



**JOINT DISSENTING OPINION OF JUDGE LUZ DEL CARMEN
IBÁÑEZ CARRANZA AND JUDGE SOLOMY BALUNGI BOSSA**

In the matter of the Request to compose an article 110(3) Panel to the Appeals Chamber concerning reduction of sentence of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

I. INTRODUCTION

1. In today's "Decision appointing three judges of the Appeals Chamber for the review concerning reduction of sentence of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud" (hereinafter: "Decision Appointing Three Judges"),¹ the majority of the Appeals Chamber (hereinafter: "Majority") does not address the preliminary issue of the composition of the Appeal Chamber to select the panel to review the sentence of Mr Al Hassan. There is a preliminary issue both of us (Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa) feel compelled to raise, concerning the inclusion of Judge Akane Tomoko on the current bench. We are concerned that given her previous substantial involvement in the conviction and sentence decisions of Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (hereinafter: "Mr Al Hassan"), she ought not to have participated in the composition of the Appeals Chamber selecting the panel.

2. The Majority has not given its view on this aspect but we consider that because of its importance and implications, it is crucial to register our dissent to the composition of the Appeals Chamber, to expand the legal implications of this and state categorically that we consider the decision to select a panel to be illegal because the Appeals Chamber that issued it was illegally constituted.

¹ Decision appointing three judges, 3 February 2025.

II. PROCEDURAL HISTORY

3. On 26 June 2024, Trial Chamber X rendered its decision entitled “Trial Judgment” (hereinafter: “Conviction Decision”), in which Mr Al Hassan was convicted on eight counts of crimes against humanity and war crimes.²

4. On 11 July 2024, the *ad hoc* Presidency granted a request for excusal of Judge Tomoko Akane and reconstituted the Appeals Chamber (hereinafter: “Excusal Decision Annex”).³

5. On 18 September 2024, the Defence and the Prosecutor filed their respective notices of appeal against the Conviction Decision.⁴

6. On 20 November 2024, the Trial Chamber rendered its decision entitled “Sentencing Judgment”,⁵ in which it sentenced Mr Al Hassan to a total period of imprisonment of 10 years and ordered that the time that he has spent in detention from 28 March 2018 and onwards be deducted from the total period of imprisonment (hereinafter: “Sentencing Decision”).⁶

7. On 17 December 2024, the Defence and the Prosecutor filed, pursuant to rule 152 of the Rules of Procedure and Evidence (hereinafter: “Rules”), their respective notices of discontinuance of the appeals against the Conviction Decision (hereinafter, jointly: “Notices of Discontinuance”).⁷

8. On 19 December 2024, the Appeals Chamber, by majority, with Judge Gocha Lordkipanidze and Judge Erdenebalsuren Damdin dissenting, invited the legal

² [Trial Judgment](#), ICC-01/12-01/18-2594-Red (confidential version filed on the same day, ICC-01/12-01/18-2594-Conf).

³ [Decision replacing a judge in the Appeals Chamber](#), 11 July 2024, ICC-01/12-01/18-2604 and [Annex to the Decision replacing a judge in the Appeals Chamber](#), 11 July 2024, ICC-01/12-01/18-2604-Anx.

⁴ [Defence Notice of Appeal against the Trial Judgment](#), ICC-01/12-01/18-2648; [Prosecution notice of appeal](#), ICC-01/12-01/18-2649.

⁵ [Sentencing Judgment](#), ICC-01/12-01/18-2662.

⁶ [Sentencing Decision](#), p. 68.

⁷ [Defence Notice of Discontinuance of Appeal against Trial Judgment rendered by Trial Chamber X on 26 June 2024](#), ICC-01/12-01/18-2667, with [Annex A](#); [Prosecution Notice of Discontinuance of its Appeals against the Trial Judgment of Trial Chamber X dated 26 June 2024](#), ICC-01/12-01/18-2668.

representatives of the participating victims to file observations, not exceeding 10 pages, on the Notices of Discontinuance.⁸

9. On 30 December 2024, the legal representatives of victims filed their observations (hereinafter: “Victims’ Observations”).⁹

10. On 9 January 2025, the Prosecutor and the Defence submitted their respective responses to the Victims’ Observations (hereinafter: jointly, “Responses”).¹⁰

11. On 13 January 2025, the Appeals Chamber issued an order allowing the legal representatives of victims to file a reply to the responses of the Prosecutor and the Defence by 31 January 2025.¹¹ The Appeals Chamber underlined that it “will provide further indications as to the procedural steps to be followed”.¹²

12. On 16 January 2025, the Defence filed its “Request to compose an article 110(3) panel” (hereinafter: “Request”), before the Appeals Chamber in its formal composition which included Judge Tomoco Akane. The Defence requested the Appeals Chamber to take the necessary steps to compose a panel of three judges to review Mr Al Hassan’s sentence to determine whether it should be reduced.¹³

13. On 31 January 2025, the legal representatives of victims filed their Reply (hereinafter: “Victims’ Reply”).¹⁴

⁸ [Order concerning reclassification and the filing of observations on the notices of discontinuance of the appeals](#), ICC-01/12-01/18-2670, para. 9.

