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**International
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**THE PLENARY OF JUDGES
OF THE INTERNATIONAL CRIMINAL COURT**

**SITUATION IN THE REPUBLIC OF THE PHILIPPINES
IN THE CASE OF *THE PROSECUTOR* v. *RODRIGO ROA DUTERTE***

Public

Prosecution's response to the Defence "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" (ICC-01/21-01/25-130)

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I. INTRODUCTION

1. Pursuant to the Plenary of Judges’ (“Plenary”) 14 May 2025 Order,¹ the Office of the Prosecutor (“Prosecution”) provides its response to the Defence request to disqualify Judges Reine Adélaïde Sophie Alapini-Gansou and María del Socorro Flores Liera (“the Judges”) from adjudicating the “Defence Challenge with Respect to Jurisdiction”² (“Defence Request”).³ The Defence Request should be rejected because it fails to call into question the presumption of impartiality attached to the Judges. Contrary to the Defence’s position, the Judges have not “already predetermined the outcome of the jurisdictional dispute in [the Prosecution’s] favour”,⁴ and no objective observer would reasonably perceive bias on the part of the Judges based on their prior “involvement in the deliberation and adjudication of the jurisdictional question in the Situation” in the Republic of the Philippines.⁵ As previously stated,⁶ the Judges’ prior ruling does not amount to any perceived bias in this case, and any conclusion to the contrary would result in the untenable situation where a judge may be barred from issuing decisions on the same legal issue more than once.

II. PROSECUTION’S SUBMISSIONS

a. A high threshold must be satisfied to rebut the presumption of judicial impartiality

2. Judges of the Court are professional judges and enjoy a presumption of impartiality. As such, the Plenary of Judges has previously established that the disqualification of a judge “is not a step to be undertaken lightly” and “a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office”.⁷ While it is sufficient to

¹ “Order concerning the ‘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’ filed on 9 May 2025 (ICC-01/21-01/25-130)”, ICC-01/21-01/25-134, p. 3.

² “Defence Challenge with Respect to Jurisdiction”, ICC-01/21-01/25-121.

³ “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”, ICC-01/21-01/25-130-Corr (“Defence Request”).

⁴ Defence Request, para. 3.

⁵ Defence Request, para. 13.

⁶ “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, para. 1.

⁷ “Annex I to the Notification of the Decision of the Plenary of Judges on the ‘Urgent Request for Disqualification of Pre-Trial Chamber I’ dated 11 July 2019”, ICC-01/12-01/18-458-AnxI-Red, para. 23 [*emphasis added*]; see also “Annex to the Notification of the decision on the “Defence Request for the Disqualification of a Judge””, ICC-02/05-03/09-344-Anx, para. 14; “Annex: Notification of the decision on the Defence Application for the disqualification of Judge Sang-Hyun Song from the case of The Prosecutor v. Thomas Lubanga Dyilo”, ICC-

demonstrate the appearance of impartiality, this is determined “from the objective perspective of whether a fair-minded and informed observer, having considered all the facts and circumstances, would reasonably apprehend bias in the judge”.⁸ Importantly, “[s]uch fair-minded person is an objective observer, not to be confused with the applicant”.⁹

b. Judges regularly adjudicate the same, or similar, legal issues

3. Judges regularly adjudicate the same, or similar, legal issues, in accordance with their mandate and ordinary duties. As such, their prior determinations on legal issues do not, under regular circumstances, create the appearance of conflict or impropriety. As previously stated,¹⁰ 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.

4. When considering a request for a Judge’s disqualification based on possible appearance of bias resulting from prior legal determinations, albeit made in an unrelated case, the Presidency has previously relied on ICTY jurisprudence stating that:

“[t]here may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case other than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions

01/04-01/06-3040-Anx, para. 37; “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”, ICC-01/05-01/13-511-Anx, para. 18; “Annex I: Notification of the 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, para. 29.

⁸ “Annex I to the Notification of the Decision of the Plenary of Judges on the ‘Urgent Request for Disqualification of Pre-Trial Chamber I’ dated 11 July 2019”, ICC-01/12-01/18-458-AnxI-Red, para. 25; *see also* “Annex: Notification of the decision on the Defence Application 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, para. 34.

⁹ “Annex I to the Notification of the Decision of the Plenary of Judges on the ‘Urgent Request for Disqualification of Pre-Trial Chamber I’ dated 11 July 2019”, ICC-01/12-01/18-458-AnxI-Red, para. 25 [*emphasis added*]; *see also* “Annex: Notification of the decision on the Defence Application 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, para. 35.

