ANNEX I

Cour
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International
Criminal
Court

3 August 2015

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*

I. Procedural History

1. On 14 March 2012, in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I ("Trial Chamber") of the International Criminal Court ("Court") found Mr Thomas Lubanga guilty of war crimes within the meaning of articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute ("Statute").[1] On 10 July 2012, the Trial Chamber sentenced Mr Lubanga to a term of imprisonment of 14 years.[2] On 1 December 2014, the Appeals Chamber confirmed the conviction and sentence against Mr Lubanga.[3]

2. On 15 June 2015, the Appeals Chamber appointed Judges Silvia Fernández de Gurmendi, Howard Morrison and Piotr Hofmański to conduct the review concerning the reduction of sentence of Mr Lubanga ("Sentence Review Panel"), pursuant to article 110(3) of the Statute and rule 224(1) of the Rules of Procedure and Evidence ("Rules").[4]

3. On 29 June 2015, the Defence for Mr Lubanga ("Applicant") filed an application for the disqualification of Judge Fernández de Gurmendi ("the Judge"), who is also President of the Court, from the Sentence Review Panel ("Application").[5]

4. The Application is based on Judge Fernández de Gurmendi's previous role in the Office of the Prosecutor ("OTP") from June 2003 to December 2006. During this period, the Judge served as Special Advisor and Director of the Jurisdiction, Complementary and Cooperation Division ("JCCD") as well as Chef de Cabinet of the former Prosecutor, Luis Moreno Ocampo.

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[1] Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842.
[2] Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901.
[3] Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red.
[4] Decision appointing three judges of the Appeals Chamber for the review concerning reduction of sentence of Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-3135.
[5] Urgent Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi, ICC-01/04-01/06-3139-tENG (hereinafter "Application for Disqualification").

5. On 30 June 2015, Judge Fernández de Gurmendi requested to be excused from any functions in the Presidency with respect to the Application pursuant to article 41 of the Statute.[6] On the same date, the remaining members of the Presidency granted the Judge's request and Judge Sanji Mmasenono Monageng assumed responsibilities as a member of the Presidency for the purpose of deliberating on the Application pursuant to regulation 11(2) of the Regulations of the Court.[7]

6. On 3 July 2015, the Prosecution filed a response to the Application.[8]

7. On 6 July 2015, Judge Fernández de Gurmendi filed written submissions on the Application in accordance with article 41(2)(c) of the Statute and rule 34(2) of the Rules.[9]

8. On 15 July 2015, a special plenary session of judges was convened in accordance with articles 41(2)(c) of the Statute and rule 4(2) of the Rules to consider the Application. The plenary session was attended in person by Judges Joyce Aluoch ("Chair"), Kuniko Ozaki, Sanji Mmasenono Monageng, Cuno Tarfusser, Howard Morrison, Olga Herrera Carbuccia, Robert Fremr, Geoffrey Henderson, Marc Perrin de Brichambaut, Piotr Hofmański, Antoine Kesia-Mbe Mindua, Bertram Schmitt, Péter Kovács, Chang-ho Chung and Raul Pangalangan.

II. The Arguments

A. Application

9. The Applicant submits that Judge Fernández de Gurmendi "has previously been involved in the case . . . in a situation which might reasonably cast doubt on her impartiality."[10] The Applicant points specifically to the Judge's performance of "high-level functions" in OTP from June 2003 to December 2006, which included serving as Special Adviser and Director of JCCD as well Chef de Cabinet for the former Prosecutor, Mr Moreno Ocampo.[11]

10. To illustrate the functions Judge Fernández de Gurmendi performed while working in OTP, the Applicant quotes from her curriculum vitae, including the following excerpts:

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[6] Request for Excusal from Presidency, 2015/PRES/00207.
[7] Response to Request for Excusal from Presidency, 2015/PRES/00207-02.
[8] Prosecution's response to the "Requête urgente de la Défense aux fins de récusation de Mme la juge Silvia Fernández de Gurmendi", ICC-01/04-01/06-3143 (hereinafter "Prosecution Response").
[9] Written submissions on Mr Thomas Lubanga Dyilo's "Urgent Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi", 2015/PRES/00212 (hereinafter "Judge Fernández de Gurmendi Written Submissions").
[10] Application for Disqualification, *supra* note 5, at para. 7.
[11] *Id*. at paras. 8-9.

