

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/20

Date: 5 October 2021

Submission: 18 April 2023

THE PRESIDENCY

Before: Judge Piotr Hofmański, President
Judge Luz del Carmen Ibáñez Carranza, First Vice-President
Judge Antoine Kesia-Mbe Mindua, Second Vice-President

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF *THE PROSECUTOR v. PAUL GICHERU*

Public

Public redacted version of "Prosecution's response to the Defence "Request for Leave to Reply to the Prosecution response to the Defence 'Request for the Disqualification of Judge Miatta Maria Samba'", ICC-01/09-01/20-186-Conf", ICC-01/09-01/20-188-Conf, 5 October 2021

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Prosecution opposes the Defence “Request for leave to reply to the Prosecution response to the Defence ‘Request for the Disqualification of Judge Miatta Maria Samba’”.¹ The Request mischaracterises the Prosecution Response;² further, the proposed reply would not assist in reaching a decision in the present litigation.
2. In its Request for leave to reply, the Defence advances extensive substantive submissions before leave being granted. The Defence’s *de facto* by-passing of the judicial authorisation violates Regulations 24(5) of the Regulations of the Court and defeats its purpose. All such Defence substantive arguments contained in the Request should therefore be disregarded.
3. The proposed points on which the Defence seeks leave to reply do not relate to “new issues raised in the response which the replying participant could not reasonably have anticipated”.³ Nor are they “necessary for the adjudication”⁴ of the Defence Request for disqualification. Instead, the Defence seeks to make unnecessary additional submissions⁵ by labelling the Prosecution’s positions it disagrees with as “misrepresentations”.⁶ The Request should accordingly be dismissed.

II. CONFIDENTIALITY

4. These submissions are filed confidentially, pursuant to regulation 23*bis*(2) of the Regulations of the Court, because they respond to a confidential filing. However, they can be reclassified as public, as they do not discuss confidential information.

¹ ICC-01/09-01/20-186-Conf, “Request for leave to reply”.

² ICC-01/09-01/20-184-Conf-Corr, “Prosecution Response”

³ Regulation 24(5) of the regulations of the Court.

⁴ ICC-01/04-02/06-1813, para.8.

⁵ ICC-01/09-01/20-173-Conf, “Request for disqualification”.

⁶ ICC-01/09-01/20-184-Conf-Corr.

III. SUBMISSIONS

5. The Defence seeks to make additional submissions on issues which are already sufficiently discussed in its original Request for disqualification, and accordingly will not assist in deciding on the merits.
6. At the outset, the Prosecution notes that the Defence has breached Regulation 24(5) of the Regulation of the Court by replying *in extenso* to the Prosecution Response, before leave to do so was granted, thereby defeating the purpose of the regulation. All such submissions should accordingly be disregarded.⁷
7. Contrary to the Defence's contention, the Prosecution did not misrepresent the Court's jurisprudence, which the Plenary is in any event able to read for themselves.⁸ Also, comparisons with the facts underlying other requests for disqualification made at the Court were entirely foreseeable. In fact, the Defence's discussion of the situation of Judge Fernandez de Gurmendi in its Request for leave to reply⁹ merely repeats its original submissions.¹⁰ It was the Defence's choice not to mention other specific recusal cases in its original Request for disqualification; it cannot now seek to add arguments on an anticipated issue which it has already addressed in its original Request for disqualification.
8. Nor does the Prosecution misrepresent any Defence arguments.¹¹ The impugned paragraph does not purport to characterise the Defence arguments at all, but rather analyses the facts in light of the legal test enshrined in rule 34(1)(c).¹²

⁷ See: ICC-01/05-01/13-2333, paras. 21-22; ICC-01/04-01/06-3412, para. 11; ICC-01/05-01/08-602, para. 9; ICC-01/04-01/06-824, para. 68; ICC-02/05-01/20-8, para. 12; ICC-02/05-01/20-141, para. 9.

⁸ *Contra* Request for leave to reply paras. 1-2.

⁹ Request for leave to reply, para. 2(a).

¹⁰ ICC-01/09-01/20-173-Conf, para. 36.

¹¹ Request for leave to reply, para. 3, citing the Prosecution Response, para. 31.

¹² "Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion *on the case in question, on the parties or on their legal representatives* that, objectively, could adversely affect the required impartiality of the person concerned", emphasis added.

9. The Defence actually seeks to respond to arguments advanced by the Prosecution it disagrees with.¹³ For these purposes, it proposes to repeat its previous submissions, and references arguments already developed in its Request for disqualification.¹⁴
10. Contrary to the Defence's assertion,¹⁵ the timing and substance of the *inter partes* correspondence demonstrate that the Prosecution provided detailed information to the Defence about Judge Samba's employment as Field Office Officer in the OTP.¹⁶ In its Response to the Request for disqualification, the Prosecution enumerated precisely OTP activities in relation to which Judge Samba provided logistical support, with specific dates and locations.¹⁷ In so doing, the Prosecution listed a September 2010 mission to [REDACTED].¹⁸ Specific information about this mission was only retrieved at the time of filing, and could not be provided to the Defence earlier, despite the Prosecution's best efforts. However, the duties and responsibilities of Judge Samba during this mission were to provide logistical and administrative support, in line with those described in earlier *inter partes* correspondence with the Defence. Critically, the mission did not involve meeting actual or prospective witnesses, or collecting evidence. Thus, Judge Samba's involvement in it has no impact on the Defence's arguments in support of disqualification. The Defence does not substantiate how the additional information on this particular mission could have affected its arguments or has any relation to the *in dubio pro reo* principle.¹⁹ A reply by the Defence on this point would not advance the resolution of the disqualification litigation.

¹³ Request for leave to reply, paras. 3-8.

¹⁴ The points proposed for reply in the Request for leave to reply, para. 4(a) to (c), were already discussed in the Request for disqualification, paras. 33-35. Those proposed in paras. 5-6, are mirrored, and sourced to the Request for disqualification, paras. 33-37, 47-48.

¹⁵ *Contra* Request for leave to reply, para. 7.

¹⁶ ICC-01/09-01/20-173-Conf-AnxB.

¹⁷ ICC-01/09-01/20-184-Conf-Corr, para. 27.

¹⁸ ICC-01/09-01/20-184-Conf-Corr, para. 27(e).

¹⁹ *Contra* Request for leave to reply, para. 8.

11. The Plenary has sufficient information to decide on the disqualification request without further submissions from the Defence; it will not be assisted by the proposed Defence reply.

IV. CONCLUSION AND RELIEF SOUGHT

12. For the reasons set out above, the Prosecution requests that the Request to reply be dismissed.



Ms Nazhat Shameen Khan, Deputy Prosecutor

Dated this 18th day of April 2023
At The Hague, The Netherlands