¹⁰ “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, para. 5.

provide an acceptable base for inferring that there is a reasonable apprehension that he will approach the issues in this way”.¹¹

5. Similarly, in its 22 November 2024 decision on the disqualification of Judges, the Plenary highlighted that the applicant’s position that “judges become conflicted in a stage of proceedings after having issued decisions in that same stage, is legally untenable, and would mean that following the issuance of an arrest warrant, the Pre-Trial Chamber would need to be recomposed for each subsequent decisions, which would paralyse the functioning of the Court”.¹² Should the Defence position be accepted, even “replacement judges could only issue one decision and become conflicted with any subsequent ones”.¹³

c. Adjudicating on jurisdiction more than once is explicitly foreseen in the Statute

6. Adjudicating on jurisdiction more than once is explicitly foreseen in the Statute, as conceded by the Defence.¹⁴ As such, article 15(4) of the Statute specifies that, the Pre-Trial Chamber shall authorise the commencement of an investigation if it considers, *inter alia*, that “the case *appears to fall within the jurisdiction of the Court*”, with the explicit safeguard that this preliminary assessment is “*without prejudice to subsequent determinations by the Court with regard to the jurisdiction*”.¹⁵ Similarly, when issuing an arrest warrant pursuant to article 58, the Pre-Trial Chamber must be satisfied that “[t]here are reasonable grounds to believe that the person has committed a crime *within the jurisdiction of the Court*”.¹⁶ These preliminary assessments regarding jurisdiction will necessarily be made by the Pre-Trial Chamber prior to any actual arrests, and thus also prior to the submission of any subsequent challenges to jurisdiction by specific suspects. Nevertheless, in accordance with article 19(6) of the Statute, the Pre-Trial Chamber is explicitly authorised to adjudicate such subsequent

¹¹ “Annex II to Decision replacing a judge in the Appeals Chamber”, ICC-01/04-01/10-503-AnxII, p. 3, quoting *Prosecutor v Brđanin and Talić* (Decision on Application of Momir Talić for the Disqualification and Withdrawal of a Judge), IT-99-36-PT, 18 May 2000, paras. 18–19.

¹² “Reasons for the Decision on the ‘Application for the Disqualification of Judges’ filed on 31 October 2024 (ICC-01/22-92-Anx)”, ICC-01/22-107, para. 12; *see also* “Annex II to the Notification concerning the ‘Application for the Disqualification of Judges’ filed on 31 October 2024 (ICC-01/22-92-Anx)”, ICC-01/22-97-AnxII, para. 5 (“Judges who have dealt with certain situation and cases at the pre-trial stage cannot sit in chambers at trial and both pretrial and trial judges cannot sit in appeals in the same case. However, they obviously must deal with all required decisions within the same stage of the proceedings, which constitute their judicial mandate.”).

¹³ “Annex II to the Notification concerning the ‘Application for the Disqualification of Judges’ filed on 31 October 2024 (ICC-01/22-92-Anx)”, ICC-01/22-97-AnxII, para. 5.

¹⁴ Defence Request, para. 15.

¹⁵ Article 15(4) of the Rome Statute [*emphasis added*].

¹⁶ Article 15(4) of the Rome Statute [*emphasis added*].

challenges should they be raised “[p]rior to the confirmation of the charges”.¹⁷ Therefore, the situation where the Pre-Trial Chamber may authorise an investigation pursuant to article 15 of the Statute and/or issue an arrest warrant *and* adjudicate a subsequent challenge to jurisdiction, is explicitly foreseen and permitted under the Statute.

d. The Judges’ preliminary determinations on jurisdiction do not amount to perceived bias

7. The Defence Request does not allege any actual bias on behalf of the Judges, but rather that “impartiality might reasonably be doubted”.¹⁸ However, the Defence fails to demonstrate that a fair-minded and informed observer, having considered all the facts and circumstances, would reasonably perceive bias on the basis of the Judges’ prior rulings touching upon jurisdiction in this Situation.

8. First, the Defence incorrectly assert that factors potentially raising an appearance of bias arise in the present case.¹⁹ The *Bemba* jurisprudence cited by the Defence in support of this contention²⁰ is distinguishable from the case at hand. Notably, in *Bemba*, the Judge seeking excusal had played “a leading role” in the preliminary examination of the relevant situation, in her capacity as a former Head of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor, which “included an assessment of those believed to be most responsible for the alleged crimes committed under article 5 of the Statute in the situation”.²¹ By contrast, the Judges in the present case have only ever considered relevant issues in their judicial capacity, as they arise from the matter before them, with all the safeguards that a reasonable observer would apprehend in those circumstances.