⁹ [Observations des Représentants légaux des victimes relatives aux désistements d’appel](#), ICC-01/12-01/18-2671, with *ex parte* and public redacted [Annex A](#) and [Annex B](#).

¹⁰ [Prosecution Response to the Observations of the Legal Representatives of the Victims on the Discontinuances of the Appeals](#), ICC-01/12-01/18-2672; [Defence Response to the Observations of the Legal Representatives of the Victims Regarding the Discontinuance of Appeals](#), ICC-01/12-01/18-2673 (hereinafter: “Defence’s Response to Victims’ Observations”).

¹¹ [Order on procedural matters](#), ICC-01/12-01/18-2674 (hereinafter: “Order on procedural matters”).

¹² [Order on procedural matters](#), para. 9.

¹³ [Request to compose an article 110\(3\) panel](#), ICC-01/12-01/18-2675, para. 4.

¹⁴ *Réplique des représentants légaux des victimes aux observations des parties*, 31 January 2025, ICC-01/12-01/18-2677.

III. MERITS

A. Whether the Request is properly before the Appeals Chamber in its present composition

14. The Defence filed the Request before “the standard composition of the Appeals Chamber rather than the bench assigned to the Al Hassan appeal”.¹⁵ It submits that, in all prior cases where a review concerning reduction of sentence has been conducted, the panel was appointed by “the Appeals Chamber, sitting in its formal composition, rather than the specific appellate bench assigned to hear appeals arising from the Trial Judgment or Decision on Sentence”.¹⁶

15. In the Decision Appointing Three Judges, the Majority acting in its “formal composition”, which includes Judge Tomoko Akane, proceeded to appoint three judges, pursuant to rule 224 of the Rules. Judge Tomoko Akane formed part of Trial Chamber X and issued, together with the other members of that Chamber, the Conviction Decision and the Sentencing Decision by virtue of which Mr Al Hassan was sentenced to 10 years of imprisonment.

1. *Legality of the composition of the Appeals Chamber*

16. At the outset, we note that pursuant to article 41(2)(a) of the Statute, “[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground”. The provision further states that “[a] judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court [...]”

17. In addition, regulation 12 of the Regulations of the Court (hereinafter: “Regulations”) is categorical that “[u]nder no circumstances shall a judge who has participated in the pre-trial or trial phase of a case *be eligible* to sit on the Appeals Chamber hearing that case”.¹⁷

18. Based on our understanding of the above provisions, there is an absolute prohibition for a judge who has participated in a prior phase of the case to sit on the

¹⁵ [Request](#), para. 4.

¹⁶ [Request](#), para. 4.

¹⁷ Emphasis added.

Appeals Chamber hearing “that case”. The issue before the Appeals Chamber is the constitution of a review panel to consider the sentence passed by Trial Chamber X, of which Judge Tomoko Akane was a member. As such, in our view, she should not be involved in any matter concerning Mr Al Hassan in the Appeals Chamber, considering her previous role and involvement in rendering the conviction and sentencing decisions.

19. Any normative act (whether general or particular) must be issued by the competent body, meaning the legitimate body authorised by a higher norm to produce the relevant normative effect. If a non-competent body issues a norm or act, the principle of legitimacy would be violated, and the act could be deemed invalid.¹⁸

20. We therefore consider that the Appeals Chamber as currently constituted has no legal authority to appoint the panel to review Mr Al Hassan’s sentence, as one of its members has legal impediments as explained above. As a consequence, we consider that the Majority decision setting up the panel of three judges pursuant to rule 224 of the Rules is illegal.

