

ANNEX I



Cour
Pénale
Internationale
International
Criminal
Court

La Présidence
The Presidency

Internal memorandum
Memorandum interne

To À	Judge Silvia Fernández de Gurmendi Judge Christine Van den Wyngaert	From De	The Presidency
Date	15 July 2015	Through Via	
Ref.	2015/PRES/ 00225-02	Copies	Judge Sanji Mmasenono Monageng Judge Howard Morrison Judge Piotr Hofmański
Subject Objet	Decision on the Requests for excusal from the Appeals Chamber in the pending appeal in the case of <i>The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé</i>		

The Presidency, composed of the First Vice-President (Judge Joyce Aluoch), the Second Vice-President (Judge Kuniko Ozaki), and Judge Sanji Mmasenono Monageng, hereby decides upon the requests for excusal submitted by Judge Silvia Fernández de Gurmendi and Judge Christine Van den Wyngaert on 15 July 2015. In the requests, Judge Fernández de Gurmendi and Judge Van den Wyngaert request 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 on an appeal in *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* ("case").

The requests for excusal are granted.

Factual Background

On 8 July 2015, Trial Chamber I issued its "Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute" ("Impugned Decision").¹

On 14 July 2015, Mr Gbagbo filed an appeal against the Impugned Decision ("appeal"), wherein he requested, *inter alia*, the recusal of Judge Fernández de Gurmendi and Judge Van den Wyngaert.²

¹ ICC-02/11-01/15127-Red.

On 15 July 2015, by confidential memorandum, Judge Fernández de Gurmendi filed a request for excusal in which she submitted that she has “‘previously been involved’ in the Case within the meaning of article 41(2)(a) of the Statute”.³ Judge Fernández de Gurmendi’s request for excusal is based on her previous involvement in the case as Single Judge of Pre-Trial Chamber I in the course of which she issued earlier decisions on the maintenance of Mr Gbagbo’s detention.⁴ In her request for excusal, Judge Fernández de Gurmendi also noted that, according to Mr Gbagbo, the appeal will “raise arguments of fact regarding the condition of his health, a subject matter which was also at issue in the decisions that [she] issued relevant to his detention at the Court”.⁵ She concluded by requesting that the Presidency excuse her from sitting on the appeal, pursuant to article 41(1) of the Statute and rule 33(1) of the Rules.⁶

In the same memorandum, Judge Fernández de Gurmendi requested to be excused from the deliberations of the Presidency on her request for excusal from sitting on the appeal.⁷ 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.”⁸ On 15 July 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 and Judge Van den Wyngaert’s requests for excusal from sitting on the appeal, in accordance with regulation 11(2) of the Regulations of the Court.

On 15 July 2015, by confidential memorandum, Judge Van den Wyngaert filed a request for excusal in which she submitted that she has “‘previously been involved’ in the Case within the meaning of article 41(2)(a) of the Statute”.⁹ Judge Van den

² Acte d’appel de la Défense relatif à la ‘ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute’ (ICC-02/11-01/15-127-Conf) de la Chambre de première instance I décidant du maintien en détention de Laurent Gbagbo, ICC-02/11-01/15-134-Conf-Exp.

³ Request for excusal from Appeals Chamber in the pending appeal in the case of *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, 2015/PRES/00225.

⁴ *Id.* at para. 5.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at para. 6.

⁸ *Id.*

⁹ Request for excusal from the appeal of Mr Laurent Gbagbo against the “Ninth decision on the review of Mr Laurent Gbagbo’s detention pursuant to Article 60(3) of the Statute” in the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, 2015/PRES/00228.

Wyngaert's request for excusal is based on her previous involvement in the case as a member of Pre-Trial Chamber I in the course of which she issued earlier decisions on the maintenance of Mr Gbagbo's detention.¹⁰ In her request for excusal, Judge Van den Wyngaert also noted that, according to Mr Gbagbo, the appeal will "raise arguments of fact regarding the condition of his health, a subject-matter which was also at issue in the decisions in which [she] partook relevant to his detention at the Court".¹¹ She therefore requested that the Presidency excuse her from sitting on the appeal, pursuant to article 41(1) of the Statute and rule 33 of the Rules.¹²

Decision

At the outset, the Presidency notes that Mr Gbagbo's request in the appeal that Judge Fernández de Gurmendi and Judge Van den Wyngaert respectively request their excusal from the appeal lacks procedural propriety. The Presidency recalls rule 35, which provides that "[w]here a judge . . . has reason to believe that a ground for disqualification exists in relation to him or her, he or she shall make a request to be excused". In practice, the judges hearing a matter are first seized of any filing in the judicial proceedings. Having had the opportunity to consider the filing, the judges are then in a position to decide whether they should seek their excusal before the Presidency. Absent such a request for excusal, should the parties believe that the judge is conflicted, they may raise the matter as a request for disqualification pursuant to article 41(2)(b). In other words, no preemptive request may be made by the parties that a judge request his or her excusal. Notwithstanding the above, the Presidency will proceed now to consider the request.

Turning to the present requests for excusal, the Presidency finds that they are properly before it 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

¹⁰ *Id.* at para. 6.

¹¹ *Id.*

¹² *Id.* at para. 4.

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.”¹³ 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.”¹⁴

The Presidency recalls that it has previously emphasized the need to note the “degree of congruence between the legal issues” and whether “the factual determinations” would be “based on the same evidence” in considering requests for excusal on grounds of a judge’s previous involvement in the case.¹⁵ 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”.¹⁶

The Presidency finds the requests to be well founded. The requests for excusal are based on Judge Fernández de Gurmendi and Judge Van den Wyngaert’s previous involvement in Pre-Trial Chamber I, where they respectively issued decisions on the maintenance of Mr Gbagbo’s detention. Mr Gbagbo’s detention is the very subject of the Appeal from which they request excusal. Accordingly, there is a high degree of congruence with respect to the legal issues as Judge Fernández de Gurmendi and Judge Van den Wyngaert have previously deliberated on and issued decisions touching upon the subject matter of the appeal.

The Presidency takes particular note that the Appeal raises arguments concerning Mr Gbagbo’s health, an issue touched upon in the decisions previously made by Judge Fernández de Gurmendi as Single Judge and Van den Wyngaert as a member of Pre-Trial Chamber I in the case. The Presidency observes that, with respect to the question of a detainee’s health, the facts or circumstances related thereto may

¹³ 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.

¹⁴ *Id.*

¹⁵ 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.

¹⁶ *Id.*

change over time. Therefore, there may be instances where a judge that has previously considered this issue would not be conflicted from considering it in the future. The Presidency finds, however, that here the prior decisions rendered by Judge Fernández de Gurmendi and Judge Van den Wyngaert were grounded in factual circumstances similar to those raised in the Appeal. The Presidency concludes that that similarity could give rise to reasonable grounds to doubt the impartiality of Judge Fernández de Gurmendi and Judge Van den Wyngaert with respect to the Appeal.

In light of the confidential *ex parte* classification of the Appeal, the Presidency shall classify this decision as confidential *ex parte*. The Presidency further instructs, however, that where a decision of the Appeals Chamber in the Appeal is filed or reclassified as "confidential" or "public", the classification of this memorandum is also to change to accord with that of the decision of the Appeals Chamber.