> 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.[12]

11. The Applicant observes that Judge Fernández de Gurmendi was engaged in these functions "during the period between the application for a warrant of arrest against Mr Thomas Lubanga and the confirmation of charges hearing in that case."[13] The Applicant submits that, accordingly,

> 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.[14]

12. In support of this submission, the Applicant refers to witness statements by two former staff members of OTP, which the Applicant argues "confirm that the executive committee established within [OTP], 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."[15]

13. The Applicant also noted that "the trial record shows that Judge Silvia Fernández de Gurmendi played a key role within [OTP] 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."[16] The Applicant states that these "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" and that the Applicant may raise the issue again during the article 110 proceedings.[17]

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[12] *Id*. at para. 9.
[13] *Id*. at para. 12.
[14] *Id*. at para. 13.
[15] *Id*. at para. 14.
[16] *Id*. at para. 17.
[17] *Id*.

14. The Applicant concludes that

> 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.[18]

B. Response of the Prosecution

15. The Prosecution submits that "a reasonable and well-informed observer would not reasonably and objectively apprehend bias by Judge Fernández" for three reasons.[19]

16. First, the Prosecution argues that "a high threshold is required to disqualify a judge under article 41(2)(a)".[20] The Prosecution supports this argument, *inter alia*, by applying the "rules on interpretation of treaties in the *Vienna Convention*" to the relevant provisions of the legal framework.[21] In applying the *Vienna Convention* rules, the Prosecution relies on a prior decision of the Presidency, which reasoned that article 41(2)(a) "is designed to safeguard the integrity and to ensure the overall efficiency of the conduct of proceedings before the Court." [22]

17. The Prosecution further submits that the word "case" in article 41(2)(a) "should not be literally and restrictively interpreted" so as to "encompass[ ] all proceedings before the Court involving an accused or convicted person."[23] The Prosecution distinguishes between "[c]riminal proceedings, which seek to establish an accused's criminal responsibility . . . from other proceedings which have different purposes and procedures, such as . . . review proceedings . . . under article 110."[24] The Prosecution notes that "a literal interpretation of . . . 'case' in article 41(2)(a)" would lead to the automatic disqualification of "all judges who were involved in some aspect of the 'main' criminal proceedings from sitting in . . . subsequent separate proceedings", which "would lead to

[18] *Id*. at para. 18.
[19] Prosecution Response, *supra* note 8, at para. 2.
[20] *Id*. at paras. 3-10 (citing Decision of the plenary of judges on the "Defence Request for the Disqualification of a Judge" of 2 April 2012, ICC-02/05-03/09-344-Anx, 5 June 2012, paras. 11, 13-14 (hereinafter "*Banda/Jerbo* Decision"); *Prosecutor v. Delalic et al*., IT-96-21-A, Judgment, 20 Feb. 2001, para. 683).
[21] *Id*. at para. 7.
[22] *Id*. at para. 8 (citing 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 (hereinafter "*Lubanga* Excusal Decision")).
[23] *Id*. at para. 9.
[24] *Id*. The Prosecution also referred to proceedings on reparations and revision of convictions or sentences under article 84 as those distinct from criminal proceedings.

unviable and impractical situations."[25] The Prosecution concludes that, "[f]or 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".[26]

18. Second, the Prosecution emphasizes "the limited purpose and nature of the review concerning reduction of sentence".[27] In particular, the Prosecution notes that "the panel's determination will not be related to the merits of the case, which have already been adjudicated and constitute *res judicata*" but will be "on separate and post-conviction events."[28] The Prosecution further notes that other international criminal tribunals have sentence review proceedings that similarly exhibit a "confined purpose and distinct nature."[29] In particular, the Prosecution observes that the President of the United Nations Mechanism for International Criminal Tribunals ("MICT") has discretion to grant or deny early release notwithstanding his prior participation in the appeals proceedings in the same case.[30]

19. Finally, the Prosecution submits that Judge Fernández de Gurmendi had a "non-operational and relatively circumscribed role in the *Lubanga* case resulting from her position as head of JCCD and as a member of ExCom".[31] The Prosecution notes, in particular, that the Judge "was never directly responsible for the investigation and prosecution of the *Lubanga* case."[32]

C. Submissions of Judge Fernández de Gurmendi

20. Judge Fernández de Gurmendi begins by emphasizing her "positive duty" under rule 35 "to excuse [her]self in circumstances where [she] believe[s her] impartiality might

