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Date: **3 July 2015**

THE PRESIDENCY

Before: **Judge Silvia Fernández de Gurmendi, President**
Judge Joyce Aluoch, First Vice-President
Judge Kuniko Ozaki, Second Vice-President

SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO

IN THE CASE OF

THE PROSECUTOR
v. THOMAS LUBANGA DYILO

Public

Prosecution's response to the "*Requête urgente de la Défense aux fins de récusation de Mme la juge Silvia Fernández de Gurmendi*"

Source: **Office of the Prosecutor**

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Introduction

1. The Defence for Mr Thomas Lubanga requests the recusal of Judge Silvia Fernández de Gurmendi, under article 41(2)(a) of the Statute, as president of the panel appointed to decide on the early release of Mr Lubanga, based on her position as head of the Jurisdiction, Complementarity and Cooperation Division ("JCCD") and as a member of the Executive Committee ("ExCom") in the Office of the Prosecutor from June 2003 to December 2006.[1]

2. The Prosecution submits that a reasonable and well-informed observer would not reasonably and objectively apprehend bias by Judge Fernández considering (1) the presumption of impartiality that attaches to judges; (2) the separate nature and confined purpose of the proceedings on early release which require the judges to make a different and specific assessment from the determination of guilt of an accused person; and (3) Judge Fernandez's limited involvement as a member of the Office of the Prosecutor in the *Lubanga* case.

Submissions

(a) A high threshold is required to disqualify a judge under article 41(2)(a)

3. Article 41 of the Statute governs the disqualification of judges. Together with rule 34, it provides a non-exhaustive list of grounds requiring disqualification.

Article 41(2)(a) of the Rome Statute provides:

> "A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph 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. […]"

[1] ICC-01/04-01/06-3139 ("Defence Request").

Rule 34(1)(c) of the Rules of Procedure and Evidence provides:

> "Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned".

4. The Plenary of Judges has recognised that a judge's disqualification is a very serious matter:

> "[Disqualification is] not a step to be undertaken lightly, noting that a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice. When assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case."[2]

5. Sufficient grounds to disqualify a judge exist where: (1) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias;[3] and (2) such apprehension is objectively reasonable.[4]

6. The Appeals Chamber of the ICTY has similarly held that a judge's disqualification is justified where "the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement)" (i.e., knowledge of the traditions of integrity and impartiality which a judge undertakes to uphold) would reasonably doubt the impartiality.[5]

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[2] ICC-02/05-03/09-344-Anx, para.14 and authorities referred to in footnotes 21 and 22 of that same decision.
[3] ICC-02/05-03/09-344-Anx, para.11.
[4] ICC-02/05-03/09-344-Anx, para.13.
[5] *Prosecutor v. Delalic et al.*, IT-96-21-A, Judgement, 20 February 2001, para.683.

7. The relevant provisions must be contextually and purposively interpreted according to the rules on interpretation of treaties in the *Vienna Convention*, [6] and must be applied on a case-by-case basis.

8. First, as recognised by the Presidency in a previous decision, the above provisions must be interpreted in their context and in light of their object and purpose.[7] As such, the word "case" in article 41(2)(a) should not be literally and restrictively interpreted. This provision is designed to safeguard the integrity and to ensure the overall efficiency of the conduct of proceedings before the Court.[8] On this reasoning, in the *Lubanga* case the Presidency concluded that the impartiality of a judge could not be reasonably doubted, and that she could sit as a member of the Appeals Chamber in an interlocutory appeal even though she had participated in a minor procedural decision as a member of the Pre-Trial Chamber in the same case.[9]

9. Second, the word "case" in article 41(2)(a) should not be interpreted as encompassing all proceedings before the Court involving an accused or convicted person. Criminal proceedings, which seek to establish an accused's criminal responsibility, should be distinguished from other proceedings which have different purposes and procedures, such as reparation proceedings,[10] revision of convictions or sentences under article 84, and review proceedings related to sentence reduction (or early release) under article 110.

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[6] "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, signed 23 May 1969 and entered into force 27 January 1980, 1155 United Nations Series 18232, art.31(1).

[7] The Presidency has supported this interpretation based on the ambiguity in relation to the interaction between the first and second sentences of article 41(2)(a). See ICC-01/04-01/06-2138-AnxIII, p.5.

[8] ICC-01/04-01/06-2138-AnxIII, p.5.

[9] ICC-01/04-01/06-2138-AnxIII, pp.6-7.

[10] The Appeals Chamber has noted the particular and distinct characteristics of reparation proceedings from criminal proceedings. In the *Lubanga* Appeals Judgment on Reparations, the Appeals Chamber quoted the Presidency as stating that "[t]he differences between reparations proceedings and criminal proceedings are numerous, spanning many aspects of substance and procedure" and "there is no requirement for reparations proceedings to constitute a stage of the 'trial' stricto sensu. As such, reparations need not be addressed by the Trial Chamber that issued the conviction and sentence. Consequently, article 36(10) does not apply to reparations proceedings". *See* ICC-01/04-01/06-3129 A A2 A3, para.234 (*Lubanga* Appeals Judgment on Reparations) quoting the Presidency in ICC-01/04-01/07-3468-AnxI (*Katanga* Decision replacing two judges in Trial Chamber II Annex), paras.6 and 8, respectively.

