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Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of *The Prosecutor v Germain Katanga*

I. Procedural History

1. On 30 September 2009, the Presidency of the International Criminal Court ("Court" or "ICC") transmitted the case of *The Prosecutor v Germain Katanga* (ICC-01/04-01/07 ("Case")) to Trial Chamber II, composed of Judges Bruno Cotte, Fatoumata Dembele Diarra and Christine Van den Wyngaert.[1]
2. On 7 March 2014, Mr Katanga was found guilty, as an accessory, of one count of crimes against humanity and four counts of war crimes by the majority of Trial Chamber II (Judges Cotte and Diarra).[2] Judge Van den Wyngaert, disagreeing with the majority, issued a Minority Opinion.[3]
3. On 16 April 2014, the Presidency granted the requests of Judges Cotte and Diarra to leave the Court upon conclusion of the sentencing proceedings in the Case pursuant to article 76 of the Rome Statute ("Statute")[4] and reconstituted Trial Chamber II, effective on the date of the issuance of the sentencing decision, as follows: Judges Van den Wyngaert, Silvia Fernandez and Olga Herrera-Carbuccia.[5]
4. On 23 May 2014, Mr Katanga was sentenced to 12 years imprisonment by Trial Chamber II.[6] Judge Van den Wyngaert issued a dissenting opinion on sentencing.[7]
5. On 30 May 2014, the Common Legal Representative for Victims in the Case ("Legal Representative") filed an application before the Presidency ("Application"), pursuant to

[1] Decision replacing a judge in Trial Chamber II, ICC-01/04-01/07-1503.
[2] Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07-3436.
[3] Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3436-AnxI
[4] Decision on conclusion of term of office of Judges Bruno Cotte and Fatoumata Dembele Diarra, ICC-01/04-01/07-3468-AnxI (Annex I to Decision replacing two judges in Trial Chamber II, ICC-01/04-01/07-3468).
[5] Decision replacing two judges in Trial Chamber II, ICC-01/04-01/07-3468.
[6] Décision relative à la peine (article 76 du Statut), ICC-01/04-01/07-3484.
[7] Dissenting opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07-3484-Anx1.

articles 21, 41(2), 68 and 82(4) of the Statue and rule 34 of the Rules of Procedure and Evidence ("Rules"), for the disqualification of Judge Van den Wyngaert ("Judge") from the Case.[8]

6. On 4 June 2014, the Defence for Mr Katanga ("Defence") filed a response to the Application.[9]
7. On 11 June 2014, the Judge filed a written submission on the Application ("Submission") in accordance with article 41(2)(c) of the Statute and rule 34(2) of the Rules.[10]
8. On 25 June 2014, a special plenary session of judges was convened in accordance with article 41(2)(c) of the Statute and rule 4(2) of the Rules[11] and attended, in person, by Judges Sang-Hyun Song ("Chair"), Sanji Monageng, Akua Kuenyehia, Erkki Kourula, Anita Ušacka, Ekaterina Trendafilova, Joyce Aluoch, Kuniko Ozaki, Howard Morrison, Olga Herrera-Carbuccia, Robert Fremr, Chile Eboe-Osuji and Geoffrey Henderson ("Plenary").

II. The Arguments

A. Legal Representative for Victims

(i) Admissibility

9. The Legal Representative argues that whereas article 41(2)(b) of the Statute provides that the Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge, the right should be extended to the victims as, pursuant to article 21(3) of the Statute, article 41(2)(b) must be interpreted consistently with internationally recognised human rights.[12]
10. He argues that article 41(2) of the Statute recalls the internationally recognised principle that: in the determination of any criminal charge against him or her, or of his or her rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by an impartial tribunal.[13] He maintains that the right to request the disqualification of a judge

[8] Requête sollicitant la récusation de Mme la juge C. Van den Wyngaert, ICC-01/04-01/07-3487.
[9] Defence Response to Requête sollicitant la récusation de Mme la juge C. Van den Wyngaert, ICC-01/04-01/07-3489.
[10] Written Submission pursuant to article 41(2)(c), ICC-01/04-01/07-3495-Corr-Anx; Annex to Second Notification concerning the defence requests for the disqualification of a Judge in case ICC-01/04-01/07 (ICC-01/04-01/07-3495-Corr-Anx).
[11] Notification concerning the application from the legal representatives for victims for the disqualification of a Judge in case ICC-01/04-01/07, ICC-01/04-01/07-3490.
[12] ICC-01/04-01/07-3487, paragraphs 10, 11 and 21.
[13] ICC-01/04-01/07-3487, paragraph 12.

