

In: KSC-BC-2018-01

Before: The President of the Specialist Chambers
Judge Ekaterina Trendafilova

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi

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Thaçi Defence Request for Substitution or Recusal of a Judge

Specialist Prosecutor's Office

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I. INTRODUCTION

1. The Single Judge assigned to the present proceedings, pursuant to Article 30(3) of the KSC Law,¹ is His Honour Judge Nicolas Guillou.² On 8 March 2024, Judge Guillou was sworn in as a Judge of the International Criminal Court (“ICC”),³ and is now listed as a “Current Judge” of the ICC.⁴

2. It is “self-evident that justice and the rule of law begin with an independent judiciary.”⁵ The principle of judicial independence, codified in human rights conventions,⁶ is considered by the UN Human Rights Committee as “an absolute right that may suffer no exceptions.”⁷ At the KSC, Specialist Judges are accordingly required, in the exercise of their judicial functions, to be independent of any authority and influence.

3. This statutory obligation to remain independent finds practical application in Article 31 of the KSC Law. Specifically, Article 31(3) provides that, once assigned,

¹ Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office (“KSC Law”).

² KSCPR-2018/F00004, President, Decision Assigning a Single Judge Pursuant to Article 33(2) of the Law, 29 May 2018, public (“Decision Assigning a Single Judge”).

³ ICC Press Release, [‘Six new judges sworn in today at the seat of the International Criminal Court’](#), 8 March 2024.

⁴ See ICC, [‘Current Judges’](#). See also Judge Guillou’s specific entry on the ICC website, [‘Judge Nicolas Guillou’ \(“ICC Biography”\)](#).

⁵ ICTR, *Prosecutor v. Ngirabatware*, MICT-12-29-R, Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay, 31 January 2017, para. 11. See also Theodor Meron, ‘Judicial Independence and Impartiality in International Criminal Tribunals’, (2005) 99(2) *American Journal of International Law* 359, p. 369: “Judicial independence is indispensable to a law-based society. Many important structural safeguards facilitate judicial independence, such as lifetime tenure and nonremovability until a certain retirement age. But judicial independence also depends on public support for the judiciary as an institution, and to earn that support the judiciary must appear scrupulously impartial in its decision making. Together with fidelity to the law, impartiality is a means of ensuring the accountability of an independent judiciary in a democratic society and in the international community.”

⁶ International Covenant on Civil and Political Rights, Article 14(1); European Convention on Human Rights, Article 6(1); American Convention on Human Rights, Article 8(1); African Charter of Human and Peoples’ Rights, Article 7(1). See also UN Bangalore Principles, Value 1: “Independence”.

⁷ UNHRC, *Gonzalez del Rio v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987, 28 October 1992, para. 5.1.

“Judges shall not engage in any other occupation of a professional nature.” Being an ICC Judge, is an occupation of a professional nature. As such, holding both positions is incompatible with the prohibition in Article 31(3) of the KSC Law.

4. There are other statutory obstacles to simultaneously serving as a Judge of both the KSC and the ICC. Article 26(1) of the KSC Law requires that a “Roster of International Judges” be established in accordance with the procedure set out in Article 28 of the KSC Law. Judge Guillou is a member of this Roster.⁸ Article 26(4) of the KSC Law then provides that “[t]he Judges on the roster shall endeavour not to undertake any activity which could compromise the President of the Specialist Chambers’ ability to assign them to exercise functions as a Judge in the Specialist Chambers.” Assuming a 9-year term as an ICC Judge undoubtedly compromises the President’s ability to assign Judge Guillou to exercise functions as a KSC Judge.

5. The KSC has adopted ‘Rules on the Assignment of Specialist Chambers Judges from the Roster of International Judges’.⁹ Rule 5 addresses the ‘Inability of Judges to Perform Duties’, and provides that “[i]n the event that a Judge, due to recusal, disqualification or other compelling reasons, is unable to take up his or her duties at the time of the assignment to a Panel or becomes unable to perform his or her duties at a later stage, **the President shall substitute that Judge.**”

6. The Defence therefore brings the present request, and asks that the President substitute Judge Guillou, and assign a different Single Judge in these proceedings. In the alternative, the Defence makes an application for Judge Guillou’s recusal.

⁸ KSC, ‘[Chambers](#)’, 2024, see section titled ‘The Judges appointed to the Roster of International Judges’.