10. Accordingly, unless expressly prohibited in the legal framework,[11] article 41(2)(a) should not be interpreted as automatically barring all judges who were involved in some aspect of the "main" criminal proceedings from sitting in those subsequent separate proceedings.[12] Instead, a case-by-case determination is required. Otherwise, a literal interpretation of the term "case" in article 41(2)(a) would lead to unviable and impractical situations. For example, all members of the Appeals Chamber would be automatically disqualified from deciding on an application for revision of a conviction or sentence pursuant to article 84, if they had previously rendered the appeals judgment in the same case. For these reasons, a judge who has participated in some aspect of the main criminal proceedings should not necessarily be conflicted to review the sentence of a convicted person and to decide on his or her early release. The Court's legal framework does not expressly prohibit this and, in addition, article 110 requires the judges to make a very specific and distinct determination from the determination of guilt or innocence.

(b) Proceedings on the early release of a convicted person have a separate and specific purpose from the main criminal proceedings in a case

11. When deciding the Defence Request, the Presidency should consider the limited purpose and nature of the review concerning reduction of sentence conducted under article 110 and rules 223 and 224. The purpose of a sentence review is to determine whether a convicted person may be released before his or her full final sentence has been served. The convicted person has the burden of demonstrating that the criteria in article 110(4) and rule 223 are met. A panel of three judges from the Appeals Chamber and appointed by that Chamber will convene a

[11] See for example, rule 173(1) with respect to requests for compensation: "Anyone seeking compensation on any of the grounds indicated in article 85 shall submit a request, in writing, to the Presidency, which shall designate a Chamber composed of three judges to consider the request. These judges shall not have participated in any earlier judgement of the Court regarding the person making the request".
[12] Regulation 12 of the Regulations of the Court ("RoC") must be read as referring to the same proceedings: "[…] Under no circumstances shall a judge who has participated in the pre-trial or trial phase of a case be eligible to sit on the Appeals Chamber hearing that case; nor shall a judge who has participated in the appeal phase of a case be eligible to sit on the pre-trial or trial phase of that case".

hearing[13] and decide.[14] As one commentator has noted, the fact that the deciding body is not the Presidency but a bench of three judges of the Appeals Chamber may indicate that such a decision is substantive in nature and does not fall within the scope of article 38(3)(a), which is related to the proper administration of the Court.[15] Further, the judges on the panel retain discretion on whether to deny early release even if any or all of the criteria are met.[16] The criteria, and the way they are to be taken into account, leave discretion, and the judges' decision will entail prognostic and balancing judgements.[17] Their analysis and final determination has a different and confined purpose from the determinations made by the Trial and Appeals Chamber, which the panel may consider, but cannot alter. The panel's determination will not be related to the merits of the case, which have already been adjudicated and constitute *res judicata*. Instead, the panel will be called to make a determination on separate and post-conviction events.

12. A review of other international criminal tribunals further denotes the confined purpose and distinct nature of these proceedings. For example, at the ICTY and ICTR—and now the MICT—the President, in consultation with the Bureau and the judges who issued the sentence and still remain judges of the tribunals, decides on decisions on early release.[18] These decisions are not appealable.[19] Like the ICC judges, the President retains discretion on whether to grant or deny early release.[20] The

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[13] A hearing will be conducted "unless they decide otherwise in a particular case, for exceptional reasons". See rule 224(1).

[14] Rule 224(2).

[15] Kress C. and Sluiter G., "Imprisonment" in *The Rome Statute of the International Criminal Court*, ed. By Cassese, Gaeta and Jones (Oxford University Press, 2002) at p.1794.

[16] Article 110(4): "In its review under paragraph 3, the Court *may* reduce the sentence if it finds that one or more of the following factors are present". [Emphasis added].

[17] Kress C. and Sluiter G., "Imprisonment" in *The Rome Statute of the International Criminal Court*, ed. By Cassese, Gaeta and Jones (Oxford University Press, 2002) at p.1793.

[18] Article 28 of the ICTY Statute and rule 124 of the ICTY Rules of Procedure and Evidence; article 27 of the ICTR Statute and rule 125 of the ICTR Rules of Procedure and Evidence. See also article 26 of the Statute and rule 150 of the Mechanism for International Criminal Tribunals ("MICT").

[19] ICTY Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the International Tribunal, IT/l46/Rev.3, 16 September 2010, para.10; Practice direction on the procedure for the determination of applications for pardon, commutation of sentence, and early release of persons convicted by the ICTR, the ICTY or the Mechanism, MICT/3, 5 July 2012, para.12.