whose impartiality is called into question is the natural counterpart to such a principle, otherwise the right to fairness in a decision on the victims' requests for reparations cannot be effectively guaranteed.[14]

11. The Legal Representative submits that the right to be tried by an impartial judge applies not only to proceedings relating to the criminal charge, but also to proceedings relating to the civil component of the case, referring to the jurisprudence of the European Court of Human Rights.[15] He further contends that such an approach is consistent with the need to safeguard the victims' rights and their proper place in criminal proceedings.[16]
12. The Legal Representative argues that the decision on reparations under article 75 of the Statute is essential for the victims. He further submits that victims are the main actors at the reparations stage,[17] arguing, in reliance upon jurisprudence of the Appeals Chamber and the Presidency, that during this stage they become parties and are not only participants.[18]
13. He recalls that in the *Lubanga* case, the Appeals Chamber considered that:

> "[…] under article 82 (4) of the Statute, victims are entitled to bring an appeal. They are therefore parties to the proceedings and not, as is the case at other stages of the proceedings, participants who, under article 68 (3) of the Statute, may present their views and concerns where their personal interests are affected."[19]

14. He also recalls that in the *Katanga* case the Presidency founded its decision to reconstitute Trial Chamber II at the reparations stage on the following consideration:

> "While the Court's jurisprudence on reparations is limited, some differences, such as the participants and evidentiary standards, are evident. Notably, victims receive an enhanced procedural role in that they become parties to the proceedings, thereby altering the nature and focus of proceedings from punitive to reparative."[20]

15. As such, the Legal Representative prays that the Plenary finds the Application to be admissible.[21]

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[14] ICC-01/04-01/07-3487, paragraphs 12 and 19 to 21.
[15] ICC-01/04-01/07-3487, paragraphs 13, 14 and 20.
[16] ICC-01/04-01/07-3487, paragraph 14.
[17] ICC-01/04-01/07-3487, paragraph 18.
[18] ICC-01/04-01/07-3487, paragraphs 16 and 17.
[19] ICC-01/04-01/07-3487, paragraph 16, citing Decision on the admissibility of the appeals against Trial Chamber I's "Decision establishing the principles and procedures to be applied to reparations" and directions on the further conduct of proceedings, ICC-01/04-01/06-2953, paragraph 67.
[20] ICC-01/04-01/07-3487, paragraph 17, citing Decision on conclusion of term of office of Judges Bruno Cotte and Fatoumata Dembele Diarra, ICC-01/04-01/07-3468-AnxI, paragraph 4.
[21] ICC-01/04-01/07-3487, paragraph 22 and page 17.

(ii) Grounds for Disqualification

16. The Legal Representative argues that an informed observer would reasonably question the composition of the current bench.

17. In contesting the Judge's impartiality in the reparations proceedings, the Legal Representative cites rule 34(1)(c) of the Rules as a ground for disqualification, that is: "[p]erformance 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".[22] He argues that the Judge has formed an opinion on the Case which could adversely affect her required impartiality or simply renders it impossible for her to decide upon the reparations.[23]

18. First, the disqualification of the Judge is sought on the ground that her Minority Opinion criticises the majority's evaluation of the evidence and in so doing dismisses the credibility of three witnesses in the Case who are also victims.[24] The Legal Representative contests the Judge's ability to now decide upon the victims' request for reparations objectively and without prejudice, given that she has already formed an opinion, which is irreconcilable with that of the majority, on their credibility or the reliability of their testimony.[25]

19. Second, the Application is based on the ground that the Judge minimises the harm suffered by victims in the Case by: rejecting the existence of any attack against the civilian population, considering the harm suffered as collateral damage to a legitimate military attack and, thus, rejecting a finding of war crimes and crimes against humanity.[26] As such, it is argued that the view of the Judge is incompatible with the recognition of the harm suffered by the victims.[27]

20. In sum, the Legal Representative argues that a reasonably and properly informed observer would have legitimate doubts as to the Judge's impartiality to decide upon the harm suffered by the victims and on the reparations to be granted to such victims, given that the legal characterisation of the harm suffered in the Judgment is the basis for reparations.[28] He argues that the bias in the present situation is rendered even more acute since, following the

[22] ICC-01/04-01/07-3487, paragraph 24.
[23] ICC-01/04-01/07-3487, paragraph 50.
[24] ICC-01/04-01/07-3487, paragraphs 34 and 35.
[25] ICC-01/04-01/07-3487, paragraphs 38 to 40.
[26] ICC-01/04-01/07-3487, paragraphs 41 and 43, 44, 52 and 56.
[27] ICC-01/04-01/07-3487, paragraph 48.
[28] ICC-01/04-01/07-3487, paragraphs 31, 47, 53 and 55.