2. *The Impartiality of the Appeals Chamber*

21. We also consider that Judge Tomoko Akane’s participation in the selection of the panel calls into question the impartiality of the Appeals Chamber as a whole. Judge Tomoko Akane has for some time been aware of her substantial involvement in the *Al Hassan* case at trial and how this may be perceived by a reasonable observer if she were to participate in the appeal proceedings in this case. To cite a concrete example, on 5 July 2024, Judge Tomoko Akane filed before the Presidency a “Request for excusal pursuant to article 41(1) of the Statute and Rule 33 of the Rules of Procedure and Evidence”.¹⁹ The request concerned her excusal from sitting in respect of the appeal against the Conviction Decision as well as all future appeals that may arise in this case, based on her “previous involvement as a judge of Trial Chamber X which rendered the Trial Judgment in the Case”.²⁰

¹⁸ See, in this regard, H. Kelsen, *Teoría pura del derecho*, Traducción de la segunda edición en alemán, por Roberto J. Vernengo (Universidad Nacional Autónoma de México, 1982), pp. 202, 282. See also L. Ferrajoli, *Las Fuentes de Legitimidad de la Jurisdicción* (Reforma Judicial: Revista Mexicana de Justicia, 2010), pp. 11-14.

¹⁹ [Excusal Decision Annex.](#)

²⁰ [Excusal Decision Annex.](#)

22. The *ad-hoc* Presidency considered the request for excusal from sitting on the appeal in the case and granted it, underlining that:

the impartiality of a judge who was a member of the trial chamber which rendered the Trial Judgment, might be reasonably be doubted for the purpose of sitting on any appeal in that case. Given [the Judge's] involvement in rendering the Trial Judgment, the *ad hoc* Presidency finds the Request for excusal to be well founded and hereby grants it.²¹

23. This happened before the appeals briefs were filed. The appeal proceedings in the *Al Hassan* case are almost coming to an end following the filing of the Notices of Discontinuance by both Mr Al Hassan and the Prosecutor, the Victims' Observations, the Responses, and the Victims' Reply. The Appeals Chamber is enjoined to appoint a panel of three judges to consider whether Mr Al Hassan's sentence should be reduced under article 110 of the Statute.

24. The current proceedings emanate from the same case against Mr Al Hassan. It is our considered view that the reasons given by the *ad hoc* Presidency previously in granting Judge Tomoko Akane's request for excusal are still valid. In our view, Judge Tomoko Akane is sitting in the Appeals Chamber on the *Al Hassan* case, in contravention of article 41(2)(a) of the Statute and regulation 12 of the Regulations.

25. We acknowledge that the review concerning the reduction of sentence under article 110 of the Statute is not part of the appeal proceedings in this case. As such, the Excusal Decision does not extend to the sentence review process. However, in our view, the same reasons underlying the Excusal Decision apply in the present situation..

3. *Impartiality*

26. The integrity of any judicial process depends on the impartiality of the judges involved. It is a fundamental principle that all decisions of the Court be made by judges with no appearance of bias and that any reasonable appearance of bias in the process is eliminated.

27. However, without further consideration of the matter, the Majority proceeds to issue the present decision in its original composition. It is with the greatest respect for our colleagues and under the mandate of our conscience that we issue this dissenting

²¹ [Excusal Decision Annex](#).

opinion to set out our disagreement, and the reasons thereof, with this aspect of the Decision appointing three judges. Indeed, our disagreement is based on the need to observe one of the most fundamental principles in criminal proceedings and indeed one that lies at the foundation for the rule of law, the principle of impartiality

28. The right to an “impartial tribunal” is a fundamental right, protected in article 14(1) of the International Covenant on Civil and Political Rights. In the interpretation of the Human Rights Committee, “(t)he requirement of [...] impartiality of a tribunal [...] is an absolute right that is not subject to any exception”.²² The interpretation and application of the sources of law set out in article 21(1) and (2) of the Statute must be consistent with internationally recognised human rights and be without any adverse distinction founded, *inter alia*, on those grounds stipulated in article 21(3) of the Statute.

29. The principle of impartiality is of such importance to the Court that it applies to the judges as soon as they have made their solemn undertaking, pursuant to article 45 of the Statute, to exercise their functions “impartially and conscientiously”. A claim of impartiality may be concerned not with actual partiality but with the appearance of grounds to doubt impartiality, the relevant standard of assessment being whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias or a lack of partiality.²³ The legal framework of the Court provides for an elaborated system of checks and counterbalances “as it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done”.²⁴

30. We recall that Judge Tomoko Akane’s excusal request was considered well-founded and it was granted. In the Excusal Decision, the ad-hoc Presidency replaced

²² Human Rights Committee, Ninetieth session, Geneva, 9 to 27 July 2007, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, para. 19.

²³ See for example, [Annex I-Red to the Notification of the Decision of the Plenary of Judges on the Defence Request for the Disqualification of Judge Kuniko Ozaki from the case of *The Prosecutor v. Bosco Ntaganda*](#), 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 32.