⁹ KSC-BD-02, Rules on the Assignment of Specialist Chambers Judges from the Roster of International Judges, 27 March 2017 (“Rules on Assignment of Judges”).

II. PROCEDURAL HISTORY

7. By way of a decision of the President on 29 May 2018, His Honour Judge Guillou was assigned as the Single Judge "to consider any request for judicial authorisation and related matters submitted by the Specialist Prosecutor prior to the filing of an indictment and the ensuing assignment of a Pre-Trial Judge under Article 33(1)(a) of the Law."¹⁰ He remains assigned as Single Judge in the present proceedings.

8. Judge Guillou was elected as an ICC Judge on 6 December 2023.¹¹ On 14 December 2023, the KSC issued a Press Release about his election, which records the KSC President stating that "**while the KSC will lose a valuable Judge** and colleague when Judge Guillou takes up his position as Judge of the ICC, the cases before the KSC will not be impacted and they will proceed without interruption."¹²

9. Judge Guillou was sworn in as an ICC Judge, in a public ceremony, on 8 March 2024. His term officially commenced on 11 March 2024, in accordance with Regulation 9(1) of the ICC Regulations.¹³

10. On 12 March 2024, the ICC Presidency issued its 'Decision assigning judges to divisions and recomposing Chambers', indicating that Judge Guillou had been assigned to the ICC Trial Division.¹⁴ Specifically, Judge Guillou was assigned: (i) to Trial Chamber I, as an Alternate Judge in the ongoing *Abd-Al-Rahman* case in the Situation in Darfur, Sudan; (ii) to Trial Chamber II as a Judge in the *Katanga, Lubanga*, and *Ntaganda* cases in the Situation in the Democratic Republic of the Congo, the *Al*

¹⁰ See Decision Assigning a Single Judge, pp. 1, 5.

¹¹ ICC ASP, '[2023 – Election of six judges – Results](#)', 6 December 2023.

¹² KSC, Specialist Chambers Press Release, '[Kosovo Specialist Chambers Judge Elected to the International Criminal Court](#)', 14 December 2023 ("KSC Press Release").(emphasis added).

¹³ ICC-BD/01-05-16, Regulations of the Court, 12 November 2018 ("ICC Regulations").

¹⁴ ICC, ICC-01/14-185, Presidency, Decision assigning judges to divisions and recomposing Chambers, 12 March 2024.

Mahdi case in the Situation in the Republic of Mali, as well as the *Ongwen* case in the Situation in Uganda, and (iii) to Trial Chamber IV, as a Judge in the *Banda* case in the Situation in Darfur, Sudan.¹⁵ The decision also stated that, on the basis of workload, Judge Guillou will commence “full-time service” in “mid-August 2024”.¹⁶

11. Since 11 March 2024, the Defence has not been advised of any orders issued by the KSC Presidency replacing Judge Guillou as the Single Judge in these proceedings. Judge Guillou still appears on the KSC website under ‘The Judges appointed to the Roster of International Judges’, rather than ‘Former Judges’.¹⁷ As such, at the date of filing, Judge Guillou is a member of the Roster of International Judges at the KSC, a Judge of the KSC, and a Judge at the ICC.

III. APPLICABLE LAW

12. Article 26(1) of the KSC Law requires that a “Roster of International Judges” be established in accordance with the procedure set out in Article 28. Once on the Roster, Judges can then be assigned pursuant to Article 30(3) of the KSC Law “to hear a pre-trial, trial, court of appeal or supreme court phase of a case or to hear a constitutional referral in accordance with Article 33”. Article 31(3) of the KSC Law provides that, “[i]f assigned pursuant Article 30(3), **Judges shall not engage in any other occupation of a professional nature.**” Article 26(4) of the KSC Law then provides that, “[t]he Judges on the roster shall endeavour **not to undertake any activity which could compromise the President of the Specialist Chambers’ ability to assign them to exercise functions as a Judge in the Specialist Chambers.**”

¹⁵ *Ibid.*, pp. 7-8.

¹⁶ *Ibid.*, p. 9.

¹⁷ KSC, ‘[Chambers](#)’, 2024, see section titled ‘The Judges appointed to the Roster of International Judges’.

13. The conduct of KSC Judges is also governed by the Code of Judicial Ethics.¹⁸

Article 3 addresses the independence of Judges, and provides that:

(1) In the exercise of their judicial functions, Judges shall be independent of any authority and influence.

(2) Judges shall uphold the independence of their office and the authority of the Specialist Chambers and shall conduct themselves accordingly in carrying out their judicial functions.