reconstitution of Trial Chamber II, the contested Judge is the only judge who has heard all of the evidence.[29]

B. Submissions of Judge Van den Wyngaert

(i) Admissibility

21. In her Submission, the Judge does not express a view on whether the Legal Representative has standing to bring the Application under article 41(2)(b) of the Statute.[30]

(ii) Grounds for Disqualification

22. The Judge states that her position on the merits of the criminal case does not affect her ability to rule impartialy in the reparations proceedings.[31]
23. The Judge submits that the Application misrepresents her Minority Opinion.[32] She clarifies that whilst she "expressed serious misgivings about the evidentiary standard that was applied by the [m]ajority in making certain findings concerning particular instances of crimes", she never denied that civilians of Bogoro were the victims of crimes[33] or found that civilian casualties were collateral damage.[34] Rather, she challenged the majority's finding that the crimes were planned beforehand.[35]
24. The Judge states that, contrary to the arguments set forth by the Legal Representative, ruling on the "criminal merits" of the Case does not amount to "previous involvement" in the Case in the sense of article 41(2)(a) of the Statute.[36] She states that if it were the situation then Judges Cotte and Diarra would have had to excuse themselves on the basis that they have expressed opinions which disadvantage Mr Katanga, were they still in Trial Chamber II. The Judge argues that "given the staggered nature of the proceedings, it is unavoidable that trial judges have to express their opinion on the merits of the criminal case before they decide on the merits of reparations."[37] She states that if the fact of having expressed a view on the merits would be enough to disqualify a judge, then the same bench

[29] ICC-01/04-01/07-3487, paragraph 54.
[30] ICC-01/04-01/07-3495-Anx, paragraph 7.
[31] ICC-01/04-01/07-3495-Anx, paragraphs 8 and 10.
[32] ICC-01/04-01/07-3495-Anx, paragraphs 1, 4 and 5.
[33] ICC-01/04-01/07-3495-Anx, paragraphs 4 and 15.
[34] ICC-01/04-01/07-3495-Anx, paragraph 5.
[35] ICC-01/04-01/07-3495-Anx, paragraph 5.
[36] ICC-01/04-01/07-3495-Anx, paragraph 9.
[37] ICC-01/04-01/07-3495-Anx, paragraph 9.

could never rule on guilt, sentencing and reparations, which is clearly not what the Statute envisaged,[38] given article 76(3) of the Statute.[39]

25. Further, the Judge maintains that in any case, it has not yet been decided how the Trial Chamber will conduct the reparations proceedings. On the one hand, it might be decided that the accused's liability for reparations must be decided *de novo* on the basis of a different and presumably lower standard or it might be decided that any findings in the criminal trial, including criminal responsibility, are binding for the reparations proceedings.[40] In any event, the Judge accepts that she is bound by the findings in the majority opinion relevant to reparations, including the criminal responsibility of Mr Katanga.[41]
26. The Judge states that the only point where she sees a "potential complication" concerns the credibility of the witnesses who are also victims. The Judge accepts that her opinion of their testimony in the criminal proceedings may indeed influence her appraisal of their testimony in the reparations proceedings.[42] However, the Judge maintains that had Judges Diarra and Cotte remained in the Chamber, they would equally have had a predetermined opinion regarding the credibility of those witnesses and if it would not have been a ground for their disqualification, it should not now be a ground for her disqualification.[43]

C. Response of the Defence for Mr Katanga

(i) Admissibility

27. The Defence contest the admissibility of the Application on the ground that the provisions of the Statute do not allow the Legal Representative to file a request for disqualification at any stage of the proceedings.[44] The Defence argue that the victims are not in the same position as the Prosecutor or the accused. It is argued that they are participants and not parties and, as such, are granted fewer rights and obligations.[45] It is further submitted that the Prosecutor is deemed to act in the general interest and, thus, it is unnecessary to grant

[38] ICC-01/04-01/07-3495-Anx, paragraph 9.
[39] ICC-01/04-01/07-3495-Anx, paragraph 12.
[40] ICC-01/04-01/07-3495-Anx, paragraphs 10 and 11.
[41] ICC-01/04-01/07-3495-Anx, paragraph 13.
[42] ICC-01/04-01/07-3495-Anx, paragraph 14.
[43] ICC-01/04-01/07-3495-Anx, paragraph 14.
[44] ICC-01/04-01/07-3489, paragraph 12.
[45] ICC-01/04-01/07-3489, paragraph 14.

