

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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*No.: ICC-01/09-01/20
Date: 22 September 2021*

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 “Request for the Disqualification of Judge Miatta Maria Samba,” 17 September 2021, ICC-01/09-01/20-173-Conf

Source: Counsel for Paul Gicheru

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

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Defence****States' Representatives****Other****REGISTRY****Registrar**

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Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other**

Mr. Paul Gicheru, through his Counsel (“the Defence”), pursuant to Article 41(2)(a) of the Rome Statute and Rule 34(1)(c) of the Rules of Procedure and Evidence (“Rules”), hereby requests the disqualification of Judge Miatta Maria Samba due to the appearance of bias resulting from her prior involvement in the *Kenya* situation as an Office of the Prosecutor of the International Criminal Court (“ICC OTP”) Field Operations Officer (“FOO”) and performance of functions in the *Kenya* situation, which would invariably cause her to form an opinion on the *Gicheru* case, objectively and adversely affecting her impartiality. Considering that Judge Samba is the sole Judge assigned to hear the *Gicheru* case under Provisional Rule 165, and with no possibility of interlocutory appeals, it is in the interests of justice that Judge Samba is disqualified. Granting this request not only preserves the integrity of the proceedings but causes no appreciable delay to the proceedings or prejudice to the OTP. This request and its annexes are filed confidentially pursuant to Regulation 23bis(1) of the Regulations of the Court since they contain confidential material, and are also filed simultaneously with an Urgent Request for Trial Chamber III to Temporarily Stay the Proceedings until Judge Samba’s disqualification is decided.¹

I. BACKGROUND

1. On 22 July 2021, seven days after Pre-Trial Chamber A confirmed the Article 70 charges against Mr. Gicheru,² the Presidency, based on Provisional Rule 165, constituted Trial Chamber III with Judge Samba as the Single Judge.³
2. Immediately upon notification of the Presidency’s decision, the Defence reviewed Judge Samba’s official Curriculum Vitae,⁴ Statement of Qualifications,⁵ response to the Advisory Committee on Nomination of Judges’ (“Advisory Committee”) questionnaire,⁶ and public profiles and interviews found online.⁷ Judge Samba stated that she:
 - a. worked from 2006 to 2010 as a FOO stationed in Uganda managing databases on OTP witnesses;⁸

¹ *Prosecutor v. Gicheru*, Urgent Request for Trial Chamber III to Temporarily Stay the Proceedings Due to Mr. Gicheru’s Request for the Disqualification of Judge Miatta Maria Samba, filed on 17 September 2021.

² [ICC-01/09-01/20-153](#).

³ [ICC-01/09-01/20-157](#).

⁴ Judge Miatta Maria Samba, [Model Curriculum Vitae](#).

⁵ Judge Miatta Maria Samba, [Statement of Qualifications](#).

⁶ Judge Miatta Maria Samba, [Advisory Committee on Nomination of Judges Questionnaire](#), 3 July 2020.

⁷ The Giraffe Heroes, Profile, [Miatta Maria Samba](#).

⁸ Judge Miatta Maria Samba, [Model Curriculum Vitae](#), p. 3.

- b. conducted risk assessments and “provided assistance to investigators from the [OTP] on field missions to Kenya, Tanzania and Uganda;”⁹
 - c. was the “custodian of exhibits for the [OTP];”¹⁰
 - d. “assisted investigators who went out into the field to gather information and evidence for crimes within the Court’s jurisdiction, for the OTP;”¹¹
 - e. “travelled widely in the interiors of both Sierra Leone and Uganda in an effort to protect and promote the rights of witnesses and survivors who were participating in an accountability process,” as part of her work at the Special Court for Sierra Leone and the ICC;¹² and
 - f. “place[s] great importance on the psychological and physical welfare of survivors as witnesses in the criminal justice process and ... wanted to work in a position which gave [her] a role in ensuring that survivors and witnesses of international crimes would be able to meaningfully and safely participate in trials.”¹³
3. On 26 July 2021, the Defence requested the OTP for information concerning Judge Samba’s employment since it appeared that she was previously employed by the OTP and may have assisted with or been involved in the OTP’s investigation in the various *Kenyan* cases.¹⁴
 4. On 26 July 2021, the OTP responded that it was “aware of this issue,” was “investigating the exact nature and extent of Judge Samba’s duties, inasmuch as these may impact on the current case,” and would “revert with more information as soon as possible.”¹⁵
 5. On 29 July 2021, the OTP informed the Defence that Judge Samba:¹⁶
 - a. worked in the OTP as a FOO from 2006 until 28 October 2010 [REDACTED]¹⁷
 - b. [REDACTED]¹⁸