(3) Judges shall not engage in any activity which is likely to interfere with their judicial functions **or to affect confidence in their independence and respect for their judicial office.**

14. Article 10 of the same Code then addresses “Other Activity” of KSC Judges and provides that, “[i]n accordance with Article 26(4) of the Law, any activity undertaken by Judges other than that before the Specialist Chambers **shall be compatible with their judicial functions and the efficient and timely functioning of the Specialist Chambers.**”

15. Rule 20 of the KSC Rules¹⁹ governs the recusal or disqualification of Judges. Rule 20(1) provides that “[a] Judge shall not sit in any case in which he or she has a personal interest or has or has had any involvement which may affect or may appear to affect his or her impartiality, **judicial independence or the integrity of the proceedings.**”

16. Rule 20(3) then provides that “[a] Party may apply to the President for the disqualification of a Judge immediately, but no later than ten (10) days after the grounds on which the application is based become known to the Party.” A Judge whose disqualification is sought may recuse himself or herself after being notified of the application for disqualification. If the President considers that the request is

¹⁸ KSC-BD-01/Rev1/2023, Code of Judicial Ethics for Judges Appointed to the Roster of International Judges of the Kosovo Specialist Chambers, 24 March 2023 (“KSC Code of Judicial Ethics”).

¹⁹ KSC-BD-03/Rev3/2020, Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, 2 June 2020 (“Rules”).

vexatious, misconceived, frivolous or lacking in substance, he or she shall summarily dismiss it as soon as possible. However, “[i]n any other case, the President shall assign a Panel of three Judges to determine whether the Judge should be disqualified.”

IV. SUBMISSIONS

A. TIMING OF THE REQUEST

17. The present request is being made in two parts. First, the Defence is asking that the President replace Judge Guillou as the Single Judge in the present proceedings. There is no applicable time limit for this primary request.

18. In the alternative, the Defence is asking that Judge Guillou be recused. Rule 20(3) of the KSC Rules provides that “[a] Party may apply to the President for the disqualification of a Judge immediately, but no later than **ten (10) days after** the grounds on which the application is based become known to the Party.”

19. In this case, Judge Guillou was elected as an ICC Judge in December 2023. Following his election, however, the KSC Press Release on 14 December 2023 made reference to ‘losing’ Judge Guillou as a KSC Judge when he assumed his position as a Judge at the ICC.²⁰ A temporal line was also drawn in Judge Guillou’s ICC Biography, which states that “[p]rior to his election as a Judge of the International Criminal Court, Judge Nicolas Guillou **served** as Pre-Trial Judge at the Kosovo Specialist Chambers for four years”. As such, the Defence reasonably understood that Judge Guillou did not intend to hold the two positions simultaneously.

²⁰ See KSC Press Release: “while the KSC will lose a valuable Judge and colleague when Judge Guillou takes up his position as Judge of the ICC, the cases before the KSC will not be impacted and they will proceed without interruption.”

20. According to Article 35(1) of the Rome Statute, and Regulation 9(1) of the ICC Regulations, Judge Guillou has been serving as an ICC Judge since 11 March 2024. As such, it could reasonably be expected that an order replacing him as the Single Judge in the present proceedings would not have been issued until 11 March 2024. Having received no such order, the Defence became aware of the grounds on which this application is based as at that date. Namely, on 11 March 2024, the Defence became aware that Judge Guillou intended to serve as a Judge of both the KSC and the ICC simultaneously. As such, the present request is filed within the applicable time limit in Rule 20(3) of the KSC Rules.

B. REQUEST FOR SUBSTITUTION

21. Judicial independence is at the core of a Court's legal framework to safeguard the general integrity of proceedings.²¹ Specialist Chamber Judges are required by Article 31(1) of the KSC Law "to be independent in the performance of their functions." Article 31(3) then provides that once assigned, "Judges **shall not engage in any other occupation of a professional nature**", thus making a direct link between a Judge's independence and holding another professional position.

22. Judge Guillou's role as an ICC Judge, is another occupation of a professional nature. As a starting point, the clear prohibition in Article 31(3) of the KSC Law cannot be circumvented by asserting that the positions of (i) Judge at the KSC, and (ii) Judge at the ICC, are the "same occupation". First, the prohibition in Article 31(3) is aimed at preserving judicial independence of the KSC's Specialist Judges, which is threatened regardless of whether the second occupation is that of an Ambassador, or civil servant, or Judge of a different international court. Since 11 March 2024, Judge

²¹ ICC, *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2666-Red, Appeals Chamber, Judgment on the Appeals of Mr. Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, para. 86.

