

## **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 <i>Aluoch</i>
Date	20 April 2015	Through   Via	
Ref.	2015/PRES/00145-02	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 <i>The Prosecutor v. Dominic Ongwen</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 16 April 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. Dominic Ongwen* ("Ongwen").

The request for excusal is granted.

### Factual Background

On 11 March 2015, Judge Fernández de Gurmendi was elected President of the Court.<sup>1</sup> Judge Fernández de Gurmendi was subsequently assigned to the Appeals Division in accordance with article 39(1) of the Statute, which provides that the Appeals Division "shall be composed of the President and four other judges".<sup>2</sup>

On 16 April 2015, by confidential memorandum, Judge Fernández de Gurmendi requested the Presidency to excuse her from sitting in all pending and future appeals in *Ongwen* pursuant to article 41(1) of the Statute and rule 33(1) of the

<sup>1</sup> Press Release, Judge Fernández de Gurmendi elected ICC President for 2015-2018; Judges Aluoch and Ozaki elected First and Second Vice-Presidents respectively, 11 Mar. 2015, ICC-CPI-20150311-PR1096.

<sup>2</sup> See Decision assigning judges to divisions, 13 Mar. 2015, ICC-02/11-01/12/6/.

Rules.<sup>3</sup> The request for excusal is based on Judge Fernández de Gurmendi's "previous involvement in the situation in Uganda as Head of the Jurisdiction, Complementarity and Cooperation Division ["JCCD"] in the Office of the Prosecutor ("OTP") from June 2003 to December 2006."<sup>4</sup> Judge Fernández de Gurmendi noted that

[w]hile serving in this capacity, [she] had a leading role in the preliminary examination of the Uganda situation, and more specifically in relation to an examination of the activities of the Lord's Resistance Army ["LRA"], the armed group of which Mr Dominic Ongwen is alleged to be a member.<sup>5</sup>

She further noted that "[t]his 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."<sup>6</sup>

Finally, Judge Fernández de Gurmendi noted that

[s]he was also involved in the investigative phase of the case against the leaders of the LRA, including Mr Dominic Ongwen, 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 [Ongwen].<sup>7</sup>

Judge Fernández de Gurmendi observed that 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'"; 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 Uganda 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."<sup>8</sup> She concluded that she was therefore requesting excusal "before any of the parties raise concerns as to [her] impartiality."<sup>9</sup>

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

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<sup>3</sup> Request for excusal from Appeals Chamber in all pending and future appeals in the case of *The Prosecutor v. Dominic Ongwen*, 2015/PRES/00145, para. 3.

<sup>4</sup> *Id.* at para 4.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at para. 5.

<sup>9</sup> *Id.*



Appeals Chamber in all pending and future appeals in *Ongwen*.<sup>10</sup> 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.”<sup>11</sup> On 20 April 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 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 *Ongwen* 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.”<sup>12</sup> 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.”<sup>13</sup>

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

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<sup>10</sup> *Id.* at para. 6.

<sup>11</sup> *Id.*

<sup>12</sup> 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.

<sup>13</sup> *Id.*

excusal on grounds of an applicant's previous involvement in the case.<sup>14</sup> 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".<sup>15</sup>

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 Uganda 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 Uganda 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."<sup>16</sup> 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 LRA, including Mr Dominic Ongwen" and having taken part in "discussions that led to the request for an arrest warrant in [Ongwen]".<sup>17</sup> 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 *Ongwen* 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.<sup>18</sup>

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.

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<sup>14</sup> 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.

<sup>15</sup> *Id.*

<sup>16</sup> Request for excusal, *supra* note 3, at para. 4.

<sup>17</sup> *Id.*

<sup>18</sup> 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 Uganda 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 Uganda situation and appeals emanating from *Ongwen*.

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.