partly-heard case, with the possibility of proceedings continuing without requiring a rehearing, either where there is consent of the accused or the remaining Judges of the trial chamber unanimously consider that doing so would serve the interests of justice (with any latter decision being subject to appeal).[28] A substitute judge who joins a trial chamber shall certify that she or he has been familiarised with the record of proceedings.

20. The judges of the Court consider that the potential need to explore amendments to the Rome Statute system to include a mechanism allowing some form of replacement of judges after a trial has commenced, in exceptional predefined circumstances.

V. Conclusion

21. In the view of the judges, it appears likely that amendments to both the Statute and Rules would be the ideal means to address the various shortcomings and limitations which currently create difficulties in the management of transitions in the judiciary.

Division first be assigned as alternate judges, regardless of the period of time remaining in their judicial mandates. Regulation 16, may, of course, be amended by the Court to eradicate this problem, yet the more significant problems posed by article 74 and rule 39 remain, together with the resource problem that the Court simply does not have a sufficient number of available judges to appoint an inactive alternate judge if there is more than 1-2 ongoing trial proceedings.

[27] ICTY, Rules of Procedure and Evidence, IT/32/Rev.50, rule 15*bis*.

[28] ICTY, Rules of Procedure and Evidence, IT/32/Rev.50, rule 15*bis* (C) and (D) provides that:

(C) If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the remaining Judges of the Chamber shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of all the accused, except as provided for in paragraphs (D) and (G).

(D) If, in the circumstances mentioned in the last sentence of paragraph (C), an accused withholds his consent, the remaining Judges may nonetheless decide whether or not to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken from the decision to continue proceedings with a substitute Judge or the Appeals Chamber affirms that decision, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made.

22. As the system currently exists, a number of features make recourse to article 36(10) inevitable. Article 36(10) is mandatory and automatic in nature, thus limiting the capacity of the Court to make interventions. The Rome Statute system does not allow trial chambers to be recomposed at will and does not allow such chambers to be recomposed at all once the hearing has commenced. Other aspects of the Rome Statute, such as article 39(4), further limit the pool of available judges for any given trial. When combined with the practical reality that the overall duration of the Court's trials still remains unpredictable, recourse to article 36(10) cannot be entirely avoided. Attempting to do so would likely result in an undesirable and significant under-utilisation of judges during the latter half of their judicial mandate. In addition, as the Appeals Chamber is made up of all the judges of the Appeals Division,[29] there is no scope to limit which judges are hearing an appeal, regardless of the pending mandate duration of a judge.

23. Alternate judges do not offer a solution to the problem of extensions of mandate. Even if there is an alternate judge in place, the Rome Statute system assumes, in article 36(10), that an extension of mandate occurs and does not appear to provide for the replacement of a judge whose mandate has ended by an alternate judge, unless a request for excusal is made and granted, an outcome which cannot be guaranteed. Furthermore, there are significant problems of resources and practicality in using alternate judges at the Court, meaning that the appointment of alternate judges will be very difficult once the Court faces more than two ongoing trial proceedings.

24. Given the lack of viability of the model of alternate judges currently included in the Statute, the judges of the Court encourage that serious consideration be given to the development of a means to address the replacement of a judge once a hearing has already commenced in situations such as death, illness, resignation and similar. Rule 15*bis* (C) and (D) of the ICTY/ICTR Rules of Procedure and Evidence, may prove to be a starting point for consideration in this regard.

[29] Article 39(2)(b)(i) of the Rome Statute.

VI. Summary of relevant provisions

Key provision to be considered as part of Review	Potential problems	Alternatives approaches used in other international courts or tribunals
Article 36(10): 'a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.' (see also article 39(2)(b)(i): 'The Appeals Chamber shall be composed of all the judges of the Appeals Division')	Automatic application of the provision in all cases (no exception is included for situations where an alternate judge is available) In respect of art. 36(10)'s application at the appeals level, this should also be read in conjunction with art. 39(2)(b)(i), which requires that the functions of the Appeals Chamber be carried out by all judges of the Appeals Division. This, combined with the automatic application of article 36(10), means that there is no scope or possibility to alter the composition of the Appeals Chamber for the purpose of specific appeals, even where it is foreseeable that it may be prudent to do so because the end of mandates of judges are imminent.	This issue did not arise in the same way at the ICTY/ICTR due to a number of factors: • judges at the ICTY/ICTR were eligible for re-election (see article 13 *bis* (3)/article 13 *ter* (1)(e)) • the use of *ad litem* judges appointed to serve in specific trials as the need arises (article 13 *ter* (2)) • the possibility of a judge who is not able to continue sitting in an ongoing case being replaced (see rule 15 *bis* below, discussed below in the context of article 74).
Article 39(4): 'Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, *provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case*.'	Restrictions on pre-trial judges being used in trial chambers in the same case	ICTY/ICTR RPE rule 15(C) IRMCT RPE, rule 18(C) SCSL RPE, rule 15(D) See e.g. rule 15(C) ICTY/ICTR RPE: 'The Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61, shall not be disqualified for sitting as a member of the Trial Chamber for the trial of that accused. Such a Judge shall also not be disqualified for sitting as a member of the Appeals Chamber to hear any appeal in that

		case.’
Article 74(1): ‘. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.’ Rule 39: ‘Where an alternate judge has been assigned by the Presidency to a Trial Chamber pursuant to article 74, paragraph 1, he or she shall sit through all proceedings and deliberations of the case, but may not take any part therein and shall not exercise any of the functions of the members of the Trial Chamber hearing the case, unless and until he or she is required to replace a member of the Trial Chamber if that member is unable to continue attending. Alternate judges shall be designated in accordance with a procedure pre-established by the Court.’	Requirement of physical presence at all stages of the trial – this makes it impossible for the composition of a trial chamber to be changed after the hearing of a trial has commenced This means that unless an alternate judge has been designated in advance, there is no scope for dealing with the unavailability of a judge after a hearing has commenced (e.g. death, illness, resignation etc.) The role of the alternate judge, as set out in rule 39 is both highly resource intensive (this being connected to art. 74(1)) and fails to give an alternate judge a meaningful role	ICTY/ICTR RPE rule 15 *bis* (esp. C onwards) ICTY RPE rule 15 *ter* See e.g. rule 15 bis (C) ICTY/ICTR RPE: ‘Absence of a Judge (A) If (i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and (ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so, those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days. (B) If (i) a Judge is, for illness or urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and (ii) the remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case continue in the absence of that Judge, then (a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied it is in the interests of justice that they be disposed of notwithstanding the absence of that Judge, and (b) the remaining Judges of the Chamber may

		adjourn the proceedings. (C) If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the remaining Judges of the Chamber shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of all the accused, except as provided for in paragraphs (D) and (G). (D) If, in the circumstances mentioned in the last sentence of paragraph (C), an accused withholds his consent, the remaining Judges may nonetheless decide whether or not to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken from the decision to continue proceedings with a substitute Judge or the Appeals Chamber affirms that decision, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made. (E) For the purposes of paragraphs (C) and (D), due consideration shall be given to paragraph 6 of Article 12 of the Statute. (F) Appeals under paragraph (D) shall be filed within seven days of filing of the impugned

		decision. When such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless (i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or (ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from the filing of the written decision. (G) If, in a trial where a reserve Judge has been assigned in accordance with Rule 15 ter, a Judge is unable to continue sitting and a substitute Judge is not assigned pursuant to paragraphs (C) or (D), the trial shall continue with the reserve Judge replacing the Judge who is unable to continue sitting. (H) In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.'