Guillou has been subject to two sets of competing Presidencies, timetables, obligations, and mandates. A key component of independence is ensuring that a Judge is not susceptible to taking instructions from any source other than those which properly govern his judicial activities within the Court itself. As a Judge in two international courts, Judge Guillou has assumed obligations and responsibilities to two judicial institutions, which will not necessarily align.

23. This interpretation is reinforced by the other cited provisions of the KSC Law and Code of Judicial Ethics,²² which are aimed at ensuring a KSC Judge remains **available** to be assigned to KSC proceedings. This availability is undermined where the Judge has not only been assigned as a Judge in another jurisdiction, but also to cases on which he will soon be required to work.

24. Importantly, the meaning of “any other occupation of a professional nature” was considered by the UN Secretary General in 1995, in the context of Judges of the International Court of Justice (“ICJ”) occasionally moonlighting as international arbitrators.²³ The UN Secretary General noted that the ICJ had:

in view of the judicial character of the activities involved, interpreted the bar to the members of the Court engaging in other occupations of a professional nature as not debarring a **limited participation of Judges** in other judicial or quasi-judicial activities of an **occasional nature**, as well as scholarly pursuits in the sphere of international law as members of learned societies or as occasional lecturers. The Judges accepting such **occasional activities** give the fullest precedence to their supervening duties as members of the Court.²⁴

25. Relevantly, even with this narrow opening for “**limited participation**” by ICJ Judges in “**occasional**” judicial or quasi-judicial activities, it soon became evident that

²² Article 26(4) of the KSC Law; Rules 3 and 10 of the KSC Code of Judicial Ethics.

²³ UN General Assembly, A/C.5/50/18, *Conditions of service and compensation for officials other than Secretariat officials, Members of the International Court of Justice, Report of the Secretary-General*, 2 November 1995 (“1995 Report of the Secretary-General”).

²⁴ 1995 Report of the Secretary-General, para. 31 (emphasis added).

the adverse impact of this moonlighting was eroding the legitimacy of the Court itself. Perceptions of “conflict of interests, issue conflicts, economic incentivization for switching workload, cementing positions for future appointments, among other issues” were considered as grave concerns for an adjudicatory system.²⁵ Consequently, in 2018, the ICJ President, His Honour Judge Yusuf, informed the United Nations General Assembly about new guidelines,²⁶ which prohibited sitting ICJ judges from accepting new appointments as arbitrators in investor-state proceedings, and authorized participation in inter-state court proceedings only in exceptional circumstances. Although justified on the basis of workload, these new guidelines were “intended to place the judges’ impartiality and independence beyond reproach”.²⁷

26. Applying this reasoning to the present situation, the start of Judge Guillou’s mandate as an ICC Judge, is not an activity of an “occasional nature” in which he will have “limited participation”.²⁸ Even if Judge Guillou is not being called to full-time service until mid-August 2024, his role as an ICC Judge is neither occasional nor limited. Outgoing ICC President Hofmanski noted at the 8 March 2024 swearing-in ceremony that, while not every new ICC judge will immediately be called to full-time duty, “[r]egardless of this, the nine-year mandate of each of the new colleagues **commences next Monday**, and they will form part of the Court’s new composition of 18 judges”.²⁹ Moreover, Article 35(1) of the Rome Statute provides that all judges shall be elected as full-time members of the Court “**and shall be available** to serve on that basis from the commencement of their terms of office.” Whether immediately starting

²⁵A. Lath and S Gandhi, ‘[Eclipsing the Moonlight: The Tricky Predicament When ICJ Judges Act as Arbitrators](#)’, *Centre for Research in International Law*, 10 October 2021.

²⁶ ICJ, ‘[Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the occasion of the Seventy-Third Session of the United Nations General Assembly](#)’, 25 October 2018.

²⁷ L. Brocca, ‘[Moonlighting and Multiple Hatting in International Law](#)’, *Just Access*, 2 August 2023.

²⁸ 1995 Report of the Secretary-General, para. 31.

²⁹ ICC, Judge Piotr Hofmański, President of the ICC, ‘[Remarks at Ceremony for the solemn undertaking of six new judges](#)’, 8 March 2024 (“ICC President’s Remarks”).

on a case or not, Judge Guillou has a statutory obligation at the ICC to be **available** to do so, which is an obligation that is neither occasional nor limited.

