

**Cour
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**International
Criminal
Court**



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No.: **ICC-01/21-01/25**

Date: **1 May 2025**

PRE-TRIAL CHAMBER I

Before: Judge Iulia Antoanella Motoc, Presiding Judge
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge María del Socorro Flores Liera

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

IN THE CASE OF THE PROSECUTOR v. RODRIGO ROA DUTERTE

CONFIDENTIAL

Defence Invitation for the Excusal of Judge Reine Adélaïde Sophie Alapini-Gansou and Judge María del Socorro Flores Liera from Adjudicating on the Issue of Jurisdiction

Source: Defence for Mr Rodrigo Roa Duterte

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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☒ **Counsel for the Defence**

Duterte Defence Team

☐ **Legal Representatives of the Victims**

☐ **Legal Representatives of the Applicants**

☐ **Unrepresented Victims**

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(Participation/Reparation)**

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I. INTRODUCTION

1. Contemporaneously with this filing, the Defence is, today, submitting a challenge concerning jurisdiction and the exercise thereof in the case against Mr Rodrigo Roa Duterte. Pursuant to Article 41(1) of the Rome Statute and Rule 33(1) of the Rules of Procedure and Evidence,¹ Mr Duterte respectfully invites Judge Reine Adélaïde Sophie Alapini-Gansou and Judge María del Socorro Flores Liera ("the Judges") to petition the Presidency for a partial excusal from exercising their functions in Pre-Trial Chamber I on the specific issue of jurisdiction in case ICC-01/21-01/25 ("Case"). A partial excusal in the Case is justified and, moreover, appropriate given the possibility of perceived bias. Such bias arises out of the Judges' prior ruling on substantially the same issue in the Situation in the Republic of the Philippines ("Situation").
2. Pursuant to Article 19(2)(a), challenges to the jurisdiction of the Court must take place prior to the commencement of trial. If intended, however, to be brought prior to the confirmation of charges, Article 19(6) requires that jurisdictional challenges be addressed to the Pre-Trial Chamber.
3. Given their direct involvement in the Situation by way of a prior ruling on the very same issue *sub judice*, an objective observer would reasonably perceive bias on the part of the Judges if they were, once again, to deliberate on the precise issue they have already adjudicated. For want of a better description, the outcome would be perceived as predetermined. A request by the Judges, however, to partially excuse themselves on this question would protect the integrity of the proceedings, the impartiality of the Judges, and the fairness of the proceedings for Mr Duterte. This invitation is narrowly tailored to a single

¹ All references to "Article" are to the Rome Statute and all references to "Rules" in the present submission are to the ICC Rules of Procedure and Evidence ("RPE"), unless otherwise indicated. Pursuant to Regulation 23*bis* of the Regulations of the Court, this submission is classified as confidential for the reasons set out herein.

issue. In the circumstances, the invitation (and subsequent excusal) would be a reasonable and proportionate measure under the applicable statutory framework and invites no prejudice.

4. This invitation is, furthermore, formulated with the maximum of respect and deference. There is no intention whatsoever to create a shadow of a doubt as to the Judges' integrity. To this end, the invitation is filed confidentially to maintain the Judges' autonomy and so that a decision to excuse may be presented to the world as the exercise of unprompted judicial discretion. The Defence does not wish to offend the Judges by taking the unnecessarily aggressive step of seeking public disqualification, with the accompanying media circus, when the same result may be achieved by confidentially inviting excusal.
5. The Defence does not object to the reclassification of this filing as public should the Judges deem it appropriate.

II. APPLICABLE LAW

6. Article 41(1) reads, in pertinent part, as follows:

The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

7. Rule 33(1) RPE states that:

[a] judge, the Prosecutor or a Deputy Prosecutor 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.

III. SUBMISSIONS

8. Excusal and disqualification requests, albeit emanating from different parties and provisions, stem from the common concern of perceived bias. Rule 38(1) suggests the replacement of a judge would be appropriate where there exist “objective and justified reasons” for such a recourse. This would include, *inter alia*, an “accepted excuse”.² Accepted excuses have been recognised where there appears to be an objective concern that a judge could be predisposed to a certain opinion on account of prior involvement in the case.³ By way of illustration, the Defence can point to a number of examples at the ICC where judges who participated in the pre-trial stage thereafter sought to be excused from sitting on the Appeals Chamber in the same case.⁴
9. Article 41(2)(a) and Rule 34, as distinct from Article 41(1) and Rule 33, provide a mandatory requirement that “a judge **shall** not participate in any case in which his or her impartiality might reasonably be doubted on any ground”. Both excusal and disqualification, so it is submitted, may act as legitimate statutory avenues to mitigate such a concern. Doubt as to judicial impartiality has, similarly, been presumed at the ICC where a judge has previously ruled on substantially the same issue in a prior case or phase of the same case;⁵ where

² See [Rule 38\(1\)\(b\)](#).

