

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: **29 June 2015**

THE PRESIDENCY

Before: Judge Silvia Fernández de Gurmendi, President
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public Document

With Public Annexes 1 to 3 and Confidential Annex 4

Urgent Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi

Source: Defence team for Mr Thomas Lubanga

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

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PURPOSE OF THE APPLICATION

1. This application seeks the disqualification of Judge Silvia Fernández de Gurmendi as Presiding Judge of the Chamber constituted to review in accordance with article 110 of the Statute the sentence imposed on Mr Thomas Lubanga.

APPLICABLE LAW

2. Article 41(2)(a) of the 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. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

3. A judge's inability to act in a judicial capacity in accordance with article 41(2)(a) exists where a judge is driven by demonstrated bias or where there is an appearance of bias on his or her part,¹ that is, when "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias".²

¹ ICC: *The Prosecutor v. Thomas 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, 11 June 2013, paras. 9-10, and *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, "Decision of the plenary of judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2015", 5 June 2012, ICC-02/05-03/09-344-Anx, para. 11. ICTY: *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgment on Appeal, 21 July 2000, para. 189; *Prosecutor v. Brdanin and Talić*, Case No. IT-99-36-T, "Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge" (Trial Chamber), 18 May 2000, paras. 9-14. ICTR: *The Prosecutor v. Nzirorera et al*, Case No. ICTR-98-44-T, "Decision on Joseph Nzirorera's motion for disqualification of Judge Byron and stay of proceedings", 20 February 2009, para. 4.

² ICC: ICC-01/05-01/13-511-Anx, "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*", 23 June 2014, para. 17; ICC-02/05-03/09-344-Anx, "Decision of the plenary of judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012", 5 June 2012, para. 11 and ICC-01/04-01/06-3040-Anx, "Decision of the plenary of judges on the 'Defence Application of 20 February 2013 for the

4. Article 4(2) of the Code of Judicial Ethics provides that “[j]udges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest.”³

DISCUSSION

5. By a decision of 15 June 2015, the Appeals Chamber established the composition of the Chamber that was to review the sentence imposed on Mr Thomas Lubanga to determine whether it should be reduced. Judge Silvia Fernández was appointed to sit on that Bench.⁴
6. By a decision of the same date, the Chamber constituted to review the sentence imposed on Mr Thomas Lubanga appointed Judge Silvia Fernández de Gurmendi as Presiding Judge.⁵
7. However, it appears that Judge Silvia Fernández de Gurmendi has previously been involved in the case before this Chamber in a situation which might reasonably cast doubt on her impartiality.
8. Indeed, it is apparent from the annexes to this application that, between June 2003 and December 2006, Judge Silvia Fernández de Gurmendi performed high-level functions in the Office of the Prosecutor and in that capacity was involved in the case of *The Prosecutor v. Thomas Lubanga*.
9. Judge Silvia Fernández de Gurmendi’s curriculum vitae, produced in support of her candidacy as judge, specifically states that she acted as Special Adviser and Director of the Jurisdiction, Complementarity and Cooperation Division. She states that she performed the following functions:

disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*”, 11 June 2013, para. 10. See also: ICTY: *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Judgment on Appeal, 21 July 2000, para. 189.

³ ICC-BD-02-01-05.

⁴ ICC-01/04-01/06-3135.

⁵ ICC-01/04-01/06-3136.

Special Adviser and Director of the Jurisdiction, Complementarity and Cooperation Division at the Office of the Prosecutor of the International Criminal Court (June 2003-December 2006)

Duties and responsibilities included participating in the Executive Committee, which is in charge of the overall management of the Office of the Prosecutor, provides advice on policies, strategies and situation and case selection, and supervises investigative teams.

Among other duties and functions, in charge of the elaboration of legal reports on jurisdiction and admissibility of situation and cases; participated in the elaboration of legal briefs and in proceedings before the judges; elaborated systems for the reception and follow-up of communications of crimes and for obtaining cooperation and judicial assistance; led missions of the Office of the Prosecutor to the territory of States relevant to situations under preliminary analysis or investigation.⁶

10. These parts of the curriculum vitae, which do not appear in Judge Silvia Fernández de Gurmendi's public presentation on the website of the International Criminal Court, confirm that she performed high-level functions within the Office of the Prosecutor.⁷
11. Moreover, official Court documents show that Judge Silvia Fernández de Gurmendi acted as Chef de Cabinet for the Prosecutor, Mr Moreno Ocampo.⁸
12. In particular, Judge Silvia Fernández de Gurmendi was engaged in that capacity during the period between the application for a warrant of arrest against Mr Tomas Lubanga and the confirmation of charges hearing in that case.⁹
13. It follows that a reasonable observer, properly informed, must necessarily conclude that she participated in person in the investigations concerning Mr Thomas Lubanga, participated in the drafting of the application for his arrest, participated in the drafting of the detailed list of charges submitted to the Pre-Trial Chamber for examination and, in general, that she participated at the highest level of the organisation in the proceedings against Mr Thomas Lubanga until December 2006.

⁶ Annex 1: Curriculum vitae of Ms Silvia Fernández de Gurmendi dated 3 September 2009, 15:00, available at: <http://www.icc-cpi.int/NR/ronlyres/4D226D8D-6045-4B3D-8CB2-6855DD1D3C80/0/ICCASPEJ22009ARGCVENG.pdf>.

⁷ Annex 2: Extract of the Court's official website, Biography of Judge Silvia Alejandra Fernández de Gurmendi (Argentina), President, available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/judge%20silvia%20alejandra%20fernández%20de%20gurmendi.aspx.