[25] *Id*. at para. 10.
[26] *Id*.
[27] *Id*. at para. 11.
[28] *Id*.
[29] *Id*. at para. 12 & nn. 18-21 (citing, *inter alia*, article 26 of the Statute and rule 150 of the Mechanism for International Criminal Tribunals).
[30] *Id*. at para. 12.
[31] *Id*. at para. 13. The Prosecution submits that as head of JCCD, Judge Fernández de Gurmendi "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." The Prosecution further submits that as a member of the Executive Committee, the Judge "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" but that "her intervention would have necessarily been sporadic and general in nature" as "[s]he was not one of the lawyers involved in investigating or prosecuting the case against Mr Lubanga". *Id*. at paras. 13-14.
[32] *Id*.

reasonably be doubted on any ground."[33] She observes, in this respect, that she has "systematically sought to avoid being involved in the judicial proceedings related to any case arising from investigations that commenced or were conducted during the time [she] worked at the OTP."[34]

21. Judge Fernández de Gurmendi states that in concluding that a request for excusal was not warranted in these circumstances, she explicitly considered "[t]he distinct nature of the sentence review":

> My positions at the OTP involved actual or perceived participation in consideration of evidence and legal issues related to the commission of crimes within the jurisdiction of the Court and the criminal responsibility of alleged perpetrators. There is, in my view, a fundamental distinction between these type of considerations and pre-trial, trial or appellate proceedings that may follow and the article 110 sentence review. The latter only deals with the reduction of a sentence already imposed and entails the consideration of circumstances that may have arisen after the culpability of the person and corresponding penalty have been already settled by a Trial Chamber and ruled upon by the Appeals Chamber.[35]

22. Judge Fernández de Gurmendi submits, in particular, that the sentence review is "quasi-executive in nature".[36] In support of this argumentation, the Judge observes the respective placement of article 110 and rules 223-24 in those parts of the legal framework addressing "Enforcement", which is a function undertaken by the Presidency pursuant to rule 199.[37] The Judge also notes "the structure of the body undertaking the review", that is "three judges of the Appeals Chamber appointed by that Chamber" whereas "appellate proceedings need to be carried out by all judges of the Appeals Chamber, in accordance with article 39(2) of the Statute."[38] Accordingly, the Judge concludes that the sentence review

> while conducted by three appellate judges, is not appellate in nature as the judges are not called to revise the final judgment or sentence. This review does not seek to disturb the finality of the conviction or sentence, but is merely to decide whether to reduce the imposed sentence in light of the time that has elapsed and new circumstances that may have arisen.[39]

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[33] Judge Fernández de Gurmendi Written Submissions, *supra* note 9, at para. 14.
[34] *Id*.
[35] *Id*. at para. 17.
[36] *Id*. at para. 18.
[37] *Id*.
[38] *Id*. at para. 19.
[39] *Id*. at para. 20.

23. Judge Fernández de Gurmendi also elaborates on the specific factors that the Sentence Review Panel must consider pursuant to article 110(4) and rule 223 of the Rules. The Judge notes, in this respect, that "[t]hese factors are distinct from those considered by Trial Chambers to establish culpability and the appropriate penalty" as "the purpose of the review is to determine whether there is a change of individual circumstances since the imposition of the sentence and to assess the potential social impact of a potential reduction."[40] The Judge submits that she "do[es] not see and the Application fails to explain how any decisions or determinations that [she] may have made at the OTP could colour [her] evaluation of the specific factors [she] must consider during the article 110 review".[41]

24. Finally, Judge Fernández de Gurmendi addresses the Applicant's point that "the role [she] played in . . . negotiations with the UN of confidentiality agreements under Article 54(3)(e) of the Statute . . . were part of the litigation and may be invoked again by the Defence in their submissions . . . under the review."[42] The Judge observes that "the Application does not elaborate further, making it impossible to determine how this issue bears any relevance to the article 110 review."[43] The Judge further submits that her "involvement in the negotiations . . . was such that no reasonable observer would reasonably apprehend bias on this basis".[44] She states that "[t]hese negotiations concerned the general conclusion of confidentiality agreements with the United Nations" and that she did not "play a role in the specific implementation of any such agreement or the litigation that followed during the trial proceedings against Mr Lubanga, which took place after [her] departure from the OTP."[45]

25. For these reasons, the Judge concludes that "the Application has failed to demonstrate that a reasonable observer, properly informed could reasonably apprehend bias with relation to an article 110 review" and "to rebut the strong presumption of impartiality".[46]

III. Relevant Law

26. 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

[40] *Id*. at para. 21.
[41] *Id*. at para. 23.
[42] *Id*. at para. 24.
[43] *Id*.
[44] *Id*. at para. 25.
[45] *Id*.
[46] *Id*. at para. 26.

> this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court . . . . A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

27. Rule 34(1) of the Rules provides a list of non-exhaustive grounds for disqualification, including, in paragraph (c):

> 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.