³ See e.g. *Lubanga*, Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, [ICC-01/04-01/06-3154-AnxI](#), 3 August 2015 (“*Lubanga* Decision of the Plenary of Judges”), para. 39 (“[t]his was a case of apparent, not actual, bias, but that the prudent approach in such cases is for the judge to step aside so as to protect the judicial process from the charge of bias”).

⁴ *Katanga*, Decision on the request to be excused from sitting on the appeal against the decision of Trial Chamber II in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* pursuant to article 41 of the Rome Statute, [2009/PRES/00310-4](#), 4 August 2009 (“*Katanga* Decision”), p. 2. See also *Katanga*, [ICC-01/04-01/07-1949-Anx2](#) (a similar decision subsequently rendered on 8 March 2010). See also *Gbagbo*, Decision on the requests for excusal from the Appeals Chamber in all pending and future appeals in *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [ICC-02/11-01/15-230-AnxI](#), 18 September 2015 (“*Gbagbo* Decision”), p. 3.

⁵ *Katanga* Decision, p. 2; *Gbagbo* Decision, p. 3; *Bemba*, Decision on the request for excusal from Appeals Chamber in all pending and future appeals in *The Prosecutor v. Jean-Pierre Bemba Gombo*,

a judge's involvement would not have been sufficiently "removed from the details of the case"⁶ or would entail "any substantive aspect of the case or situation";⁷ where there is a "degree of congruence between the legal issues" or where "factual determinations would be 'based on the same evidence'".⁸ Significantly, an excusal based on conflict of interest was sought where a judge deemed herself unable "to depart from previous factual findings [...] made upon consideration of the same issues and evidence".⁹

10. An assessment of impartiality depends on the scope and nature of measures taken by a judge during any prior involvement.¹⁰ The threshold set by the Presidency to question impartiality appears to require an indication that a judge has either had the ability to "form an opinion on the case"¹¹ (as is clearly the case in the matter at hand) or cannot be sufficiently "removed from the details of the case" in the exercise of his or her functions.¹² Implication in substantially the same issue or case in distinct phases of the proceedings raises

2015/PRES/00105-2, [ICC-01/05-01/08-3245-AnxI](#), 20 March 2015 ("Bemba Decision"), p. 3; Ongwen, Decision on your request of 18 March 2021 for excusal pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, [2021/PRES/00059-02](#), 25 March 2021 ("Ongwen Decision").

⁶ *Gicheru*, Public redacted version of "Reasons for the Decision on the 'Request for the Disqualification of Judge Miatta Maria Samba' dated 17 September 2021 (ICC-01/09-01/20-173-Conf)", [ICC-01/09-01/20-205-Red](#), 1 November 2021 ("Gicheru Decision"), para. 28.

⁷ [Gicheru Decision](#), para. 28.

⁸ [Bemba Decision](#), p. 3.

⁹ *Id.*

¹⁰ See *D.P. v. France*, [App. no. 53971/00](#), Judgment, 10 February 2004, paras. 40-41 ("[t]he Court considers that, in reaching its decision, it must take account of the special features of the role and nature of the judicial review exercised by the Court of Cassation. While it is true that the Court of Cassation judges who sat on two separate appeals in the proceedings ruled on each occasion on the lawfulness of and reasons for the decisions given by the lower courts, the questions raised by the first appeal concerned the lawfulness of the investigation while those raised in the second concerned the lawfulness of the judgment. Thus, the judges concerned were never required to assess the merits of the charges against the applicant and were obliged to consider different questions of law in each of the appeals. In other words, the issues they were called upon to consider in the second appeal were not analogous to those they had been required to deal with in the first appeal"). See also *Morel v. France*, [App. no. 34130/96](#), Judgment, 6 June 2000, paras. 48-49.

¹¹ [Gicheru Decision](#), para. 20.

¹² [Lubanga Decision of the Plenary of Judges](#), para. 38.

serious and legitimate concerns that have served as the basis for prior excusals.¹³

11. Excusals have, similarly, been found appropriate at the *ad hoc* tribunals where a “‘hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement)’ would be of the view that the Judge in question ‘might not bring an impartial and unprejudiced mind to the issues’”.¹⁴
12. Needless to say, where a judge becomes aware of circumstances that may warrant disqualification, the Statute mandates him or her to initiate the excusal process without awaiting a formal request.¹⁵
13. The Defence’s invitation in the present case ensures the autonomy and irreproachability of the judges as well as the efficient conduct of the proceedings by engendering a minimum degree of disturbance to the Chamber’s current composition.¹⁶ The recourse sought will, simultaneously, preserve Mr Duterte’s right to impartial adjudication.¹⁷

¹³ [Katanga Decision](#), p. 2. See also [ICC-01/04-01/07-1949-Anx2](#); [Gbagbo Decision](#), p. 3; [Bemba Decision](#), p. 3; [Ongwen Decision](#), p. 2.