the victims the right to request the disqualification of a judge.[46] The Defence maintain that there is no ambiguity in the Statute calling for further interpretation and that had the States Parties wanted to place the victims on an equal footing with the defence and prosecution then they would have done so.[47]

28. Further, the Defence submit that the Appeals Chamber's decision cited by the Legal Representative only confers the role of parties to victims in an appeal against a decision on reparations and does not extend to the reparations proceedings themselves.[48] Moreover, the Defence submit that even if the Presidency and Appeals Chamber have attributed the title of 'party' to the victims in certain limited circumstances, article 41(2)(b) of the Statute does not, in any case, refer to the parties but to the prosecution and the person being investigated or prosecuted.[49]
29. As such, the Defence argue that the victims are not entitled to request the disqualification of the Judge and the Plenary cannot go beyond the wording of the Statute.[50]

(ii) Grounds for Disqualification

30. On the substance of the Application, the Defence argue that it should be dismissed on the ground that it cannot be maintained that a judge shows bias because he or she has written a minority opinion. It is argued that this would be contrary to article 74 of the Statute which allows for both majority and minority opinions and further that "dissent is part of a fair trial", given that it can "support or contest the point of view of any party or participant".[51]
31. The Defence submit that the Legal Representative has erroneously interpreted the conditions for disqualification. It is argued that rule 34(1)(c) of the Rules, which pertains to bias, is not applicable as it refers to bias demonstrated by the judge prior to taking office at the Court, as opposed to after taking office as is argued in the instant case.[52]
32. The Defence submit that pursuant to article 74 of the Statute, trial chamber judges are appointed from the beginning to the end of the proceedings, including the reparations phase and that the departure of two judges from the Case is the exception rather than the rule.[53]

[46] ICC-01/04-01/07-3489, paragraph 14.
[47] ICC-01/04-01/07-3489, paragraph 14.
[48] ICC-01/04-01/07-3489, paragraph 15.
[49] ICC-01/04-01/07-3489, paragraph 16.
[50] ICC-01/04-01/07-3489, paragraph 17.
[51] ICC-01/04-01/07-3489, paragraph 23.
[52] ICC-01/04-01/07-3489, paragraph 20.
[53] ICC-01/04-01/07-3489, paragraph 22.

33. The Defence also argue that the Judge participated in the sentencing proceedings and issued a dissent therein and it was not alleged that she was partial. Indeed, the fact that the Judge dissented on liability was as irrelevant for sentencing as it is for reparations.[54] The Defence submit that were the Legal Representative's reasoning to be followed, the Judge should also have been excluded from the sentencing stage, which was clearly not the intention of the drafters of the Statute.[55]
34. Finally, the Defence argue that in a Case where two judges have already withdrawn, it would be detrimental to the rights of Mr Katanga to have a bench composed of three new judges who did not attend any part of the trial.[56]

III. Relevant Law

35. Article 41(2)(a) of the Statute provides that "[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground".
36. Article 41(2)(a) of the Statute provides: "[t]he Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph".
37. A ground for disqualification set forth in rule 34(1)(c) of the Rules is the: "[p]erformance 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".
38. The plenary has previously established that it is not necessary for an applicant seeking to disqualify a judge to show actual bias on behalf of the judge; rather, the appearance of grounds to doubt his or her impartiality will be sufficient.[57]
39. The relevant standard of assessment is whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge. This standard is

[54] ICC-01/04-01/07-3489, paragraph 24.
[55] ICC-01/04-01/07-3489, paragraph 24.
[56] ICC-01/04-01/07-3489, paragraph 25.
[57] 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 ("Decision of 20 June 2014"), paragraph 16; 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* Decision"), paragraph 9; Decision of the plenary of the judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012, ICC-02/05-03/09-344-Anx ("*Banda/Jerbo* Decision"), paragraph 11.

concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension is objectively reasonable.[58]

