Concurring Separate Opinion of Judge Eboe-Osuji and Judge Morrison

1. The decision of the Appeals Chamber clearly shows that the substance of the request lacks merit, in view of the procedural history of the matter to the extent revealed.

2. Yet that consideration is compounded by an expectation, in the first place, that the entire membership of the Appeals Chamber should disqualify themselves because the alleged error was imputed to the whole. It is eminently correct that the Appeals Chamber declined to do so.

3. There may be nothing wrong in suggesting that judges may see fit to recuse themselves when propriety commands it. But, there is no requirement that judges must recuse themselves *in every case* in which a party expressed that desire or hope. Indeed, there are many instances in which it will be inappropriate for judges to do so.

4. We may begin by recalling relevant jurisprudence of the Appeals Chambers of the international criminal tribunals for the former Yugoslavia and for Rwanda, which cautions against ready self-recusal of judges from their judicial functions. According to one such pronouncement, 'it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias.'[1] To the same effect, Justice Mason at the High Court of Australia observed as follows:

> Although it is important that justice must be seen to be done, *it is equally important that judicial officers discharge their duty to sit and do not*, by acceding too readily to suggestions of appearance of bias, *encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.*[2]

5. In a further consideration, it is even permissible, on grounds of necessity, for judges to sit on cases in which they are clearly in conflict of interest, if there may be no other forum or judges left to adjudicate the case. There is a long line of case law that anchors that principle.[3]

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[1] *Prosecutor v Delalić et al*, (Judgment) 20 February 2001 ('*Čelebići* Appeal Judgment') [ICTY Appeals Chamber], para 707; *Prosecutor v Kanyarukiga* (Decision on Gaspard Kanyarukiga's Motion to Disqualify Judge Vaz) 24 February 2011 [ICTR Appeals Chamber, before President Robinson] para 9; *Prosecutor v Ntawukulilyayo* (Decision on Motion on Disqualification of Judges) 8 February 2011 [ICTR Appeals Chamber, before President Robinson] para 7.

[2] *Re JRL, ex parte CJL* (1986) 161 CLR 342 [High Court of Australia] at p 352, emphasis added.

[3] *Dimes v Grand Junction Canal Proprietors* (1852) 3 HL Cas 759 at p 787 [UK House of Lords]; *Evans v Gore*, 253 US 245 (1920) [US Supreme Court]; *Miles v Graham*, 268 US 501 (1925) [US Supreme Court]; *O'Malley v Woodrough*, 307 US 277 (1939) [US Supreme Court]; *United States v Will*, 449 US 200 (1980) 213 [US Supreme Court]; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* (1997) 3 SCR 3 [Supreme Court of Canada]; *US v Hatter*, 532 US 557 (2001) [US Supreme Court]; *Austin v Commonwealth* [2003] HCA 3 [High Court of Australia]. See also *Brinkley v Hassig*, 83 F 2d 351 at 357 (1936) [US Ct App, 10th Cir]; *State ex rel Gardner v Holm*, 62 NW 2d 52 (1954) pp 53-54 [SC Minn]; *McCoy v Handlin*, 153 NW 361 (1915); *Boulton v The Church Society of the Diocese of Toronto* (1868), 15 Grant 450;

6. Notwithstanding the question whether the recusal of the entire Appeals Chamber of the ICC may run into an impossibility of recomposing an entirely new Appeals Chamber to adjudicate a particular matter — and that scenario is not far-fetched at all, given the limited number of judges at the Court and the difficulty often encountered in finding judges who are both available and are themselves free of concerns of bias due to prior involvements with the case at the pre-trial or trial stage — there is a rule of public interest that must militate against a precedent which encourages an expectation or requirement that the *entire membership* of the Appeals Chamber may recuse themselves from a matter before them. That rule of public policy is expressed in the familiar maxim *expedit rei publicae ut sit finis litium* (alternatively *interest rei publicae ut sit finis litium*). It states the public interest that litigation must come to an end at some point.

7. The risk posed to the principle mentioned above is sufficiently evident in any precedent that supports the disqualification of the entire membership of the Appeals Chamber — rather than a minimum number amongst them — on the supposed theory that no one may sit as a judge in his own cause. It is easy enough to see how such a precedent would be readily abused to reopen any appellate judgment that is not to any party's liking, thus allowing the party to try his or her luck before a new Appeals Chamber that is entirely differently constituted. All that the party needs do in that scenario is allege a flaw in the judgment of the Appeals Chamber, and then seek to have a newly constituted Appeals Chamber to review the impugned judgment. In the meantime, litigation is prolonged and the lawyers involved send their bills to legal aid or their clients for legal services rendered. This is the very mischief that Justice Mason denounced in his dictum quoted above.

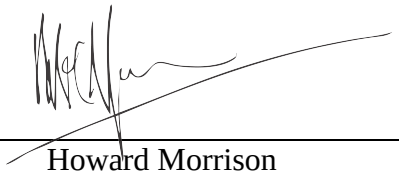
8. It is for that reason, amongst others, that it would have been an unfortunate development had this Appeals Chamber encouraged a precedent in which the entire membership of the Appeals Chamber should consider it appropriate to disqualify themselves from a matter before them.

9. It must be stressed that the concern here is not about the dignity or importance of the judges of the Appeals Chamber. It is rather a matter of the unique principle of public policy which requires that litigation must stop at some point.

Re The Constitutional Questions Act: Re The Income Tax Act 1932 [1936] 2 WWR 443, [1936] 4 DLR 134, affirmed [1937] 1 WWR 508, [1937] 2 DLR 209 [Privy Council]. See also 'The Independence of the Judiciary' (1956) 34 *Canadian Bar Review* 769 at 790 and Frank, 'Disqualification of Judges' (1947) 56 *Yale Law Journal* 605 at pp 609 - 10.

Done in both English and French, the English version being authoritative.

Chile Eboe-Osuji



Howard Morrison

Dated this 2 September 2020

At The Hague, The Netherlands