

ANNEX II



Internal memorandum
Memorandum interne

To À	Judge Silvia Fernández de Gurmendi	From De	The Presidency	
Date	20 March 2015	Through Via	Judge Sanji Mmasenono Monageng Judge Christine Van den Wyngaert Judge Howard Morrison Judge Piotr Hofmański	
Ref.	2015/PRES/00110-02	Copies		
Subject Objet	Decision on the request for excusal			

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 20 March 2015. In the request, 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 on the appeal filed by Côte d’Ivoire on 17 December 2014 against the decision rendered by Pre-Trial Chamber I on 11 December 2015 in *The Prosecutor v. Simone Gbagbo* (“Gbagbo”).

The request for excusal is granted.

Factual Background

On 11 December 2014, Pre-Trial Chamber I issued its “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”.¹

On 17 December 2014, Côte d’Ivoire filed its “Appel de la République de Côte d’Ivoire sur la décision de la Chambre préliminaire I « relative à l’exception d’irrecevabilité soulevée par la Côte d’Ivoire s’agissant de l’affaire concernant Simone Gbagbo »”.²

¹ ICC-02/11-01/12-47-Red.

² ICC-02/11-01/12-48.

On 11 March 2015, Judge Fernández de Gurmendi was elected President of the Court.³ 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”.⁴

On 20 March 2015, by confidential memorandum, Judge Fernández de Gurmendi requested the Presidency to excuse her from sitting on the appeal filed by Côte d’Ivoire against Pre-Trial Chamber I’s “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo” pursuant to article 41(1) of the Statute and rule 33(1) of the Rules.⁵ The request for excusal is based on Judge Fernández de Gurmendi’s “previous involvement in *Gbagbo* during the pre-trial proceedings, in the course of which [she], *inter alia*, issued the decision that is being challenged in the appeal by Côte d’Ivoire.”⁶ She concluded that she has “therefore ‘previously been involved . . . in that case before the Court’ within the meaning of article 41(2)(a) of the Statute.”⁷

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 Appeals Chamber in the appeal by Côte d’Ivoire in *Bemba*.⁸ 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.”⁹ On 20 March 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 on the appeal by Côte d’Ivoire 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.

³ 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.

⁴ See Decision assigning judges to divisions, 13 Mar. 2015, ICC-02/11-01/12/67.

⁵ Request for excusal, 2015/PRES/00110.

⁶ *Id.* at para. 2.

⁷ *Id.*

⁸ *Id.* at para. 3.

⁹ *Id.*

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.”¹⁰ 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.”¹¹

The Presidency finds the request to be well founded. The request for excusal is based on Judge Fernández de Gurmendi’s previous involvement in the “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, which is the very subject of the appeal from which she requests excusal. 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.¹² 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”.¹³ Here, there is no question as to the high degree of congruence with respect to both the factual determinations and legal issues as the subject of the appeal is a decision previously issued by Judge Fernández de Gurmendi. Thus, the

¹⁰ 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.

¹¹ *Id.*

¹² 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.

¹³ *Id.*

Presidency finds that Judge Fernández de Gurmendi has previously been involved in a capacity giving rise to a reasonable ground to doubt her impartiality in deliberating on the appeal.

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.