



La Présidence
The Presidency

Internal memorandum
Memorandum interne

To À	Judge Tomoko Akane	From De	The <i>ad hoc</i> Presidency
Date	10 February 2025	Through Via	
Ref.	2025/PRES/00022-2	Copies	
Subject Objet	Decision on your request of 30 January 2025 for excusal pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence		

The *ad hoc* Presidency, composed of Judge Rosario Salvatore Aitala, Judge Reine Alapini-Gansou and Judge Luz del Carmen Ibáñez Carranza, has before it a request from Judge Tomoko Akane (the 'Request') dated 30 January 2025, seeking excusal from her functions in an interlocutory appeal, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence (the 'Rules').¹ The Request is made on the basis of the risk of an appearance of bias.

The Request is granted.

Factual Background

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 pursuant to article 82(1)(d) of the Rome Statute, in response to a Defence Request (the 'Interlocutory Appeal').² The issue in respect of which leave to appeal was granted pertains to whether there was a legal error in the interpretation of article 61(2)(b) of the Rome Statute, particularly

¹ Memorandum with Presidency internal reference 2025/PRES/00022.

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.

in the 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”’.³

By memorandum dated 30 January 2025, Judge Akane sought excusal from her functions in the Appeals Chamber in connection with the Interlocutory Appeal, on the basis that, as a member of Pre-Trial Chamber II she had previously participated in several decisions in the case which appear to be connected to the subject-matter of the Interlocutory Appeal.⁴ Recalling the applicable standards of impartiality, Judge Akane emphasised that the overlap between the legal issues she had decided in the case as a member of Pre-Trial Chamber II and those in the Interlocutory Appeal created a risk that it may appear that she had predetermined matters in the case which fell within the scope of the Interlocutory Appeal, thus requiring her excusal from such appeal.

Noting that the Request also indicates the need for excusal from any Presidency functions in respect of the Request itself, an *ad hoc* Presidency was formed by virtue of the operation of regulation 11(2) of the Regulations of the Court (the ‘Regulations’).

Decision

The Request is properly before the *ad hoc* Presidency in accordance with article 41(1) of the Statute and rule 33(1) of the Rules.

Article 41(1) of the Statute provides, in relevant part, that ‘[t]he Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute’. Rule 33(1) of the Rules provides, in relevant part, that a judge ‘seeking to be excused from his or her functions shall make a request in writing to the Presidency, setting out the grounds upon which he or she should be excused.’

Noting the terms of those provisions, the *ad hoc* Presidency first grants Judge Akane’s request for excusal from the consideration by the Presidency of her Request, as a conflict of interest may arise should she not be so excused. Pursuant to regulation 11(2) of the Regulations, Judge Akane is treated as being unavailable for present

³ 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.

⁴ 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.

purposes and has been replaced in the *ad hoc* Presidency by Judge Luz del Carmen Ibáñez Carranza.

The *ad hoc* Presidency, having considered the matter before it, grants the Request to be excused from the Interlocutory Appeal. In coming to the conclusion that the Request is well-founded, the Presidency took particular note of the high degree of congruence between the legal issue in the Interlocutory Appeal and legal issues already decided by Judge Akane as a judge of Pre-Trial Chamber II. In particular, the interpretation of article 61(2)(b) of the Rome Statute and the requirements for an *in absentia* confirmation hearing in the case have already been considered by Judge Akane as a judge of Pre-Trial Chamber II.⁵ Given this congruence between legal issues, the *ad hoc* Presidency considers that the Request is well founded.

In light of the above, the *ad hoc* Presidency, pursuant to rule 38 of the Rules and regulation 15 of the Regulations, shall treat Judge Akane as unavailable and proceed with her replacement in the Appeals Chamber for the Interlocutory Appeal.

The *ad hoc* Presidency shall make both this decision public and the Request public, noting that Judge Akane has expressed her consent in accordance with rule 33(2) of the Rules.

⁵ 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.