



Le Président
The President

Internal memorandum
Memorandum interne

To À Date Ref. Subject Objet	Judge Rosario Salvatore Aitala, First Vice-President Judge Reine Alapini-Gansou, Second Vice-President 30 January 2025 2025/PRES/00022 Request for excusal pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence	From De Through Via Copies	Judge Tomoko Akane, President 赤根智子
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1. On 28 January 2025, Pre-Trial Chamber III, in the case of *The Prosecutor v. Joseph Kony*, (the 'case'), acting by majority, granted leave to appeal on the issue of whether 'the Chamber's reading of article 61(2)(b) of the Statute, and in particular its conclusion that it is not necessary for a person to make a first appearance before the Court for him or her to qualify as "a person who cannot be found", is a "central legal error"',¹ considering, by majority, that this issue fulfilled the requirements for appeal under article 82(1)(d) of the Rome Statute (the 'Interlocutory Appeal').²
2. I recall that prior to my election as President of the Court on 11 March 2024, at which time I joined the Appeals Division, I was, *inter alia*, a member of Pre-Trial Chamber II, to which the situation in Uganda was then assigned. In this capacity, I participated in a number of decisions in the case. In particular, I participated in several decisions addressing issues concerning the holding of a confirmation of charges hearing in the case in the absence of the accused.³ These decisions may appear to be connected to the subject-matter of the Interlocutory Appeal.

¹ See Pre-Trial Chamber III, *The Prosecutor v. Joseph Kony*, Decision on the 'Kony Defence request for leave to appeal [the] "Decision on the criteria for holding confirmation of charges proceedings *in absentia*"', 28 January 2025, ICC-02/04-01/05-551, para. 16.

² Pre-Trial Chamber III, *The Prosecutor v. Joseph Kony*, Decision on the 'Kony Defence request for leave to appeal [the] "Decision on the criteria for holding confirmation of charges proceedings *in absentia*"', 28 January 2025, ICC-02/04-01/05-551, para. 38.

³ See Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony*, Decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence, 23 November 2023, ICC-02/04-01/05-466; Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony*, Second decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence, 4 March 2024, ICC-02/04-01/05-481.

3. Pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence (the 'Rules'), I hereby request to be excused from sitting in the Interlocutory Appeal. In addition, I request to be excused from any functions of the Presidency in respect of this request for excusal in order to avoid any question of conflict of interest.
4. I recall that article 41(2)(a) of the Rome Statute provides that a judge shall not participate in any case in which her impartiality might reasonably be doubted on any ground and that this includes that she should not participate in a case where 'that judge has previously been involved in any capacity in that case before the Court'. I also note that regulation 12 of the Regulations of the Court provides 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'.
5. In my view, there is a potential objectively reasonable appearance of bias should I participate in the Interlocutory Appeal given that there appears to be overlap between legal issues which I considered in the case as a judge of Pre-Trial Chamber II and those which form part of the Interlocutory Appeal. In particular, issues concerning the holding of a confirmation of charges hearing in the case in the absence of the accused appear to be at the core of both the Interlocutory Appeal and several decisions in which I participated as a judge of Pre-Trial Chamber II. This creates a risk that it may appear that I have a predetermined opinion on matters in the case which are within the scope of the Interlocutory Appeal. In these circumstances, I believe that the standard of judicial impartiality requires my excusal from the Interlocutory Appeal. I note that the present excusal request relates only to the Interlocutory Appeal.
6. I note that rule 33(2) of the Rules provides for the confidentiality of this request. Please be advised that I do not object to the *ad hoc* Presidency making my request or the reasons for its eventual decision public