

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: **12 May 2025**

THE PRESIDENCY

Before: Judge Tomoko Akane, President
Judge Rosario Salvatore Aitala, First Vice-President
Judge Reine Adélaïde Sophie Alapini-Gansou, Second Vice-President

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

IN THE CASE OF THE PROSECUTOR v. RODRIGO ROA DUTERTE

PUBLIC

**Corrigendum to Request for the Disqualification 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:

☒ The Office of the Prosecutor

☒ Counsel for the Defence

Duterte Defence Team

☐ Legal Representatives of the Victims

☐ Legal Representatives of the Applicants

☐ Unrepresented Victims

☐ Unrepresented Applicants
(Participation/Reparation)

☒ The Office of Public Counsel for Victims

☐ The Office of Public Counsel for the Defence

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I. INTRODUCTION

1. The Presidency is hereby requested to disqualify Judge María del Socorro Flores Liera and Judge Reine Adélaïde Sophie Alapini-Gansou (“the Judges”) from adjudicating on the Defence’s ‘Challenge with respect to Jurisdiction’.¹ As Second Vice-President, Judge Reine Adélaïde Sophie Alapini-Gansou should also be disqualified from adjudicating on this request.²

II. PROCEDURAL BACKGROUND

2. On 1 May 2025, the Defence “invited” the Judges to excuse themselves from adjudicating on the issue of jurisdiction.³ The Defence is fully aware that such an invitation is “not contemplated in the statutory texts”.⁴ The Defence emphasised, however, that it was motivated by a sense of courtesy and deference precisely because of the presumption of judicial impartiality and integrity. The Defence did not request, or even presumptively demand, excusal as did Counsel for Mr Gbagbo in the distinguishable authority cited by the Pre-Trial Chamber.⁵

¹ *Duterte*, Defence Challenge with Respect to Jurisdiction, [ICC-01/21-01/25-121](#), 1 May 2025 (“Defence Challenge to Jurisdiction”). All references to “Article” and to “Rules” in the present submission are to the Rome Statute and the ICC Rules of Procedure and Evidence (“RPE”), respectively, unless otherwise indicated.

² Rome Statute, Art. 41(2)(c): “[a]ny question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.”

³ *Duterte*, 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, [ICC-01/21-01/25-122](#), 1 May 2025 (“Defence Invitation to Recuse” or “Defence Invitation”).

⁴ *Duterte*, Decision on the ‘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’, [ICC-01/21-01/25-126](#), 6 May 2025 (“Pre-Trial Chamber Decision”), para. 4.

⁵ *Gbagbo*, Decision on the Requests for excusal from the Appeals Chamber in the pending appeal in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [ICC-02/11-01/15-142-AnxI](#), 15 July 2015 (“*Gbagbo* Decision”). See also *Gbagbo*, Notice of appeal by the Defence against the “Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute” (ICC-02/11-01/15-127-Conf) of Trial Chamber I deciding to continue Laurent Gbagbo’s detention, [ICC-02/11-01/15-134-Red3-tENG](#), 20 July 2015, para. 52.

3. The Prosecution, on its part, appeared untroubled by any lack of “procedural propriety” and replied substantively *and* hastily – within two working days – on 6 May 2025.⁶ The speed of the Prosecution’s reply was thoroughly understandable. Rule 35 makes it clear that where a ground for disqualification exists, a judge “shall not wait” for a Defence request. Although couched in terms of presuming “judicial impartiality”,⁷ the speed of the Prosecution’s response was, so it is suggested, prompted by a concern that the Judges could already have been in the process of excusing themselves (as actually happened in the *Gbagbo* case, where the impugned judges sought recusal on the very day following the brusque Defence demand).⁸ Indeed, it is hardly surprising that the Prosecution seeks to defend the participation of two judges who, it is submitted, have already predetermined the outcome of the jurisdictional dispute in its favour.

4. On 6 May 2025, the Pre-Trial Chamber dismissed the Defence’s invitation *in limine* without considering the merits (as was done in the *Gbagbo* precedent cited).⁹ In so doing, the Pre-Trial Chamber pointed out that the correct avenue for a person being investigated or prosecuted to seek disqualification is to “submit a request before the Presidency”.¹⁰

⁶ *Duterte*, Prosecution’s Observations on the “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” (ICC-01/21-01/25-122), [ICC-01/21-01-25-125](#), 5 May 2025 (“Prosecution Observations”).

⁷ [Prosecution Observations](#), paras. 3 and 7.

⁸ See [Gbagbo Decision](#).

⁹ [Pre-Trial Chamber Decision](#), para. 4.

¹⁰ [Pre-Trial Chamber Decision](#), para. 4.