27. Moreover, whether or not they are called to immediate full-time service, ICC Judges are required to contribute to the operation of the Court from the start date of their 9-year mandate, whether through attending the ICC Judges' Induction Programme,³⁰ participating in ICC Plenary sessions and deliberations, attending the annual ICC Judges' Retreat,³¹ and engaging in continuing Judicial education.³² Judge Guillou was already required to participate, for example, in the ICC elections for the new ICC President and two Vice-Presidents,³³ the results of which have been announced.³⁴

28. Furthermore, from mid-August 2024, Judge Guillou will form part of three ICC Trial Chambers, seized of cases across multiple ICC situations, which are in varied phases of proceedings, from the trial phase through to the reparations phase. There

³⁰ Independent Expert Review of the International Criminal Court and the Rome Statute System, '[Final Report](#)', 30 September 2020, para. 414: "On commencement of their judicial mandate, newly elected Judges currently benefit from a short induction programme organised by the Presidency with the participation of other Organs of the Court."

³¹ ICC Press Release, '[ICC judges complete assessment of IER recommendations concerning the judiciary at their annual retreat](#)', 5 June 2023.

³² Article 7(2) of the ICC, ICC-BD/02-03-22, Code of Judicial Ethics, 7 October 2022; Article 31 of the Paris Declaration on the Effectiveness of International Criminal Justice, 16 October 2017. See, Coalition for the International Criminal Court, '[2023 ICC Judicial Elections, Questionnaire to candidates: Nicolas Guillou](#)', 28 July 2023, question 16: "As a French magistrate, I take part in continuing education trainings on various topics annually. In fact, continuing education is an ethical obligation. I am very much in favor of this kind of training, particularly in areas that are constantly evolving, such as digital evidence, autonomous weapons of war, or on jurisprudential advances in certain jurisdictions, such as regional human rights protection jurisdictions. In fact, I would have no objection to these training courses being followed jointly with lawyers from the chambers. During my time as Chief of Staff at the Special Tribunal for Lebanon, we set up regular lunchtime conferences for both judges and Chambers lawyers, on a wide variety of subjects."

³³<https://www.icc-cpi.int/sites/default/files/2024-03/2024-03-08-icc-president-statement-swearing-in-ceremony.pdf> ICC President's Remarks, p. 3: "Regardless of this, the nine-year mandate of each of the new colleagues commences next Monday, and they will form part of the Court's new composition of 18 judges, which will, as its first task, elect a new President and two Vice-Presidents for the Court for the next three years."

³⁴ ICC Press Release, '[New ICC Presidency elected for 2024-2027](#)', 11 March 2024.

are tens of thousands, if not hundreds of thousands of pages of relevant filings, decisions, judgments and evidence arising from them. It is easy to see how, even with fulltime application, a Judge would need months to be able to certify he had sufficiently read-in to these proceedings, particularly to the level required to assume the role of Alternate Judge in the *Abd-Al-Rahman* case, being an active trial in which the Prosecution case started in April 2022. Judge Guillou's role as an ICC Judge is not "occasional" in nature, nor of "limited participation". It is another occupation of a professional nature, and puts him in violation of the prohibition in Article 31(3) of the KSC Law.

29. At the very least, even considering only the time required, these ICC Judicial activities are incompatible with the requirement of Article 10 of the KSC Code of Judicial Ethics, which provides that "[i]n accordance with Article 26(4) of the Law, any activity undertaken by Judges other than that before the Specialist Chambers **shall be compatible with their judicial functions** and the efficient and timely functioning of the Specialist Chambers."

30. Judge Guillou's two roles also render him unable to comply with Article 26(4) of the KSC Law, which provides that "[t]he Judges on the roster shall endeavour not to undertake any activity **which could compromise the President of the Specialist Chambers' ability to assign them** to exercise functions as a Judge in the Specialist Chambers." It is manifestly obvious that being an ICC Judge necessarily compromises the KSC President's ability to assign Judge Guillou to exercise his functions as a KSC Judge. Again, Judge Guillou's concurrent role at both the ICC and KSC is incompatible with the KSC Law.