⁸ Annex 3: Press Release ICC-CPI-20030926-36 entitled "ICC – Deputy President of South Africa visits the ICC", 26 September 2003, available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2003/Pages/deputy%20president%20of%20south%20africa%20visits%20the%20icc.aspx.

⁹ Annex 1: Curriculum vitae, p. 2. The warrant of arrest was issued under seal on 10 February 2006 and the confirmation of charges hearing was held between 9 and 28 November 2006.

14. Witnesses Bernard Lavigne (P-0582) and Nicolas Sebire (P-0583) were called in this case by Trial Chamber I to “testify as to the approach and the procedures applied to intermediaries” to assist the Chamber in ruling on the Defence’s abuse of process application.¹⁰ They confirm that the executive committee established within the Office of the Prosecutor, of which Judge Silvia Fernández de Gurmendi was a member, was regularly consulted on the conduct of investigations and that it directed the course of those investigations.¹¹
15. Mr Sebire stated that he had himself attended two meetings of the executive committee, the purpose of which was “[TRANSLATION] to report on the investigation, the progress of the investigation and the evidence gathered by ... by the time of appearing before the committee”.¹²
16. His testimony further revealed that the Jurisdiction, Complementarity and Cooperation Committee had been involved in investigations in the Democratic Republic of the Congo, in particular, by seeking access to some civil registers.¹³
17. Furthermore, the trial record shows that Judge Silvia Fernández de Gurmendi played a key role within the Office of the Prosecutor in the negotiations conducted with the United Nations concerning the conclusion of confidentiality agreements on the basis of article 54(3)(e) of the Statute.¹⁴ However, conclusion by the Office of the Prosecutor of those confidentiality agreements proved, in this case, to be a contentious issue which was taken into account by the Trial Chamber in its decision on the sentence;¹⁵ the

¹⁰ ICC-01/04-01/06-2434-Red2, paras. 146 and 150(iv). See also the conclusions drawn by the Trial Chamber in its judgment: ICC-01/04-01/06-2842, paras. 178 *et seq.*

¹¹ P-0582: ICC-01/04-01/06-Rule68Deposition-Red2-FRA, 16/11/2010, p. 15, lines 19-28, p. 16, lines 1-9, “[TRANSLATION][...] And that joint team [...] obeyed, or in any event, received instructions directly from ... from the Office of ... well, of the Prosecutor, generally attended by its ... division managers, which was called ... and the Deputy Prosecutor, which was called ‘ex-COM’, I believe. So this ... there was therefore a dual structure, a classic hierarchical structure and then, depending on the situation, joint teams reporting directly to the Prosecutor and to ex-COM.”; P-0583: ICC-01/04-01/06-T-334-Red2-FRA-CT, p. 56, lines 11-19: “[TRANSLATION] Q. You stated that – I think – in late June 2006, you were appointed ... you acted as team leader, and you stated that at that time you had a direct hierarchical superior. You stated that from that moment, and even ... from that moment, you reported directly to that hierarchical superior in the Office of the Prosecutor? A. Indeed. He ... anyway, it’s the person to whom I reported – that’s certain – copying, of course, the DRC1 team leader, because he was also involved in what was going on. But, at the time, the main reporting line was to the joint investigation team, made up of the 3 ... the 3 divisions.” See also the issue of the intermediaries: ICC-01/04-01/06-Rule68Deposition-Red2-FRA, 17/11/2010, p. 74, lines 21 *et seq.*; and on the determination of the age of the witnesses: ICC-01/04-01/06-Rule68Deposition-Red2-FRA, 18/11/2010, p. 17, lines 17 *et seq.*

¹² P-0583: ICC-01/04-01/06-T-334-Red2-FRA-CT, p. 56, lines 23-26.

¹³ P-0583: ICC-01/04-01/06-T-336-Red2-FRA, p. 10, lines 13-21.

¹⁴ Confidential Annex 4: Document appended as Annex 1 to ICC-01/04-01/06-1391-Conf. Mr Bernard Lavigne confirms that the discussions between the United Nations and the Office of the Prosecutor concerning the article 54(3)(e) agreements were conducted by the Coordination and Cooperation Division. (ICC-01/04-01/06-Rule68Deposition-Red2-FRA, 17/11/2010, p. 58, lines 5-14).

¹⁵ ICC-01/04-01/06-2901, para. 91(a).

Defence may rely on it again its observations filed in accordance with article 110 of the Statute.

18. These facts show that Judge Silvia Fernández was involved in the case concerning Mr Thomas Lubanga in her capacity as a senior member of the Office of the Prosecutor, that is, in circumstances which manifestly cast doubt on her impartiality and that she cannot, therefore, participate in determination of the issue of the review of the sentence imposed on Mr Thomas Lubanga.¹⁶

FOR THESE REASONS, MAY IT PLEASE THE COURT TO

ORDER the disqualification of Judge Silvia Fernández in her capacity as Presiding Judge of the Chamber constituted to review in accordance with article 110 of the Statute the sentence imposed on Mr Thomas Lubanga.

[signed]

Ms Catherine Mabile, Counsel

Dated this 29 June 2015

At The Hague, The Netherlands

¹⁶ In this connection, it should be noted that the Senior Legal Adviser, Mr Gilbert Bitti, was separated from the Pre-Trial Chamber in *The Prosecutor v. Thomas Lubanga* on the application of the Office of the Prosecutor: ICC-01/04-01/06-632 and ICC-01/04-01/06-373.