III. APPLICABLE LAW

5. Article 41(2) provides that:

[a] judge shall not participate in any case in which **his or her impartiality might reasonably be doubted on any ground** [and] shall be disqualified [...] if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

[...]

[...] the person being investigated or prosecuted may request the disqualification of a judge

[...]

Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges.

IV. SUBMISSIONS

6. The Prosecution waxes lyrical about the presumption of judicial impartiality. The Defence does not doubt that the Judges are subjectively attuned to the need for impartiality. That, however, is not the issue. The question before the Presidency is whether, in the present scenario, there can exist a public and objective perception of impartiality when the Judges have already ruled on exactly the same issue in exactly the same situational context. The Rome Statute's language makes this clear: "**his or her impartiality might reasonably be doubted**".¹¹ Court plenaries have even determined that an applicant seeking

¹¹ [Rome Statute](#), Art. 41(2)(a). *See also Bemba et al.*, Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, filed on 20 June 2014 and notified on 23 June 2014, [ICC-01/05-01/13-511-Anx](#), 20 June 2014 ("*Bemba et al.* Decision"), para. 17. The relevant standard is whether a reasonable observer, properly informed, would be led by the circumstances to reasonably apprehend judicial bias, and whether that apprehension is itself objectively reasonable.

disqualification need not demonstrate *actual bias*; the mere *appearance* of grounds to doubt judicial impartiality suffices.¹²

7. Objective judicial bias has been presumed at the ICC where a judge's involvement would not have been sufficiently "removed from the details of the case"¹³ or would entail "any substantive aspect of the case or situation".¹⁴ Accordingly, an assessment of objective impartiality would depend on the scope and nature of measures taken by a judge during any prior involvement.¹⁵
8. To summarise the matter, the threshold set by the Presidency to question impartiality would appear to require an assessment of (i) the "degree of congruence between the legal issues"; whether (ii) "the factual determinations would be based on the same evidence"; and, whether (iii) a judge is "free to depart from previous factual findings which [he or she] made upon consideration of the same issues and evidence".¹⁶ These conditions are satisfied in the present case and warrant the disqualification of the Judges.

¹² [Bemba et al. Decision](#), para. 16; *Lubanga*, Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, [ICC-01/04-01/06-3040-Anx](#), ("*Lubanga* 2013 Decision"), 11 June 2013.

¹³ *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.

¹⁴ [Gicheru Decision](#), para. 28.

¹⁵ 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.

¹⁶ *Bemba*, Decision on the request for excusal from Appeals Chamber in all pending and future appeals in *The Prosecutor v. Jean-Pierre Bemba Gombo*, 2015/PRES/00105-2, [ICC-01/05-01/08-3245-AnxI](#), 20 March 2015 ("*Bemba* Decision"), p. 3.

9. The Judges were assigned to the Situation in the Republic of the Philippines and, as such, authorised the commencement of the investigation into the Situation after finding that all jurisdictional prerequisites were satisfied:

[w]hile the Philippines' withdrawal from the Statute took effect on 17 March 2019, the Court retains jurisdiction with respect to alleged crimes that occurred on the territory of the Philippines while it was a State Party, from 1 November 2011 up to and including 16 March 2019. This is in line with the law of treaties, which provides that withdrawal from a treaty does not affect any right, obligation or legal situation created through the execution of the treaty prior to its termination. Moreover, in the *Burundi* situation, Pre-Trial Chamber III held that a State Party's withdrawal from the Rome Statute does not affect the Court's exercise of jurisdiction over crimes committed prior to the effective date of the withdrawal. This conclusion was recently confirmed by Pre-Trial Chamber II in the *Abd-Al-Rahman* case. The Court's exercise of such jurisdiction is not subject to any time limit, particularly since the preliminary examination here commenced prior to the Philippines' withdrawal.¹⁷

10. Critically, the Judges found that the Court's exercise of jurisdiction was not subject to any time limit since, in its view, the preliminary examination commenced prior to the withdrawal of the Philippines.¹⁸

1. The threshold set by the Presidency to question impartiality warrants disqualification in the present Case

- (i) *The "degree of congruence between the legal issues"*

11. The Judges have had prior involvement in the most substantive legal question in the case against Mr Duterte. As such, the jurisdictional issues at the

¹⁷ *Duterte*, Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute, [ICC-01/21-12](#), 15 September 2021 ("Investigation Decision"), para. 13 ("[t]hus, the crime must: (i) fall within the category of crimes set out in Article 5 and defined in Articles 6 to 8 of the Statute (jurisdiction *ratione materiae*); (ii) fulfil the temporal conditions specified in Article 11 of the Statute (jurisdiction *ratione temporis*); and (iii) meet one of the two requirements contained in Article 12(2) of the Statute (jurisdiction *ratione loci* or *ratione personae*"). See also paras. 119-111 and 112.