40. Additionally, there is a strong presumption of impartiality attaching to a judge that is not easily rebutted.[59]

IV. Findings of the Plenary

41. An absolute majority of eight judges found the Application to be inadmissible on the ground that the Legal Representative has no standing to bring an application for the disqualification of a judge (Judges Song, Monageng, Kuenyehia, Aluoch, Ozaki, Morrison, Fremr and Henderson ("Majority")). A minority of three judges found the Application to be admissible on the ground that the Legal Representative has standing to bring the Application (Judges Kourula, Ušacka and Herrera-Carbuccia ("Minority")). Two judges abstained from the decision (Judges Trendafilova and Eboe-Osuji[60]).
42. The Plenary first noted article 41(2)(a) of the Statute, which lays down the principle of impartiality, providing that "[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground". The Plenary then reflected upon article 41(2)(b) of the Statute, which stipulates that: "[t]he Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph." The Plenary noted that this provision does not refer to victims who have been authorised to participate in the proceedings. The Plenary then deliberated the argument of the Legal Representative that the provision should be read as including victims, in accordance with article 21(3) of the Statute.
43. The Majority were mindful of the role played by the victims in the reparations proceedings, considering that they are indeed important protagonists at the reparations stage. They considered the literal language of article 41(2)(b) of the Statute, recalling that: "[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", as reflected in article 31 (on the "General rule of interpretation") of the Vienna Convention on

[58] Decision of 20 June 2014, paragraph 17; *Lubanga* Decision, paragraphs 9 and 10; *Banda/Jerbo* Decision, paragraphs 11 and 13.
[59] Decision of 20 June 2014, paragraph 18; *Lubanga* Decision, paragraph 10; *Banda/Jerbo* Decision, paragraph 14.
[60] Judge Eboe-Osuji concurred with the reasoning of the Majority. He abstained from the voting, out of concern (then resulting from a question pending before the Plenary) that a resolution of the preliminary question on standing may prevent consideration of the substantive question presented in the Application.

the Law of Treaties ("Vienna Convention"). They then considered whether it was necessary to resort to any principles of treaty interpretation in the instant case, recalling that pursuant to article 32 (on "Supplementary means of interpretation") of the Vienna Convention:

> "[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".

44. The Majority considered that the ordinary meaning of article 41(2)(b) of the Statute was neither ambiguous nor unreasonable. Nor was there any lacuna in the law which called for further judicial interpretation. The law was plain and determinate as to who was entitled to bring an application for the disqualification of a judge. That right was limited to the Prosecutor and the person being investigated or prosecuted.

45. The Majority further considered that the victims would not be prejudiced by such a finding; it was sufficient to limit the right to the person being investigated or prosecuted and to the Prosecutor, who is deemed to act in the general interest of the international community. The Majority also considered that broadening the provision to include victims could create uncertainty as to whether a collective or individual right had been bestowed upon the victims and thus lead to an absurd result. Moreover, the Majority considered that proceedings concerning the disqualification of a judge are exceptional in their nature given: on the one hand, the presumption of impartiality which attaches to judicial office, whereby 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[61] and, on the other hand, the duty upon a judge pursuant to rule 35 of the Rules to request to be excused where that judge has reason to believe that a ground for disqualification exists in relation to him or her and not to wait for a request for disqualification to be made against them. Thus, considering disqualification an extraordinary remedy, the Majority found that the explicit wording of the Statute should be interpreted strictly, particularly in the absence of any apparent mistake in drafting.

[61] Decision of 20 June 2014, paragraph 18; *Lubanga* Decision, paragraph 10; *Banda/Jerbo* Decision, paragraph 14.

46. The Minority found that the victims have an important role to play in the reparations proceedings, in which they arguably have the most interest, and, at this particular stage of the proceedings, should be entitled to challenge the composition of the bench through a request for the disqualification of a judge.
47. The Minority noted that the Statute uniquely establishes the right of victims to participate in international criminal proceedings. Article 68(3) of the Statute provides:

> "[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules…"

48. The Minority maintained that the Statute must be interpreted in a manner that gives meaning to the victims' right to participate in accordance with article 68(3). The Minority considered that in the instant case, the personal interests of the victims were most certainly affected by the fact or appearance of any partiality on the bench deciding the reparations proceedings. As such, they considered that article 41(2)(b) of the Statute should be given a purposive or teleological interpretation in order to ensure that those interests of victims, which are independent of those of the defence and even those of the prosecution,[62] are appropriately protected at the reparations stage of the proceedings.
49. In any event, the Plenary unanimously considered the substance of the Application to be misplaced and unfounded, as discussed below.
50. The Plenary noted the argument of the Legal Representative that partiality would necessarily flow from the Judge, considering the way in which she had assessed the evidence and decided upon the merits of the Case in her Minority Opinion. They noted the submission of the Legal Representative that the Judge's public expression of her intimate conviction in relation to the merits phase constituted bias in relation to the reparations phase.[63]
51. The Plenary considered that the entitlement of a judge to express a different opinion from the majority, whether concurring or dissenting, is safeguarded by article 74 of the Statute and the expression of a minority opinion does not render a judge biased or partial in further

[62] ICC-01/04-101-tEN-Corr, paragraph 51.
[63] ICC-01/04-01/07-3487, paragraph 53.