[20] *Prosecutor v. Zoran Vukovic*, Decision of the President on Commutation of Sentence, IT-96-23&23/1-ES, 11 March 2008, para.12; *Prosecutor v. Paul Bisengimana*, Decision of the President on Early release of Paul

incumbent President has decided on such decisions—and has never considered himself conflicted—even in cases where he had participated in the appeal proceedings and rendered the appeals judgment in that case.[21]

(c) Judge Fernández's former role in the Office of the Prosecutor

13. Finally, the Presidency should consider Judge Fernández's non-operational and relatively circumscribed role in the *Lubanga* case resulting from her position as head of JCCD and as a member of ExCom from June 2003 to December 2006. Judge Fernandez was never directly responsible for the investigation and prosecution of the *Lubanga* case. JCCD is a division of the Office of the Prosecutor entrusted with conducting preliminary examinations; evaluating information pursuant to articles 15 and 53(1); providing advice on whether a reasonable basis to proceed with an investigation exists, and providing advice on issues related to jurisdiction and admissibility, and on cooperation matters.[22] Thus, Judge Fernández would have been involved in the early stages of the proceedings in the Democratic Republic of the Congo (including the *Lubanga* case), in particular, in the decision to commence an investigation, and in transmitting requests for cooperation, including arrest warrants and investigative missions in the field.

Bisengimana and on Motion to File a Public Redacted Application, MICT-12-07, 11 December 2012, para.21; *Prosecutor v. Momcilo Krajisnik*, Decision of the President on Early Release of Momcilo Krajisnik, IT-OO-39-ES, 2 July 2013, para.15.

[21] For example, President Fausto Pocar decided on the early release of Mr Edzad Landzo (Order of the President on Commutation of Sentence, IT-96-21, 13 April 2006) even though he had ruled on the appeal judgment against the sentence in the same case (Judgement on Sentence Appeal, IT-96-21-A, 8 April 2003). President Judge Patrick Robinson decided on the early release of Mr Johan Tarculovski (Decision of President on Early Release of Johan Tarculovski, IT-04-82-ES, 23 June 2011) even though he had previously sat on the appeal judgement (Judgement, IT-04-82-A, 19 May 2010). President Judge Robinson also decided on the early release of Ms Biljana Plavsic (Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavsic, IT-00-39&40/1-ES, 14 September 2009) and Dusko Sikirica (Decision of President on Early Release of Dusko Sikirica, IT-95-8-ES, 21 June 2010) even though he had accepted their plea agreements and sat in their sentencing judgment of the Trial Chambers in both cases (Sentencing Judgement, IT-00-39&40/1-S, 27 February 2003 and Sentencing Judgement, IT-95-8-S, 13 November 2001, respectively). Similarly, President Judge Theodor Meron decided on the early release of Mr Haradin Bala (Decision of the President on Early Release of Haradin Bala, IT-03-66-ES, 9 January 2013) even though he had previously sat on his appeal judgment (Judgement, IT-03-66-A, 27 September 2007).

[22] Regulation 7 of the Regulations of the Office of the Prosecutor: http://www.icc-cpi.int/nr/rdonlyres/fff97111-ecd6-40b5-9cda-792bcbe1e695/280253/iccbd050109eng.pdf .

14. As a member of ExCom, Judge Fernández would have participated in the general discussion and approval of the main legal and strategic documents and major investigative and prosecution activities developed by the Investigation and Prosecution Divisions with respect to all the cases from June 2003 to December 2006, including that against Mr Lubanga.[23] However, her intervention would have necessarily been sporadic and general in nature. She was not one of the lawyers involved in investigating or prosecuting the case against Mr Lubanga; although she would have been kept apprised of and approved of various steps as the case proceeded against him during the period of her tenure at the Office of the Prosecutor, her situation is not comparable to that of a prosecution lawyer deeply involved in the case and knowledgeable of its details.

Conclusion

15. The issue before the Presidency is whether a reasonable and properly informed observer would apprehend bias by Judge Fernández in deciding on the early release of Mr Lubanga, and whether such apprehension is objectively reasonable. The Prosecution submits that (1) considering the presumption of judges' impartiality, (2) the separate nature and distinct and confined purpose of early release proceedings which require the judges to make a specific and different assessment from the determination of guilt and (3) Judge Fernández's non-operational and relatively circumscribed role in the Office of the Prosecutor during the early stages of the *Lubanga* case, a reasonable and well-informed observer would not apprehend on an objective and reasonable basis that she was biased so as to conflict her from sitting as a member of the panel which will determine whether he should be released prior to the termination of his sentence.

16. For the above reasons, the Prosecution requests that the Defence Request be dismissed.

[23] See also regulation 4 of the Regulations of the Office of the Prosecutor.

Fatou Bensouda, Prosecutor

Dated this 3rd day of July 2015

At The Hague, The Netherlands