¹⁸ *Id.* [para. 111](#).

situational and case levels are not just similar; they are *identical*: both concern the issue of jurisdiction.

(ii) *Whether “the factual determinations would be based on the same evidence”*

12. The Chamber’s findings at the situational phase were based on the interpretation of the applicable legal texts in a given factual context. The Defence challenge to the exercise of jurisdiction, likewise, is grounded in legal argumentation underlying which the factual matrix remains the same.¹⁹ No new facts will arise which could possibly allow the Judges to reflect differently upon the legal issues at stake other than to maintain their previous findings (whereas the Rome Statute demands a truly fresh exercise of discretion) or to admit an error. No judge should be put in such a situation.

(iii) *“A judge lacks impartiality where he or she is ‘not free to depart from previous factual findings which [he or she has] made upon consideration of the same issues and evidence’”*

13. 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.²⁰ 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.²¹ 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”.²² The Judges’

¹⁹ See [Challenge to Jurisdiction](#).

²⁰ [Investigation Decision](#), para. 111 (“[t]he Court’s exercise of such jurisdiction is **not subject to any time limit**, particularly since the preliminary examination here commenced prior to the Philippines’ withdrawal”) (emphasis added).

²¹ [Bemba Decision](#), p. 3.

²² ICTY, *Stanišić & Župljanin*, IT-08-91-A, [Decision on motion requesting recusal](#), 3 December 2013, para. 15 (internal citations omitted).

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.²³

2. The Prosecution has misrepresented the Defence's arguments

14. The Prosecution misrepresents the Defence's argument by stating that

[j]udges' prior legal determinations on legal issues, made in the course of carrying out their ordinary duties, do not amount to bias, nor should they create the appearance of conflict of propriety.

[...]

A conclusion to the contrary would lead to a nonsensical situation where a Judge may be barred from issuing decisions on the same legal issue more than once.²⁴

15. The Prosecution is fully aware that the Rome Statute 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 an earlier judicial finding resulting from litigation on exactly the same issue to which the suspect was not a party. Accordingly, the present request is not one of the "nonsensical" scenarios envisaged by the Prosecution. It is a quirk of the Rome Statute which permits jurisdiction to be litigated twice before the same Pre-Trial Chamber. The Prosecution, as well as the judiciary, is equally charged with ensuring a fair adversarial process and, frankly, should have agreed with the substance of the Defence invitation.
16. With this in mind, the Situation in the Republic of the Philippines is unique. While the Prosecution rightly points out that the text of Article 15(4) indicates

²³ Duterte, 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.

²⁴ [Prosecution Observations](#), paras. 4-5.

the Pre-Trial Chamber's findings on jurisdiction are "without prejudice to future determinations on the matter", it simultaneously ignores the fact that the Judges' conclusions on jurisdiction, in all its deliberations on the matter, are conclusively phrased in language which is set in stone:

[The Chamber] further recalls that '[t]he Court's jurisdiction and mandate is exercised in accordance with the provisions of the Statute, an international treaty to which the Philippines was a party at the time of the alleged crimes for which the investigation was authorised. By ratifying the Statute, the Philippines explicitly accepted the jurisdiction of the Court, within the limits mandated by the treaty [...]. These provisions and the ensuing obligations remain applicable, notwithstanding the Philippines['] withdrawal from the Statute.'²⁵

17. The Defence submits that this finding is erroneous and has submitted a detailed challenge setting out its reasoning. In the circumstances, it is simply not fair either to Mr Duterte, or even to the Judges themselves, to expect that the latter may diverge from their former reasoning and ultimate holding.

V. CONCLUSION

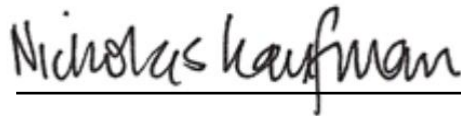
18. The Defence's request to disqualify the Judges will ensure the autonomy and irreproachability of the judges as well as the efficient conduct of the proceedings by engendering a minimum degree of disturbance to the Chamber's current composition.²⁶ The recourse sought will, simultaneously, preserve Mr Duterte's right to objectively impartial adjudication.²⁷

²⁵ *Id.*

²⁶ *Lubanga*, Decision on the Request of 16 September 2009 to be excused from sitting in the appeals, 2009/PRES/460-02, [ICC-01/04-01/06-2138-AnxIII](#), 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").

²⁷ 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

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 Defence will have far-reaching consequences on the future of the Situation. Indeed, 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 **requests** the disqualification of Judge Reine Adélaïde Sophie Alapini-Gansou and Judge María del Socorro Flores Liera with regard to the challenge to the jurisdiction of the Court and the exercise thereof.



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Dated this 12th day of May 2025

Jerusalem, Israel

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”).