proceedings. The Plenary considered that the reasoning in the Application ultimately implied an inconsistency with the idea of the independence of mind that judges bring to bear in judgment making. It considered that such independence is both external and internal, including autonomy from other members of the bench, and allows judges to maintain their intellectual integrity. Moreover, the Plenary considered that minority opinions protect judicial proceedings from the influence of forced uniformity, afford necessary impetus for the development of the law and prevent stagnation in decision making. It considered that minority opinions enrich the quality of decisions and improve their clarity from the perspective of the views of the judges thus expressed, and demonstrate to the parties, participants and public at large that a case has been thoroughly assessed. The Plenary considered it a paradox that a bastion of judicial independence was being used as a basis for the disqualification of the Judge.

52. Moreover, the Plenary considered that if it were to accept the reasoning of the Legal Representative, then any time that a decision is taken, whether by majority or unanimously, on the guilt or innocence of an accused, then the same bench could never proceed to sit in the reparations proceedings. The Plenary considered that such reasoning is contrary to article 74(1) of the Statute which stipulates: "[a]ll the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations…" Further, it noted that this line of reasoning would lead to an impractical and unreasonable outcome, contrary to the interests of justice, given that it would entail the complete replacement of one chamber (which has heard all the evidence in a particular case) with another (which has not heard any of the evidence in the case). Finally, without opining on the way in which evidence from the trial would be used during the reparations proceedings,[64] the Plenary considered that a minority judge dissenting on conviction or acquittal in a case is, at any rate, bound by the decision of the majority of the chamber.

V. Concurring Separate Opinion of Judge Eboe-Osuji

53. Judge Eboe-Osuji fully concurs with the decision of the Plenary, rejecting the request for disqualification.

[64] The Plenary notes that the description of the factual basis of the Judgment appears to be inconsistent with the Minority Opinion and that insufficient care was taken by the Legal Representative in this respect.

54. On the question of the victims' *locus standi*, he is deeply sympathetic with victims' desire for standing to seek disqualification of judges where there are compelling reasons to seek disqualification. Although he had abstained during the voting on that particular question, he is of the view that the Plenary's decision in that regard is ultimately correct, taking into account various considerations that bear on the matter. For one thing, it is often the case that the texts of statutory provisions leave room for ambiguity as to the intendment of the particular provision in question. But, that is not the case with article 41(2)(b) of the Statute, as to who has standing to seek disqualification of judges. It is to be stressed that article 41 is the only provision that confers upon the Plenary the power to take the extraordinary step of disqualifying a judge from a case with which he or she is seised. There appears to be little room for ambiguity as to whom article 41(2)(b) permits to bring such an application. That permission is provided for in the following words: "The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph". There is no room for ambiguity in that provision, such that the victims may also be read into article 41(2)(b) as among parties and participants who may bring applications for disqualification of judges.
55. In that regard, the Plenary was correct, in his view, in declining to accept any implicit argument of an analogy with the decision (of the majorities of the Appeals Chamber and Trial Chamber V(A) in *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* and of the majority of Trial Chamber V(B) in *The Prosecutor v Uhuru Muigai Kenyatta*) finding the existence of discretion in a Trial Chamber to conditionally excuse accused persons from continuous presence at trial, in spite of the provisions of article 63(1) that provides: "The accused shall be present during the trial."
56. Judge Eboe-Osuji recalled the explanation (made in the decision of the Majority of Trial Chamber V(A) in the *Ruto and Sang* excusal decision) that there was ambiguity in the provision of article 63(1). That is, whether the burden of the obligation of accused presence at trial encumbered the accused in commanding *him* or *her* to be present at the trial, at the pain of forfeiture of his or her right to be present during his or her own trial, or whether the burden rested upon a Trial Chamber in forbidding it from proceeding with a trial even when an accused had deliberately absconded from the trial; with the aim of frustrating the ends of justice in the case, including the right of victims and society to the truth. The decision of Trial Chamber V(A) was to the effect of resolving that ambiguity in favour of placing that burden of obligation upon the accused to be present at trial and not on the

Chamber to refrain from proceeding with the trial in the absence of the accused; thus permitting the Trial Chamber the discretion to excuse the accused from conditional presence at trial. There is, therefore, no similar scope for ambiguity as regards whom article 41(2)(b) has given standing to request the disqualification of a judge. Secondly, there are reasons to consider that the omission of victims from persons indicated in article 41(2)(b) as having standing to seek the extraordinary remedy of disqualification of judges should not lightly be viewed as a mistake in drafting, such that the Plenary should readily correct by way of interpretation. It is recalled that disqualification of judges is a remedy to be sought only in the rarest of cases.[65] The provision of article 41(2)(b) indicating only '[t]he Prosecutor or the person being investigated or prosecuted' as persons with standing to seek disqualification of judges in any case, is consistent with the jurisprudence which insists that disqualification is an exceptional remedy to be sought in the rarest of instances. The converse outcome should be expected in any given case in which victims—who may run into the thousands in the particular case—are permitted standing to seek the disqualification of any judge in the case.