9. Second, any prior determinations related to jurisdiction made by the Judges in this Situation were preliminary in nature and made for the limited purpose of (i) authorising the Prosecution to commence²² and then resume²³ the investigation into the Situation, and (ii) for the issuance of the arrest warrant.²⁴ Contrary to the Defence’s contention that the Judges’

¹⁷ Article 19(6) of the Rome Statute.

¹⁸ Defence Request, para. 6.

¹⁹ Defence Request, para. 8.

²⁰ “Annex I to: Decision replacing a judge in the Appeals Chamber”, ICC-01/05-01/08-3245-AnxI, p. 3.

²¹ “Annex I to: Decision replacing a judge in the Appeals Chamber”, ICC-01/05-01/08-3245-AnxI, p. 3, citing the Request for excusal, 2015/PRES/00096, para. 2.

²² “Decision on the Prosecutor’s request for authorisation of an investigation pursuant to Article 15(3) of the Statute”, ICC-01/21-12 (“Article 15 Decision”).

²³ “Authorisation pursuant to article 18(2) of the Statute to resume the investigation”, ICC-01/21-56-Red.

²⁴ “Warrant of Arrest for Mr Rodrigo Roa Duterte”, ICC-01/21-01/25-83 (“Arrest Warrant”).

determinations on jurisdiction were “conclusively phrased in language which is set in stone”,²⁵ the Judges made only preliminary findings, in line with the relevant stage of the proceedings.

10. For instance, when issuing the article 15 Decision, the Pre-Trial Chamber explicitly acknowledged its “limited mandate [...] at this stage of the proceedings”²⁶ and emphasised that the required evidentiary standard of ‘reasonable basis to proceed’ is “the lowest evidentiary standard provided in the Statute”.²⁷ Likewise, in its conclusion, the Pre-Trial Chamber further recalled its preliminary findings by stating that “there is a reasonable basis for the Prosecutor to proceed with an investigation, in the sense that the crime against humanity of murder appears to have been committed, and that potential case(s) arising from such investigation *appear* to fall within the Court’s jurisdiction”.²⁸

11. Similar language, demonstrating the Judges’ awareness of the limits of their preliminary findings on jurisdiction, was again used by the Pre-Trial Chamber when issuing the arrest warrant, which specifically states: “the Chamber finds, *on the basis of the materials submitted and without prejudice to future determinations on the matter*, that the case against Mr Duterte falls within the jurisdiction of the Court”.²⁹

12. Finally, any prior determinations related to jurisdiction made by the Judges in this Situation were done in the absence of any Defence observations on the issue. As previously stated,³⁰ there is no indication that the Judges would not be in a position to impartially and objectively evaluate the matter in light of the additional arguments presented by the Defence in its “Defence Challenge with respect to Jurisdiction”,³¹ particularly since the Defence raises a purely legal question regarding the distinction “between jurisdiction, on the one hand, and the *exercise* of jurisdiction on the other”.³² There is no reason why the Judges would not be in a position to objectively evaluate this new, and purely legal in nature, question. No fair-minded and informed observer, having considered all the facts and circumstances, would reasonably apprehend bias on the part of the Judges in this case.

²⁵ Defence Request, para. 16.

²⁶ Article 15 Decision, para. 10, *see also* paras. 11, 38.

²⁷ Article 15 Decision, para. 12.

²⁸ Article 15 Decision, para. 113.

²⁹ Arrest Warrant, para. 6 [*emphasis added*].

³⁰ “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, para. 8.

³¹ “Defence Challenge with Respect to Jurisdiction”, ICC-01/21-01/25-121.

³² “Defence Challenge with Respect to Jurisdiction”, ICC-01/21-01/25-121, para. 21.

III. CONCLUSION

13. For the above reasons, the Plenary should reject the Defence Request to disqualify the Judges from adjudicating the Defence's challenge with respect to jurisdiction in this case.

A handwritten signature in black ink, appearing to read 'Mame Mandiaye Niang', written over a horizontal line.

Mame Mandiaye Niang, Deputy Prosecutor

Dated this 22nd day of May 2025

At The Hague, the Netherlands