²⁴ United Kingdom, King’s Bench Division, *The King v. Sussex Justices, Ex parte McCarthy*, 9 November 1923, [1924] 1K.B. 256, at p. 259.

Judge Tomoko Akane “for the purpose of hearing appeals in the *Al Hassan* case, as long as the need for [her] replacement in the Appeals Chamber persists”.²⁵

31. The Plenary of Judges has offered ample guidance on avoiding bias. In a recent request for disqualification of a judge, the Plenary stated that:

The Plenary of Judges has consistently considered that the question of impartiality should be viewed from the objective perspective of whether a fair-minded and informed observer, having considered all the facts and circumstances, would reasonably apprehend bias in the judge. It has regularly emphasised that such fair-minded person is an objective observer, whose consideration of facts and circumstances included an understanding of the nature of a judge’s profession. The Plenary specifies that, in forming a view regarding the appearance of bias, the fair-minded observer should take into account *the entire context of the case*.²⁶

32. Moreover, in the *Banda and Jerbo* case, the majority of Plenary of Judges emphasised that “such test was concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension was objectively reasonable”.²⁷

33. Taking into account the entire context of this case, we consider that a reasonable observer would reasonably apprehend bias in the decision-making process of the Appeals Chamber because of the participation of Judge Tomoko Akane in the Decision Appointing Three Judges to select a panel to review Al Hassan’s sentence.

4. Previous jurisprudence

34. We believe that the Majority should have explained why, despite the clear provisions in the statutory framework and the background spelled out above, it decided to issue the present decision. We are aware that in the *Katanga* case, one of the judges who was part of Trial Chamber II issuing the conviction and sentence decisions was also part of the Appeals Chamber appointing the three judges for the review concerning the reduction of sentence, as well as one of the three appointed judges.²⁸ Nonetheless,

²⁵ [Excusal Decision Annex](#), p. 3.

²⁶ [Reasons for the Decision on the ‘Application for the Disqualification of Judges’ filed on 31 October 2024 \(ICC-01/22-92-Anx\)](#), 22 November 2024, ICC-01/22-107, para. 20 (emphasis added).

²⁷ [Decision of the plenary of the judges on the “Defence Request for the Disqualification of a Judge” of 2 April 2012](#), 5 June 2012, ICC-02/05-03/09-344-Anx, para. 13.

²⁸ [Decision on the review concerning reduction of sentence of Mr Germain Katanga](#), 13 November 2015, ICC-01/04-01/07-3615.

pursuant to article 21(2) of the Statute the Court is not bound to apply principles and rules of law as interpreted in previous decisions. In our view, these precedents were made *per incuriam*, given the clear wording of article 41(2)(a) of the Statute.

35. Notably, in the *Gbagbo and Blé Goudé* case, the Appeals Chamber emphasised that pursuant to article 21(2) of the Statute, the Court may apply principles and rules of law as interpreted in its previous decisions but it is not obliged to follow its previous interpretations of principles and rules of law through binding *stare decisis* and retains the discretion as to whether to do so.²⁹ Similarly, in the *Said* case, the Appeals Chamber emphasised the discretion of a chamber to adhere to its previous decisions. Absent convincing reasons, the Appeals Chamber will not depart from its previous decisions, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions.³⁰

36. However, in the present case, as spelled out in detail below, there are clear and convincing reasons to depart from previous jurisprudence, which allowed judges who had sat in previous phases of the case, to sit on the Chamber selecting a panel for sentence review.

5. *Hierarchy of norms*

37. First of all, the provisions of article 41(2) of the Statute are clear and unambiguous. The hierarchy of norms set down in article 21(1) of the Statute enjoin the Court to apply in first place the provisions of the Statute, Elements of Crimes, and Rules. Given the clarity of the above provisions, it is our view that the previous decisions were made *per incuriam*.

38. In any event, the factual circumstances in the *Katanga* precedent to those of the situation at hand are different. By the time the review concerning the reduction of sentence took place, the *Katanga* case was no longer being heard at the Court. The

²⁹ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Reasons for the “Decision on the ‘Request for the recognition of the rights of victims authorised to participate in the case to automatically participate in any interlocutory appeal arising from the case and in the alternative, the application to participate in the case of Prosecutor v. Gbagbo and Ble Goude](#), 31 July 2015, ICC-02/11-01/15-172, para. 140.

