

Annex 2

(Public)



Internal memorandum
Memorandum interne

To À	Judge Tomoko Akane	From De	The <i>ad hoc</i> Presidency
Date	28 June 2024	Through Via	
Ref.	2024/PRES/00122-03	Copies	
Subject Objet	Decision on your request of 19 June 2024 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 Sergio Gerardo Ugalde Godínez, has before it a request from Judge Tomoko Akane ('Request') dated 19 June 2024, seeking excusal from her functions as a judge of Trial Chamber X, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence ('Rule').¹ This Request is made on the basis of workload and the need to safeguard the proper administration of the Court.

The Request is granted.

Factual Background

On 15 April 2024, Trial Chamber X scheduled the date of delivery for its Trial Judgment for 26 June 2024.² On 26 June 2024, Trial Chamber X filed its Trial Judgment in which Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud was convicted, by majority, under eight counts of crimes against humanity and war

¹ Memorandum with Presidency internal reference 2024/PRES/00122-01.

² Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Further order scheduling the delivery of the Trial Judgment, 15 April 2024, ICC-01/12-01/18-2591, p. 4.

crimes,³ which included three separate and partly dissenting opinions, filed on 26 June 2024⁴ and 28 June 2024.⁵

By confidential memorandum dated 19 June 2024, Judge Akane sought excusal from her functions as a judge of Trial Chamber X. 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') on 20 June 2024.

The Request provides as follows, in relevant part:

I wish to request that, after Trial Chamber X has issued its Trial Judgment, if it is necessary to proceed to sentencing under article 76, that I be excused from sitting on Trial Chamber X for the remainder of the *Al Hassan* case, in accordance with article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence (the 'Rules'). Accordingly, this request becomes effective only as of the delivery of the Trial Judgment and only if relevant in view of its content. I make this request on the basis of excessive workload, noting the current workload in the *Al Hassan* case, combined with my heavy duties and responsibilities as President of the Court as well as the current and anticipated workload of the Appeals Chamber in which I also sit. Accordingly, I hereby make the present request, in the interests of the fair and efficient administration of justice. Further, in my view, it would not be inconsistent with the Court's legal text for a judge to be replaced in a trial chamber following the handing down of the article 74 decision, although it would be for an *ad hoc* Presidency, of course, to consider and determine this question. In addition, I request to be excused from any functions of the Presidency in respect of this request for excusal to avoid any question of conflict of interest.

Composition of the *ad hoc* Presidency

In relation to the composition of the *ad hoc* Presidency, the remaining members of the Presidency, First Vice-President Aitala and Second Vice-President Alapini-Gansou, considered that the *ad hoc* Presidency must be formed in the following manner.

³ Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Trial Judgment, 26 June 2024, ICC-01/12-01/18-2594-Red, para. 1785.

⁴ Separate and Partly Dissenting Opinion of Judge Tomoko Akane, 26 June 2024, ICC-01/12-01/18-2594-OPI; Separate and Partly Dissenting Opinion of Judge Kimberly Prost, 26 June 2024, ICC-01/12-01/18-2594-OPI2.

⁵ Opinion individuelle et partiellement dissidente du Juge Antoine Kesia-Mbe Mindua, 28 June 2024, ICC-01/12-01/18-2594-OPI3.

Regulation 11(2) of the Regulations provides that: “[i]n the event that a member of the Presidency is unavailable or disqualified, his or her responsibilities as a member of the Presidency shall be carried out by the next available judge having precedence in accordance with regulation 10.”. The next judges having precedence are as follows:

- Judge Luz Ibáñez Carranza
- Judge Solomy Balungi Bossa
- Judge Kimberly Prost
- Judge Joanna Korner
- Judge Gocha Lordkipanidze
- Judge María del Socorro Flores Liera
- Judge Sergio Gerardo Ugalde Godínez

Judge Ibáñez, Judge Bossa and Judge Lordkipanidze are members of the Appeals Chamber. Due to the possibility that any decision impacting on the composition of Trial Chamber X could be of potential relevance to any eventual appeal arising in the *Al Hassan* case, it was considered that judges of the Appeals Chamber should not be considered as ‘available’ to participate in the *ad hoc* Presidency.

Judge Prost, like Judge Akane, is a member of Trial Chamber X and therefore cannot participate in the *ad hoc* Presidency’s decision-making on whether Judge Akane should be excused from Trial Chamber X. In addition, it was considered that Judge Korner should be excluded from considering questions related to the assignment of a replacement judge to Trial Chamber X because she would likely be an ideal candidate to serve as a replacement judge in *Al Hassan* due to her availability, workload, the current stage of the trial of *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* over which she presides, her seniority amongst available members of the Trial Division and her extensive expertise as a trial judge. Finally, upon approach by Vice-President Aitala, Judge Flores communicated her unavailability to perform functions in connection with the *Al Hassan* case. Accordingly, Judge Sergio Gerardo Ugalde Godínez was the next available judge having precedence in accordance with regulation 10 and thus forms part of the *ad hoc* Presidency for present purposes.

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 deliberations of the Presidency on 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 the purpose of these deliberations.

Further, the *ad hoc* Presidency, having considered the matter before it, grants the Request to be excused from Trial Chamber X.

The *ad hoc* Presidency notes the anticipated workload of Trial Chamber X and of the Appeals Chamber, and considers that the simultaneous management of this workload, together with the ongoing responsibilities as the President of the Court, collectively constitute an exceptionally heavy workload which would warrant excusal on this basis. The *ad hoc* Presidency also notes the availability of other judges assigned to the Trial Division to assume duties in the Trial Chamber X and considers that granting the Request best serves the proper administration of the Court.

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 Trial Chamber X. The *ad hoc* Presidency considers that such replacement in Trial Chamber X at the present stage of proceedings is entirely consistent with the Court’s legal texts and will include full reasoning in this regard in the public decision replacing Judge Akane in Trial Chamber X.

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