57. Concerning the substantive complaint of the victims in the present case, quite apart from the matter of their *locus standi*, Judge Eboe-Osuji feels the need to add the following observations, while agreeing entirely with the decision and reasoning of the Plenary as it stands. Judge Eboe-Osuji wishes to reiterate, as apposite in the present case, the observations that he had previously made in the Plenary decision on the request to disqualify Judge Song in the *Lubanga* appeal.[66]

58. It is a central tenet of the law of disqualification of judges that the correct stand-point of appreciation of the matter is from the perspective of the average by-stander who is fully informed of the circumstances.[67] The correct stand-point of appreciation is not solely from

[65] *Banda/Jerbo* Decision, paragraph 14; Presidency 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 September 2009 as contained in ICC-01/04-01/06-2138-AnxIII, 13 November 2009, p 6. See also International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v Vojislav Šešelj*, Case No. IT-03-67-R77.3, Decision on Vojislav Šešelj's Motion to Disqualify Judge Alphons Orie, 7 October 2010, paragraph 11; *Prosecutor v Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on the Motion for Disqualification, 12 January 2009, paragraph 3; *Prosecutor v. Blogojević*, Case No. IT-02-60-R, Decision on Motion for Disqualification, 2 July 2008, paragraph 3; *Prosecutor v. Sejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landzo*, Case No. IT-96-21-A, Appeals Judgment, 20 February 2001, paragraph 707.

[66] *Lubanga* Decision, paragraphs 51-56, as per Judge Eboe-Osuji.

[67] *Banda/Jerbo* Decision, paragraph 11. Lord Denning notes in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599 that there should be 'a reasonable apprehension or suspicion of bias on the part of a fair-minded and informed member of the public' (UK). Similarly in Canada, the standard is an 'apprehension of bias [that]

the perspective of the complaining party.[68] And the test is whether the average by-stander, fully informed of the circumstances, will indeed apprehend bias in the ultimate decision in which the impugned judge participated or is to participate.[69] For an apprehension of bias to be legitimate or valid, it is critical that the average by-stander be fully informed of all the circumstances in the case. It would not do to shoot from the hip. Judge Eboe-Osuji insists that consideration of all the circumstances must take into account whether the impugned judge is the sole judge to render the ultimate decision, or whether he or she sits in a panel among other judges. The validity of apprehension of bias is markedly evident when the ultimate decision is to be rendered by the same judge—alone—against whom bias is suspected. But the same conclusion does not follow in the ultimate decision of a panel of judges, who individually enjoy a presumption of not only impartiality but, perhaps, a demonstrable tradition of independence.

59. At the ICC for instance, the tradition of independence is demonstrated by a robust judicial culture of dissenting and separate opinions. There is, for instance, rarely a member of the Plenary who has not issued a separate opinion or a dissenting opinion or been part of majority opinion in the Chamber in which he or she sits. Occasionally, those dissenting or separate opinions are issued in decisions of the Plenary itself. Indeed, the cause of the present application is the very epitome of that culture of judicial independence made manifest in the manner of a dissenting opinion; for, it was Judge Van den Wyngaert's spirited dissenting opinion in the merits phase of the case that gave rise to the application of the victims to disqualify her from the reparation phase. This tradition of majority decisions, separate opinions and dissenting opinions must be reckoned as a healthy reassurance that judges of the Court are not beholden in their views to those held by anyone of their colleagues. And, it needs to be said, that judges are particularly careful to keep in mind any allegation or concerns of bias expressed against a colleague. In the circumstances, the more sensible approach is to consider that the commonality of the views

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must be a reasonable one, held by reasonable and right minded persons' (*Committee for Justice and Liberty v. National Energy Board* [1978] 1 S.C.R. 369, 394 (Canada)).

[68] See R. Matthew Pearson, *Duck Duck Recuse? Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 Washington & Lee Law Review 1799 (2005) at 1812-13 in which he describes the standard as protecting against excessive disqualifications by managing purely subjective fear of bias by litigating parties.