28. Prior Plenaries of the Court have established that "it is not necessary for an applicant seeking to disqualify a judge to show actual bias on behalf of the judge; the appearance of grounds to doubt his or her impartiality will be sufficient."[47] Thus, "[t]he relevant standard of assessment is whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge."[48] This standard "is concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension is objectively reasonable."[49]

29. Prior Plenaries of the Court have further established that "there is a strong presumption of impartiality that is not easily rebutted":

> 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, 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

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[47] Decision of the Plenary of Judge 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*, filed on 20 June 2014 and notified on 23 June 2014, ICC-01/05-01/13-511-Anx, para. 16 (hereinafter "*Bemba et al.* Decision") (citing *Banda/Jerbo* Decision, *supra* note 20); 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 (hereinafter "*Lubanga* Disqualification Decision")).

[48] *Id.* at para. 17 (citing *Banda/Jerbo* Decision, *supra* note 20, at para. 11; *Lubanga* Disqualification Decision, *supra* note 47, at para. 9).

[49] *Id*. (citing *Banda/Jerbo* Decision, *supra* note 20, at para. 13; *Lubanga* Disqualification Decision, *supra* note 47, at para. 10).

deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case.[50]

30. The Presidency has also considered the interpretation of article 41(2)(a) in the context of requests for excusal from judges on grounds that their impartiality might reasonably be doubted. In a prior decision, the Presidency 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.'"[51] The Presidency explained 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.'"[52]

31. The Presidency has particularly "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."[53] Moreover, the Presidency has noted 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'."[54]

IV. Findings of the Plenary

32. An absolute majority of the judges (Judges Aluoch, Ozaki, Herrera Carbuccia, Perrin de Brichambaut, Hofmański, Schmitt, Kovács, Chung and Pangalangan) dismissed the Application. A minority of two judges (Judges Monageng and Henderson) were in favour of granting the request for disqualification. Four judges (Judges Tarfusser, Morrison, Fremr and Mindua) abstained from the decision.[55]

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[50] *Id*. at para. 18 (citing *Banda/Jerbo* Decision, *supra* note 20, at para. 14; *Lubanga* Disqualification Decision, *supra* note 47, at para. 10).
[51] Decision on the requests for excusal from the Appeals Chamber in the pending appeal in the case of *The Prosecutor v. Saif Al-Islam Gaddafi*, 13 May 2015, ICC-01/11-01/11-591-Conf-Exp-AnxI, p. 3 (citing *Lubanga* Excusal Decision, *supra* note 22, at p. 5).
[52] *Id*. (citing *Lubanga* Excusal Decision, *supra* note 22, at p. 5).
[53] *Id*. (citing 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 (hereinafter "*Ngudjolo* Excusal Decision")).
[54] *Id*. at pp. 3-4 (citing *Ngudjolo* Excusal Decision, *supra* note 53, at p. 4).
[55] Two judges were unable to attend the plenary.

33. Before proceeding to the merits of the Application, the Plenary deliberated on the question of whether the Application was properly before it pursuant to article 41(2) of the Statute. It was submitted that article 41(2)(b) provides that "the person being investigated or prosecuted may request the disqualification of a judge under this paragraph" and that, accordingly, the provision limits those who can raise requests for disqualification to persons actually "being investigated or prosecuted". It was further submitted that the proceedings in question are governed by article 110, which is contained in Part 10 of the Statute addressing enforcement and therefore applies to persons who have been convicted and sentenced. Thus, it was suggested that the Applicant could not bring a request for disqualification with respect to the article 110 proceedings.

34. The Plenary decided, by acclamation, that article 41(2) does permit a convicted and sentenced person to bring a request for disqualification of a judge from the Sentence Review Panel. It was noted that a strict reading of article 41(2)(b) would indeed limit requests for disqualification to persons being investigated or prosecuted. However, it was held that a broader reading should be adopted in the interest of fairness and to uphold the principle of impartiality. In this respect, it was noted that, read as a whole, article 41(2) establishes this principle of impartiality, which should apply to all phases of a case before the Court. It was also observed that a strict reading of article 41(2)(b) might conflict with the principle of the equality of arms, in that such a reading would permit the Prosecutor, but not the convicted and sentenced person, to bring a request for disqualification with respect to article 110 proceedings.

