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Proposal by Spain and Venezuela concerning the Rules of Procedure and Evidence

Excusing and disqualification of judges

Development of article 41, paragraphs 1 and 2 (a) and (c), and article 42, paragraphs 6 to 8, of the Statute

A. Judges must request to be excused and, if they fail to do so, they may be disqualified where the grounds established in the Statute and in these Rules of Procedure and Evidence concur.

B. The Prosecutor, the person being investigated or prosecuted and, where applicable, the victims may request that a judge be disqualified.

C. In addition to the grounds established in article 41, paragraph 2 (a), of the Statute, the following circumstances shall be grounds for excusing and, where applicable, disqualifying, the challenged judge:

- (1) The existence of a matrimonial bond or a comparable situation of fact, or the fact of being a relative in the ascending or descending line, or a sibling, by consanguinity or affinity with any of the persons referred to in the previous article or their legal counsel;
- (2) Being or having been a defending legal counsel or having exercised the care or tutelage of any of the parties, or having been under the care or tutelage of any of them;
- (3) Being or having been denounced or accused by any of the parties as responsible for an offence or misdemeanour prior to undertaking his or her functions;
- (4) Having been a defending counsel or representative of any of the parties, pronounced judgement in a lawsuit or case as an attorney or been involved in such a case as prosecutor, expert or witness;

- (5) Being or having been a denouncer or accuser of any of the parties prior to undertaking his or her functions;
 - (6) Having a pending lawsuit with any of the parties;
 - (7) The existence of intimate friendship or grave and manifest personal enmity with any of the parties to the proceedings;
 - (8) Having a direct or indirect personal interest in the case;
 - (9) Having been subordinate to any of the parties to the proceedings, or the fact that any of the parties is, or has been, subordinate to the challenged judge;
 - (10) Having performed functions during which he or she might have formed an opinion on the subject of the case, on the parties or on their representatives and counsels;
 - (11) Having expressed, through the communications media, in writing or in public actions, opinions that might tarnish the required image of impartiality in the case;
 - (12) Belonging to institutions or associations which publicly maintain the position of any of the parties.
- D. 1. A judge to whom any of the grounds set out in the previous paragraphs apply shall request to be excused from the case without waiting to be disqualified.
2. The request to be excused shall set out the grounds on which it is based and shall be communicated to the Presidency of the Court through the President of the Chamber.
3. If the Presidency of the Court does not deem justifiable the judge's request to be excused, it shall rule that the judge should continue to sit in the case, without prejudice to the right of the parties to the proceedings to challenge the judge and the imposition on him or her, if there are sufficient grounds, of the applicable disciplinary penalty.
- E. 1. If the provisions of the previous article have been implemented, and if the judge does not receive, within five days, an order to continue to sit in the case, he or she shall withdraw definitively and shall transfer, where appropriate, the records of the proceedings to the judge who will sit in place of him or her.
2. The decision on a request to be excused shall set out the grounds on which it is based and shall be communicated to the parties.
- F. 1. The challenge shall be presented as soon as there is knowledge of the grounds on which it is based. If this knowledge exists prior to the case, it must be presented at the beginning of the proceedings; otherwise, it shall not be permitted to be prosecuted.
2. The challenge shall be presented in writing by the attorney, and shall also be signed by the objector, who must be confirmed in the presence of the Court.
- G. The following shall investigate the issues relating to the challenge:
- (a) When the challenged judge is the President of the Pre-Trial Chamber, the President of the Trial Chamber; when the challenged judge is the President of the Trial Chamber, the President of the Appeals Chamber; when the challenged judge is the President of the Appeals Chamber, the most senior judge and, where this is not possible, the oldest judge of this Chamber;
 - (b) When the challenged judge is any other judge, the judge with the most seniority of his or her Chamber, and if the challenged judge has the most seniority, the judge with the next highest seniority.
- H. 1. Once the challenge has been formulated, and while it is being decided, the case shall be taken over by the replacement judge and, where applicable, the brief and

documents relating to the challenge shall be referred to the judge who is investigating the matter.

2. The latter shall submit a copy of the brief and documents to the challenged judge, requesting him to enter a plea on the challenge within three days.

3. If the challenged judge accepts as true the grounds for the challenge, the matter shall be resolved without further proceedings.

4. If not, the investigating judge shall order the production of evidence, if it has been put forward in due form and is relevant, within 10 days. He or she shall subsequently refer the case to the Presidency of the Court, which shall convene a full panel of judges to make a determination in accordance with article 41, paragraph 2, of the Statute; the panel shall do so by means of a ruling setting out the grounds on which it is based, after hearing the views of the Prosecutor.

I. 1. A ruling rejecting the challenge shall provide for the return of the case in its current state, to the challenged judge. When this ruling expressly declares the existence of bad faith on the part of the objector, a fine shall be imposed on him or her, without prejudice to any disciplinary penalties that may apply.

2. A ruling upholding the challenge shall remove the judge definitively from the case. The replacement judge shall continue to hear the case until its completion.

J. There shall be no appeal against a ruling concerning the grounds for disqualification.

K. The provisions of this chapter shall be applicable *mutatis mutandis* to the excusing and disqualification of the Prosecutor and Deputy Prosecutors in accordance with the provisions of article 42, paragraphs 6, 7 and 8.