[69] In Canada this is understood as 'an informed and right-minded member of the community' who determines bias with a 'complex and contextualised understanding of the issues of the case.' (*R.D.S. v. The Queen* [1997] 3 S.C.R. 484, 1 46, 48 (Canada) (L'Heureux-Dube & McLachlin JJ, concurring)).

of an impugned judge with the decision of his or her colleagues should be seen as diminishing rather than enhancing the apprehension that the decision was tainted with bias.

60. In his concurring opinion in the Plenary decision in the recusal decision in the *Lubanga* appeal, Judge Eboe-Osuji relied upon the decision of the Supreme Court of Canada in *Wewaykum Indian Band v Canada*, where the Supreme Court considered situations in which a reasonable apprehension of bias may arise.[70] The court noted that its decision-making process was a collegial process whereby each judge expresses individual views and prepares independently for the hearing of an appeal.[71] Therefore, even where the involvement of a single judge *does* give rise to a reasonable apprehension of bias, no reasonable person informed of the decision making process of the court, could conclude that it was likely that a panel of judges was biased or tainted by the apprehended bias of one of those judges.[72] This is particularly the case where the entire panel of judges is put on notice of the allegation of bias ahead of time.

61. In a dissenting opinion in the *Lubanga* disqualification decision, disagreement was expressed against Judge Eboe-Osuji's reliance upon the judgment of the Supreme Court and on the proposition that 'the Appeals Chamber, as a collegial body, could neutralise a possible appearance of bias of one of its judges'.[73] The disagreement was founded in an important part upon the claim that 'the decision-making process of the ICC Appeals Chamber is not a matter of public record as in the Supreme Court of Canada and that the legal framework and structure of the two bodies are different.'[74] Judge Eboe-Osuji feels unable to agree — especially to the extent of a general import of that objection. He notes, in particular, that the bases of those claims remained unexplained. First, the deliberation methods of the Supreme Court of Canada were described in the *Wewaykum*. Before that judgment, the decision-making process of the Supreme Court of Canada was no more 'a matter of public record' than are the decision-making process of the Chambers of the ICC. Secondly, it is the case that decision-making processes described in *Wewaykum* are very similar to the general approach of the Chambers of the ICC. In the circumstances, there has been no argument to support the view that while the considerations indicated by the Supreme Court of Canada may be appropriate in that court, it is to be rejected at the ICC.

[70] *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (Wewaykum), at paragraphs 92-93, as cited in *Lubanga* Decision, paragraph 55, as per Judge Eboe-Osuji.
[71] *Wewaykum*, at paragraphs 92-93.
[72] *Wewaykum*, at paragraphs 92-93.
[73] *Lubanga* Decision, paragraph 64, as per Judge Ušacka.
[74] *Lubanga* Decision, paragraph 64, as per Judge Ušacka.

62. It should, perhaps, be stressed that the essence of the *Wewaykum* approach is the emphasis on *independence* of individual members of the bench, and not their *collegiality*, as such, as a body. It must especially be said that any rejection of the *Wewaykum* approach cannot be founded upon the argument appearing in a commentary on the Plenary decision in the *Lubanga* case, which invokes the epigram that 'one bad apple spoils the bunch',[75] hence the apprehension of bias against one judge poses a legitimate risk of contaminating the perception of a panel of judges with whom the impugned judge sits. Not everyone accepts the wisdom of the epigram, of course.[76] But, it is possible to accept that the epigram serves a useful purpose in its own particular context of moral instructions and formation of the young. It is difficult to quarrel with parents and priests when they teach the young to beware of the company they keep and the bad influence that may result from bad company. Beyond such limited purposes, the epigram is difficult to accept as a theory that should animate the administration of justice. There is much that is wrong with it indeed. Its havocs are readily seen in the ease with which it may displace the presumption of innocence, validate the idea of guilt by association, as well as collective punishment. It is quite simply an inadequate basis to displace the presumption of impartiality, integrity and independence that other judges must enjoy when they sit in cases with a colleague against whom a complaint of bias has been made.

In light of the foregoing, the Plenary by majority finds that the Legal Representative has no standing to bring the application.

The Application is inadmissible.

Judge Sang-Hyun Song

President

[75] Steven W Becker, 'The "Presumption of Impartiality" and other Errors in the International Criminal Court's Plenary Decision Concerning Judicial Disqualification of the President of the Court in *The Prosecutor v. Thomas Lubanga Dyilo*' in (2013) 1 *Global Community Yearbook of International Law and Jurisprudence* 111 at p 120.

[76] Notably, the American pop band, the Osmonds, had literally recorded a contradictory note, insisting that 'One bad apple don't spoil the whole bunch'.