³⁰ *The Prosecutor v. Mahamat Said Abdel Kani*, [Judgment on appeal of M. Mahamat Said Abdel Kani against the decision of Trial Chamber VI entitled “Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions](#), 19 May 2022, ICC-01/14-01/21-318, para. 45.

conviction and the sentence decisions were final. The defence did not challenge the composition of the Appeals Chamber for purposes of the sentence review, in circumstances where the relevant judge, in her dissenting opinion filed as part of Trial Chamber II, was of the view that Mr Katanga should have been acquitted of all charges.³¹

39. Although a review concerning the reduction of sentence is not an appeal proceeding, the reasons for the re-composition of the Appeals Chamber remain entirely valid, especially when there are reasons to believe that a fundamental right, such as the right to impartiality, could be affected.

6. *Nature of the decision*

40. There may be an argument that the decision on the constitution of the review panel is administrative, as opposed to judicial, and therefore not subject to the impartiality considerations spelled out above. In our view, the decision to set up a panel pursuant to article 110 of the Statute is taken as part of judicial proceedings. In fact, all decisions made by a chamber in conducting any Court proceedings under the Statute are judicial. We believe that it cannot be a valid argument to claim that the decision to select a panel to review sentence is purely administrative. First, this distinction does not appear in the Statute, which seems to suggest the opposite, as it states that “[a] judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been *involved in any capacity* in that case before the Court [...]”.³²

41. Second, even if this criterion was warranted (which we dispute), we note that Judge Tomoko Akane excused herself from the Presidency so as not to take similar “administrative measures”, such as the appointment of Judge Miatta Maria Samba to the Appeals Chamber.³³ Consistently, she should have recused herself from participating in the Appeals Chamber for the creation of the sentence review panel.³⁴

³¹ [Dissenting Opinion of Judge Christine Van den Wyngaert](#), 23 May 2014, ICC-01/04-01/07-3436-Anx1.

³² Emphasis added.

³³ [Decision replacing a judge in the Appeals Chamber](#), 11 July 2024, ICC-01/12-01/18-2604.

³⁴ The *ad-hoc* Presidency decided (i) on Judge Tomoko Akane’s request for excusal and (ii) on the more administrative side of the excusal process; namely the selection and appointment of another ICC judge to the Appeals Chamber for purposes of the appeals proceedings in the Al Hassan case. This rather “administrative” side of the excusal process was not retained by the Presidency, sitting in its formal composition, but discharged by the *ad-hoc* Presidency. See [Excusal Decision Annex](#), p. 3.

42. Third, the argument that this is an administrative decision is misleading. This is a judicial decision of the Appeals Chamber, which even required deliberations on the composition of the Chamber and on the panel. Any decision made will be filed in the record. Administrative decisions are rarely, if ever, filed in the record of proceedings.

43. Fourth, even if it were an administrative decision, which we dispute, Judge Tomoko Akane should not sit on the Appeals Chamber to render such decision, to avoid the appearance of bias.

44. In our view, the principle of legality and compliance with the law call into question the issuing of this decision, as the authority issuing it lacks legitimacy. Our view is that the decision is invalid. One of the members of the Appeals Chamber is legally prohibited from issuing this decision, based on the rules and principles discussed above.

45. Contrary to the position of the Majority, Mr Al Hassan did appeal his conviction. The Prosecutor also filed an appeal. Later, the parties filed the Notices of Discontinuance. The submissions regarding the Notices of Discontinuance that have been received thus far partially overlap with the considerations relevant to the review concerning the reduction of sentence, with the Victims' Reply received as recently as 31 January 2025.³⁵ Although a decision from the Appeals Chamber will be rendered thereafter, proceedings are ongoing and we would have found it appropriate to postpone the appointment of three judges of the Appeals Chamber for purposes of conducting the review with respect to reduction of sentence until the appeals proceedings are formally terminated.

IV. CONCLUSIONS

46. Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Bossa are of the view that:

- a. The Appeals Chamber has not been properly constituted for purposes of the present decision, as it has been established in contravention of article 4(2)(a) of the Statute and regulation 12 of the Regulations.

³⁵ See [Victims' Observations](#); [Defence's Response to Victims' Observations](#), para. 19.

- b. The decision on the constitution of the panel for the review concerning the reduction of sentence has been taken outside the legal framework of the Court. The Decision Appointing Three Judges is therefore null and void and has as such no legal validity.
- c. The remedy should be that a panel should be appointed by an Appeals Chamber properly constituted.

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



**Judge Luz del Carmen Ibáñez
Carranza**



Judge Solomy Balungi Bossa

Dated this 4th day of February 2025
At The Hague, The Netherlands