¹⁴ ICTY, *Stanišić & Župljanin*, IT-08-91-A, [Decision on motion requesting recusal](#), 3 December 2013 (“*Stanišić & Župljanin Decision*”), para. 17 (internal citations omitted).

¹⁵ See [Rule 35](#).

¹⁶ *Lubanga*, Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, [ICC-01/04-01/06-2138-AnxIII](#), 23 September 2009, p. 5 (“[t]he Presidency considers the overriding purpose of article 41(2)(a) to be the safeguarding of the integrity of proceedings of the Court by ensuring that no judge participates in a case in which his or her impartiality might reasonably be doubted on any ground”).

¹⁷ See e.g. *Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, [ICC-01/04-01/06-773](#), 14 December 2006, para. 21 (“[t]he Impugned Decision fails to address properly [...] why the Pre-Trial Chamber considered that the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”).

14. It is not reasonable to expect a judge who has recently expressed a highly publicised position on a specific legal issue to depart from that view. It is specifically for this reason, so it is submitted, that the Presidency has ruled that an objective observer's perception of a judge's inability to diverge from previous rulings on the same issues gives rise to a presumption of partiality.¹⁸ A reasonable observer is defined as "an informed person, with knowledge of all relevant circumstances, including traditions of judicial integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold".¹⁹ The Judges' direct involvement in the deliberation and adjudication of the jurisdictional question in the Situation would give rise to legitimate concerns regarding an absence of impartiality on the same issue in the Case.²⁰
15. As will be recalled, the Pre-Trial Chamber in the Situation authorised the commencement²¹ and subsequent re-initiation of the investigation,²² eventually issuing the warrant for Mr Duterte's arrest.²³ In the course thereof, the Pre-Trial Chamber addressed the Republic of the Philippines' general challenges to the Court's jurisdiction and deliberated on the effects of its withdrawal. Ultimately, as part of its Article 18(2) admissibility assessment, the Court found that it could exercise jurisdiction in the Situation, a finding which is deemed erroneous by the Defence.

¹⁸ [Bemba Decision](#), p. 3.

¹⁹ [Stanišić & Župljanin Decision](#), para. 15 (internal citations omitted).

²⁰ Situation in the Republic of the Philippines, Public Redacted Version of "Authorisation pursuant to article 18(2) of the Statute to resume the investigation", [ICC-01/21-56-Red](#), 26 January 2023 ("Decision authorizing the resumption of the investigation").

²¹ Situation in the Republic of the Philippines, Decision on the Prosecutor's request for authorization of an investigation pursuant to Article 15(3) of the Statute, [ICC-01/21-12](#), 15 September 2021, para. 113.

²² [Decision authorizing the resumption of the investigation](#), p. 42.

²³ Situation in the Republic of the Philippines, Warrant of Arrest for Mr Rodrigo Roa Duterte, [ICC-01/21-83](#), 7 March 2025.

16. The Rome Statute clearly permits a suspect, post-arrest, to litigate the issue of jurisdiction *de novo* and in first instance. This statutory right must not be prejudiced by earlier judicial findings resulting from litigation to which the suspect was not a party. That would not be in keeping with a fair judicial process or with the adversarial system of justice practised at the ICC.
17. The Defence fully appreciates that the Judges are cognisant of their solemn duties. It is further assured that the Judges will understand and respect the rationale for this invitation. The concern raised here does not concern the Judges subjectively, but rather the objective perception of the fairness and impartiality of the proceedings – something which is critical to maintaining confidence in the administration of justice. Essentially, the Judges should not find themselves burdened with the unreasonable and unfair predicament of being obliged to permit Mr Duterte a fresh assessment of jurisdictional issues while not diverging from their former reasoning and ultimate holding.
18. The disposition of the jurisdictional issue in the Situation, with the amount of ink spilled to date, has been unique. As a rule, when pronouncing on jurisdiction for the limited purpose of issuing arrest warrants, ICC judges have reserved their ultimate findings by resort to the following formula: “on the basis of the materials submitted and without prejudice to future determinations on the matter”.²⁴ Such a policy cannot reasonably be expected to be applied by the Judges in the present instance.

IV. CONCLUSION

19. The question of jurisdiction and the exercise thereof is a contentious – if not *the* most contentious – issue in the Case. Deciding this matter in favour of the

²⁴ *Id.* [para. 6](#).

Defence will have far-reaching consequences on the future of the Situation. The ICC judiciary has already shown that it is divided on the issue.

20. This matter should be not decided in the Case by judges who have formulated a firm opinion on the question *sub judice* prior to hearing Defence submissions.
21. In light of the aforementioned, the Defence respectfully invites Judge Reine Adélaïde Sophie Alapini-Gansou and Judge María del Socorro Flores Liera to petition for their excusal with regard to the challenge to the jurisdiction of the Court and the exercise thereof.



Nicholas Kaufman

Counsel for Mr Rodrigo Roa Duterte

Dated this 1st day of May 2025

At The Hague, The Netherlands