

ANNEX I



Cour
Pénale
Internationale
International
Criminal
Court

La Présidence
The Presidency

Internal memorandum
Memorandum interne

To À	Judge Silvia Fernández de Gurmendi	From De	The Presidency
Date	21 October 2015	Through Via	
Ref.	2015/PRES/00379-02	Copies	Judge Sanji Mmasenono Monageng Judge Christine Van den Wyngaert Judge Howard Morrison Judge Piotr Hofmański
Subject Objet	Decision on the request for excusal from Appeals Chamber in all pending and future appeals in the case of <i>The Prosecutor v. Bosco Ntaganda</i>		

The Presidency, composed of the First Vice-President (Judge Joyce Aluoch), the Second Vice-President (Judge Kuniko Ozaki), and Judge Sanji Monageng, hereby decides upon the request for excusal submitted by Judge Silvia Fernández de Gurmendi on 20 October 2015. Judge Fernández de Gurmendi requests to be excused, pursuant to article 41(1) of the Rome Statute of the International Criminal Court (“Statute”) and rule 33(1) of the Rules of Procedure and Evidence (“Rules”), from sitting in all pending and future appeals in *The Prosecutor v. Bosco Ntaganda* (“Ntaganda case”).

The request for excusal is granted.

Factual Background

On 19 October 2015, the Defence for Mr Bosco Ntaganda filed the “Appeal on behalf of Mr Ntaganda against Trial Chamber VI’s ‘Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9’, ICC-01/04-02/06-892”.¹

On 20 October 2015, by confidential memorandum, Judge Fernández de Gurmendi requested the Presidency to excuse her from sitting in all pending and future appeals in the *Ntaganda* case, pursuant to article 41(1) of the Statute and rule 33(1) of the Rules.² The request for excusal is based on Judge Fernández de Gurmendi’s “previous involvement in the situation in [the] Democratic Republic of the Congo (hereinafter: “DRC”) as Head of the Jurisdiction, Complementarity and Cooperation

¹ ICC-01/04-02/06-909.

² Request for excusal from Appeals Chamber in all pending and future appeals in the case of *The Prosecutor v. Bosco Ntaganda*, 2015/PRES/00379, at para. 3.

Division ["JCCD"] in the Office of the Prosecutor ("OTP") from June 2003 to December 2006."³ Judge Fernández de Gurmendi noted that

[w]hile serving in this capacity, [she] had a leading role in the preliminary examination of the DRC situation, and more specifically in relation to an examination of the activities of the Forces Patriotiques pour la Libération du Congo (hereinafter: "the FPLC"), the armed group of which Mr Ntaganda is alleged to be a member. This preliminary examination included an assessment of those believed to be most responsible for alleged crimes committed under article 5 of the Statute in the situation.⁴

Judge Fernández de Gurmendi further noted that

[she] was also involved in the investigative phase of the case against the leaders of the FPLC, including Mr Ntaganda, and as member of the Executive Committee of the OTP, [she] took part of discussions that led to the request for an arrest warrant in [the *Ntaganda* case].⁵

Judge Fernández de Gurmendi observed that article 41(2)(a) of the Statute "provides that '[a] judge shall not participate in any case' where 'that judge has previously been involved in any capacity in that case'"; she further observed that while her previous involvement "was in a 'situation' as opposed to a 'case'", she considered that "in the particular context of the DRC situation and the findings that were made at the preliminary examination stage," her involvement is "equivalent to previous involvement in the case within the meaning of article 41(2) of the Statute."⁶ She concluded that she was therefore requesting excusal "before any of the parties raise concerns as to [her] impartiality."⁷

In the same memorandum, Judge Fernández de Gurmendi requested to be excused from the deliberations of the Presidency on her request for excusal from the Appeals Chamber in all pending and future appeals in the *Ntaganda* case.⁸ Judge Fernández de Gurmendi based this request for excusal on her position as a member of the Presidency, which she noted "may give rise to a possible conflict of interest."⁹ On 20 October 2015, the remaining members of the Presidency granted Judge Fernández de Gurmendi's request for excusal from the deliberations of the Presidency. On the same date Judge Monageng assumed responsibilities as a

³ *Id.* at para. 4.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at para. 5.

