




Internal memorandum
Memorandum interne

To À	President Eboe-Osuji	From De	The <i>ad hoc</i> Presidency 
Date	25 October 2019	Through Via	
Ref.	2019/PRES/00229-2	Copies	
Subject Objet	Decision on your Request dated 18 October 2019		

1. The *ad hoc* Presidency of the International Criminal Court (the 'Court'), composed of Judges Fremr, Perrin de Brichambaut and Morrison, has before it your memorandum dated 18 October 2019 ('Memorandum') in which you consider that you should withdraw from the Appeals Chamber's handling of the appeal(s)¹ against Pre-Trial Chamber II's 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan' ('Appeal').²
2. The *ad hoc* Presidency grants your request for excusal from the Appeal and related matters.

¹ For further details on the various appeals see Appeals Chamber, 'Corrigendum of order scheduling a hearing before the Appeals Chamber and other related matters', 27 September 2019, ICC-02/17-72-Corr.

² 12 April 2019, ICC-02/17-33.

I. Relevant aspects of your Memorandum

3. Your Memorandum indicates that all members of the Appeals Chamber will render judgment in the Appeal with absolute impartiality. Nonetheless, you duly note that as the President of the Court, it is of crucial importance that you are able to engage in public communication and diplomatic engagements in a manner which is unrestrained. The *ad hoc* Presidency notes that, in an email addressed to it on 16 October 2019 foreshadowing your request for excusal, you referred in particular to the importance of the Court having a communication strategy to deal with the public response to the decision on the Appeal, whatever its outcome, a vital component of which will include the President of the Court being unrestrained in his defence of such judgment.

II. Decision

4. 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) provides, *inter alia*, that ‘[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground’.
5. The *ad hoc* Presidency notes that it is well established that the need for the excusal (or disqualification) of a judge may be justified not only on the basis of actual bias but also the potential existence of an objectively reasonable appearance of grounds to doubt the impartiality of a judge.³ The Court has consistently emphasised that a

³ Decision of the Plenary of Judges on the Defence Application for the Disqualification of judges of Pre-Trial Chamber I from the case *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag*

high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office.⁴ The *ad hoc* Presidency emphasises that your Memorandum raises no issues of an actual lack of impartiality and is concerned only with the question of public perception, in other words, the existence of an objectively reasonable appearance of grounds to doubt impartiality. More generally, it is undisputed that questions of appearance and perception lie at the heart of the need to safeguard judicial impartiality.

6. The *ad hoc* Presidency notes that, at the core of the concerns raised in your Memorandum and related email, is your concern as to your ongoing capacity to perform your functions as President of the Court. In particular, the *ad hoc* Presidency has been persuaded by your specific observation that the particular sensitivity of the Appeal means that it is highly foreseeable that, whatever its outcome, a significant degree of related international engagement in connection

Mohamed Ag Mahmoud, 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, paras. 24-25. See also Decision of the plenary of judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344-Anx, para. 11 ('*Banda & Jerbo* Disqualification Decision 5 June 2012'); 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*, 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 9 ('*Lubanga* Disqualification Decision 11 June 2013'); Decision of the Plenary of Judges 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*, 20 June 2014, ICC-01/05-01/13-511-Anx, para. 16 ('*Bemba et al* Disqualification Decision 20 June 2014'); Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of *The Prosecutor v Germain Katanga*, 22 July 2014, ICC-01/04-01/07-3504-Anx, para. 38; Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Marc Perrin de Brichambaut from the case *The Prosecutor v. Thomas Lubanga Dyilo*, 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27.

⁴ *Ibid.* para. 23; *Banda & Jerbo* Disqualification Decision 5 June 2012, ICC-02/05-03/09-344-Anx, para. 14; *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 37; *Bemba et al* Disqualification Decision 20 June 2014, ICC-01/05-01/13-511-Anx, para. 18; 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*, 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 29.

to it will subsequently occur. Accordingly, it will be essential that the President of the Court be unencumbered in his capacity to engage, in accordance with the best interests of the Court at such time. The *ad hoc* Presidency considers that the granting of the present request for excusal, which is essentially prospective in nature, is entirely exceptional. It considers that the need to avoid any risk of perceived conflict between the ordinary duties of the President of the Court and his participation as a judge in the present Appeal, is justified by the extraordinarily high likelihood that the President will be required to engage in discussions and explanations which might prove to be inappropriate if he remained a member of the Appeals Chamber for the purpose of the Appeal.

III. Confidentiality

7. The *ad hoc* Presidency notes that rule 33(2) of the Rules which provides that '[t]he Presidency shall treat the request as confidential and shall not make public the reasons for its decision without the consent of the person concerned'. Noting that your Memorandum expressly indicates that it is not necessary that it remain confidential, the *ad hoc* Presidency understands that you do not wish to maintain confidentiality under rule 33(2). Accordingly, it will make public a copy of the present decision at the time it issues its decision replacing you in the Appeals Chamber for the purpose of the Appeal.