31. As noted above, Rule 5 of the KSC Rules on Assignment of Judges, addresses the 'Inability of Judges to Perform Duties', and provides that "[i]n the event that a

Judge, due to recusal, disqualification or other compelling reasons, is unable to take up his or her duties at the time of the assignment to a Panel or becomes unable to perform his or her duties at a later stage, **the President shall substitute that Judge.**” From 11 March 2024, Judge Guillou became unable to perform his duties, given that his concurrent service at the ICC and KSC has rendered him incapable of compliance with Articles 31(3) and 26(4) of the KSC Law, and Article 10 of the KSC Code of Judicial Ethics. Perhaps the strongest indicator of the incompatibility of the two roles, has been the KSC President’s decision to assign a different Single Judge in new matters arising since Judge Guillou’s election as an ICC Judge.³⁵

32. On this basis, the Defence asks the President to replace Judge Guillou as the Single Judge in the present proceedings.

C. IN THE ALTERNATIVE, REQUEST FOR RECUSAL

33. Should this request for substitution be denied, the Defence seeks Judge Guillou’s recusal, on the basis that his obligation of independence pursuant to Article 31 of the KSC Law, which requires him to be independent in the performance of his functions, and not to engage in any other occupation of a professional nature, can no longer be met.

34. Importantly, there is no requirement for the Defence to demonstrate that Judge Guillou’s independence has, in fact, been undermined by his dual roles. In considering whether recusal is warranted due to a lack of independence, “[i]t is not necessary that a Judge’s independence be actually compromised; it is sufficient if confidence in the judge’s independence is compromised.”³⁶ In other words, the “question is inevitably

³⁵ KSC-BC-2020-05/R001/F00001, Decision Assigning a Judge, 17 January 2024; KSC-BC-2020-05/R001/F00002, Decision Assigning a Judge, 17 January 2024.

³⁶ A. Cassese, P. Gaeta and J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), p. 256. See also UNODC, ‘Commentary on the Bangalore

concerned with the appearance of judicial independence, in the eyes of reasonable outsider observers.”³⁷ A reasonable observer, properly informed, may well understand that a KSC Judge in Judge Guillou’s position could, for example, be inclined to issue KSC decisions or indictments within a timeframe that would make him available to commence full-time service as an ICC Judge in mid-August 2024, as ordered by the ICC President. Or that fulfilling his ICC responsibilities may come at the detriment of an exhaustive consideration of issues pending in KSC proceedings.

35. It is imperative that any impartial and independent adjudicatory system is infallible to any questions of this kind. The independence of KSC Judges should be beyond reproach. Judge Guillou’s concurrent roles as ICC Judge and KSC Judge, has opened the door to these kinds of concerns over independence, and the integrity of the present proceedings. Rule 20(1) of the KSC Rules provides that “[a] Judge shall not sit in any case in which he or she has a personal interest or has or has had any involvement which may affect or may appear to affect his or her impartiality, **judicial independence or the integrity of the proceedings.**” On this basis, the Defence requests Judge Guillou’s recusal.

Principles Of Judicial Conduct’, September 2017: “An individual who wishes to challenge the independence of a tribunal need not prove an actual lack of independence, although that, if proved, would be decisive for the challenge. Instead, the test for this purpose is the same as the test for determining whether a decisionmaker is biased. The question is whether a reasonable observer would (or in some jurisdictions “might”) perceive the tribunal as independent. Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, the test for independence is thus whether the tribunal may be reasonably perceived as independent. See also, *Prosecutor v. Gucati & Haradinaj*, KSC-BC-2020-07/F00272, Decision on the Application for Recusal or Disqualification, 6 August 2021, para. 31: “At the outset, the President recalls the overarching precepts governing disqualification proceedings. As consistently found by various international and other judicial institutions applying the same standards, an unacceptable appearance of bias exists where the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias”.

³⁷ ICC, *Prosecutor v Ntaganda*, ICC-01/04-02/06-2326-Anx1, Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute, 29 March 2019, para. 15, being the reasoning of the minority.

V. CLASSIFICATION

36. This filing is classified as public, since it contains no confidential information about any investigations or proceedings currently before the Court, and is a matter of public interest.

VI. CONCLUSION AND RELIEF SOUGHT

37. In reliance on the above submissions, the Defence asks that the President:

ORDER the substitution of Judge Guillou as the Single Judge in these proceedings; OR, in the alternative,

ASSIGN a panel of three judges in accordance with Rule 20(3) of the KSC Rules, to determine the present application for recusal.

[Word count: 4,629 words]

Respectfully submitted,



Luka Misetic

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Thursday, 14 March 2024

At New York, United States