⁹ *Id.*

¹⁰ Judge Miatta Maria Samba, [Advisory Committee on Nomination of Judges Questionnaire](#), 3 July 2020, p. 3.

¹¹ *Id.*

¹² Justice Miatta Samba interview with Dato’ Shyamala Alagendra Khan, [ATLAS](#), 3 September 2021.

¹³ *Id.*

¹⁴ Email from the Defence to OTP entitled “Judge Samba’s prior employment with the ICC OTP,” 26 July 2021 at 10:41 (Annex B, p. 1).

¹⁵ Email from OTP to Defence entitled: “Re: Judge Samba’s prior employment with the ICC OTP,” 26 July 2021 at 11:38 (Annex B, p. 2).

¹⁶ Letter from OTP to Defence entitled “Re: Appointment of Judge Miatta Maria Samba,” 29 July 2021 at 14:56 (Annex B, pp. 6-8).

¹⁷ *Id.*, p. 1 (Annex B, p. 6).

¹⁸ *Id.*, pp. 1-2 (Annex B, pp. 6-7).

- c. [REDACTED]¹⁹
 - d. [REDACTED]²⁰
 - e. [REDACTED]²¹ and
 - f. [REDACTED]²²
6. [REDACTED].²³
- a. [REDACTED].²⁴ [REDACTED].²⁵
 - b. [REDACTED].²⁶ [REDACTED]²⁷
 - c. [REDACTED]²⁸
 - d. [REDACTED]²⁹
 - e. [REDACTED].³⁰
 - f. [REDACTED].³¹
 - g. [REDACTED]³²
7. On 2 August 2021, considering the sensitive nature of seeking information from Judge Samba for purposes of determining whether it might be reasonable and necessary to seek her disqualification, and the obligation to do so as soon as any grounds are discovered,³³ the Defence sent a letter to Judge Samba requesting clarification of her former employment with the OTP.³⁴

¹⁹ *Id.*, p. 2 (Annex B, p. 7).

²⁰ *Id.*, (bold in original).

²¹ *Id.*, (bold in original).

²² *Id.*, (bold in original).

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ Rule 34(2) of the Rules.

³⁴ Letter from Defence to Trial Chamber III entitled "Request for Clarification of Background," 2 August 2021 at 17:02 (Annex B, pp. 10-3).

8. On 17 August 2021, Judge Samba took notice of the Defence's letter, ordering the Defence to "raise the matter in a written filing," which would "allow[] the Prosecution to make formal submissions on the matter, should it wish to do so."³⁵
9. On 18 August 2021, the Defence filed a request seeking from Judge Samba information on:
- a. The tasks she performed in her role as a FOO in the Uganda Field Office assisting OTP investigators in Kenya, Tanzania, and Uganda;
 - b. The names and positions of OTP staff members with whom she had contact in connection with the *Kenya* investigation and the times, locations, and nature of these contacts;
 - c. The names of *any* witnesses in the *Ruto and Sang* and *Gicheru* cases she interacted with, including the times, locations, and nature of these interactions;
 - d. Whether she participated in any interviews of any witnesses in the *Ruto and Sang* or *Gicheru* cases and the names of these witnesses, the participating OTP staff members, and the times and locations of these interviews;
 - e. Whether she was present during any discussions or de-briefing sessions concerning any of the witnesses in the *Ruto and Sang* or *Gicheru* cases, the names of the witnesses and participating OTP staff members, and the times and locations of these discussions or sessions;
 - f. Whether she received or handled any evidence, reports, or communications of any kind regarding the OTP's investigation in the *Ruto and Sang* or *Gicheru* cases and the nature of the evidence, reports, or communications;
 - g. Whether in her capacity as a FOO, she participated in or was aware of any discussions within the OTP concerning the legality of using witnesses to [REDACTED] other witnesses in the investigation in Kenya, Tanzania, and Uganda, and the content of these discussions;
 - h. Whether the impression that she was "putting her life at risk in Sierra Leone and Uganda"³⁶ came from anything concerning any of the witnesses in the *Kenya* investigation; and