⁷ *Id.*

⁸ *Id.* at para. 6.

⁹ *Id.*

member of the Presidency for the purpose of deliberating on Judge Fernández de Gurmendi's request for excusal from sitting in all pending and future appeals in the *Ntaganda* case in accordance with regulation 11(2) of the Regulations of the Court.

Decision

The present request for excusal is properly before the 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". Article 41(2)(a) of the Statute further 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

The Presidency has previously clarified that the second sentence of article 41(2)(a) is "concerned with disqualification where a judge has previously been involved in any capacity which gives rise to a reasonable ground to doubt his or her impartiality."¹⁰ The Presidency elaborated that this interpretation is "most consistent with the objective of ensuring that the impartiality of judges cannot reasonably be reproached" while "at the same time . . . ensuring the efficient conduct of proceedings."¹¹

The Presidency recalls that it has previously emphasized the need to note the "degree of congruence between the legal issues" and whether "the factual determinations" would be "based on the same evidence" in considering requests for excusal on grounds of an applicant's previous involvement in the case.¹² The Presidency further recalls that "it may reasonably appear to an objective observer that" 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

¹⁰ 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, 23 Sept. 2009, ICC-01/04-01/06-2138-AnxIII, p. 5.

¹¹ *Id.*

¹² Decision on the Request of First Vice President Diarra and Second Vice President Kaul to be excused from the Presidency in relation to the "Defence Application for Review of the Registrar's Decision of 10 June 2009 entitled *Third Decision of the Registrar on the Monitoring of Non-privileged Telephone Communications and Visits of Mr Mathieu Ngudjolo Chui*", 17 Dec. 2009, ICC-RoR221-04/09-2-Conf-Exp-Anx2, p. 4.

¹³ *Id.*

The Presidency finds the request to be well founded. The Presidency notes that Judge Fernández de Gurmendi's request for excusal is based on her previous involvement in the DRC Situation as Head of the JCCD in OTP from June 2003 to December 2006. The Presidency observes, in particular, that Judge Fernández de Gurmendi describes having played "a leading role" in the preliminary examination of the DRC situation, 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."¹⁴ The Presidency also observes that Judge Fernández de Gurmendi describes having been "involved in the investigative phase of the case against the leaders of the FPLC, including Mr Ntaganda" and having taken part in "discussions that led to the request for an arrest warrant in [the *Ntaganda* case]".¹⁵ In these circumstances, the Presidency finds there to be a significant degree of congruence between the legal issues and factual determinations made during the preliminary examination and appeals emanating from the *Ntaganda* case such that it may reasonably appear to an objective observer that Judge Fernández de Gurmendi lacks impartiality both with respect to pending and future appeals in the case.¹⁶

Henceforth, the President of the Appeals Division shall promptly inform the Presidency of the filing of any appeal in the case, in order for the Presidency to proceed with the replacement of Judge Fernández de Gurmendi in a timely fashion in accordance with this decision.

The Presidency shall make public this decision, noting that Judge Fernández de Gurmendi has expressed her consent in accordance with rule 33(2) of the Rules.

¹⁴ Request for excusal, *supra* note 2, at para. 4.

¹⁵ *Id.*

¹⁶ In her memorandum, Judge Fernández de Gurmendi observed that while article 41(2)(a) "provides that '[a] judge shall not participate in any case' where 'that judge has previously been involved in any capacity in that case'" and that her previous involvement "was in a 'situation' as opposed to a 'case'", she considered that "in the particular context of the DRC situation and the findings that were made at the preliminary examination stage," her involvement is "equivalent to previous involvement in the case within the meaning of article 41(2) of the Statute." *Id.* at para. 5. The Presidency is in agreement with Judge Fernández de Gurmendi for the reasons stated above, namely the significant degree of congruence between the legal issues and factual determinations made during the preliminary examination of the DRC situation and appeals emanating from the *Ntaganda* case.