35. Turning to the merits of the Application, the Majority emphasized that any decision must begin from the principle that the impartiality of a judge is presumed and that the threshold for overcoming this presumption is high.[56] The majority remarked, as a matter of institutional policy, on the need for a high threshold given the limited pool of judges at the Court. The Majority further observed that each judge has a responsibility to consider whether his or her impartiality might reasonably be doubted. As such, the Majority noted that there is also the presumption that Judge Fernández de Gurmendi undertook this responsibility and reflected on whether her prior work might reasonably raise such a doubt.

36. The Majority reasoned that the distinct nature of the article 110 proceedings warranted dismissal of the Application. The Majority acknowledged that the article 110 proceedings were part of a single case but distinguished between proceedings dealing with attribution

[56] The Majority also reiterated the relevant law, as stated above, that the impartiality of a judge comprises both an objective and a subjective analysis. The Majority noted that this dual approach is also reflected in the jurisprudence of the European Court of Human Rights. *See, e.g.*, Morice v. France, 29369/10, paras. 73-78, ECHR 2015; Vera Fernández-Huidobro v. Spain, no. 74181/01, paras. 115-17, ECHR 2010.

of responsibility (*i.e.* conviction and sentence) and sentence review. In particular, the Majority emphasized the need to look at the facts and circumstances a judge sitting on a Sentence Review Panel would consider in reaching a decision. The Majority observed that article 110 proceedings require an assessment of facts and circumstances, such as the person's conduct in prison and recognition of his criminal responsibility, that largely arise following conviction and sentence. Accordingly, the Majority found that the functions Judge Fernández de Gurmendi performed in OTP were irrelevant to this type of assessment.

37. The Majority noted, in particular, as submitted in the Prosecution Response, that the MICT permits its President to review sentences regardless of his prior participation in the appeals phase of the same case. Several members of the Majority also observed that, in their respective national jurisdictions, judges who have taken part in trial or appeals proceedings may subsequently make observations or otherwise participate at the sentence review stage of the case.

38. Some members of the Majority cautioned that there might be circumstances where Judge Fernández de Gurmendi's prior functions in OTP could raise a reasonable doubt as to her impartiality, but that the Applicant had failed to provide any concrete evidence pointing to such circumstances. Rather, the Majority, as a whole, noted that the functions performed by the Judge, as articulated by the Applicant, appear to have been strategic, high-level and relatively removed from the details of the case against Mr Lubanga. Accordingly, the Majority concluded that the circumstances raised in the Application did not meet the threshold for overcoming the presumption of impartiality attaching to the Judge.

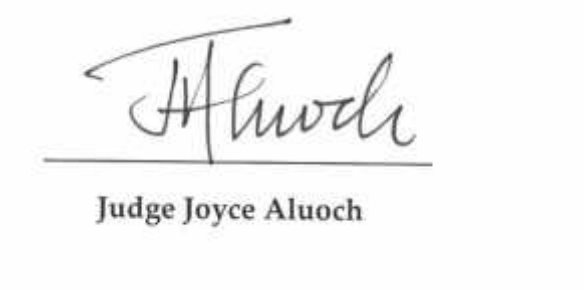
39. The Minority emphasized the seriousness of the matter before the Plenary and urged it to consider the question of disqualification with care. The Minority underlined that this was a case of apparent, not actual, bias, but that the prudent approach in such cases is for the judge to step aside so as to protect the judicial process from the charge of bias.

40. With respect to the nature of the article 110 proceedings, the Minority noted that the judges on a Sentence Review Panel are exercising a fundamentally judicial discretion rather than an administrative or quasi-executive discretion. The Minority elaborated that in exercising this discretion, an article 110 judge must weigh various factors. In particular, the Minority pointed out that article 110(4)(a) requires an article 110 judge to consider as one of the factors in reviewing a person's sentence, "[t]he early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions." The Minority expressed concern that the Application suggests Judge Fernández de Gurmendi's prior involvement in the case touched upon the Applicant's cooperation with

the Court's investigation. The Minority urged the Plenary to consider whether the Judge could appropriately consider the article 110(4)(a) factor given her prior role in OTP. The Minority also observed, more broadly, that the functions performed by the Judge in OTP – including as a member of the Executive Committee and in negotiating confidentiality agreements – might bear some relevance to issues that could be ventilated before the Sentence Review Panel.

41. The abstaining judges expressed a diversity of viewpoints regarding the Application. Some of the abstaining judges, for example, noted their agreement with the Majority regarding the need for an institutional policy maintaining a high threshold for overcoming the presumption of impartiality. In general, however, the abstaining judges observed that a lack of sufficient information prevented them from formulating a distinct position on the Application.

42. In light of the foregoing, the Plenary by majority decides to dismiss the Application.



Judge Joyce Aluoch