³⁵ Email from Trial Chamber III to Defence entitled "RE: Message to the Honorable Single Judge of Trial Chamber III from Counsel representing Mr. Gicheru," 17 August 2021 at 14:06 (Annex B, p. 14).

³⁶ See Giraffe Heroes Project, Profile, [Miatta Maria Samba](#).

- i. Whether upon her appointment she brought to the Presidency's attention her employment with the OTP and involvement in the *Kenya* investigations, [REDACTED], and was [REDACTED].³⁷
10. On 18 August 2021, by email the OTP stated that it "takes note of the Defence's Request for Information ... and respectfully advises that it does not intend to file any observations or response to said Request."³⁸
11. On 20 August 2021, Judge Samba ordered the OTP to "state[] its position via official filing" by 26 August 2021, including "comments on the Defence's Request and any further information it considers useful," given that "the Defence makes reference to interactions with the [OTP]."³⁹
12. On 26 August 2021, the OTP confirmed that: (a) "at this stage, it has no observations or comments to make in relation to the Defence's Request;" (b) "all information available to the OTP concerning the Single Judge's previous employment with the OTP was provided to the Defence by way of formal communication on 29 July 2021," which was "subsequently annexed to the Defence's Request;" and (c) "[s]ince then, the [OTP] has not identified any further information of relevance to the matter at hand."⁴⁰
13. On 27 August 2021, Judge Samba provided the following information in relation to the questions posed to her by the Defence for the parties "to form their own opinion about this impartiality:"⁴¹
- a. Judge Samba between October 2006 and September 2010 worked as an FOO for the OTP under the Operational Support Unit of the Investigation Division;⁴²
 - b. Judge Samba's supervisor was the "current head of the Operational Risk and Support Unit within the Investigation Division;"⁴³

³⁷ [ICC-01/09-01/20-163](#).

³⁸ Email from the OTP to Trial Chamber III entitled "The Prosecutor v. Paul Gicheru: ICC-01/09-01/20-163-Conf+Conf-AnxA - Request for Information from Judge Miatta Maria Samba concerning Her Employment with the Office of the Prosecutor of the International Criminal Court," 18 August 2021 at 18:02 (Annex B, p. 16).

³⁹ Email from Trial Chamber III to OTP entitled "RE: The Prosecutor v. Paul Gicheru: ICC-01/09-01/20-163-Conf+Conf-AnxA - Request for Information from Judge Miatta Maria Samba concerning Her Employment with the Office of the Prosecutor of the International Criminal Court," 20 August 2021 at 08:22 (Annex B, p. 18).

⁴⁰ [ICC-01/09-01/20-167](#), paras. 1-2.

⁴¹ [ICC-01/09-01/20-168](#), para. 3.

⁴² *Id.*, para. 4.

⁴³ *Id.*, para. 9.

- c. Judge Samba's duties during her employment were "to provide logistical support to the operations of the [OTP]," including "assistance in the operational preparation, execution and follow-up of the activities of the Investigation Division of the [OTP];"⁴⁴
- d. Judge Samba supported OTP investigators "who went to the field office to interview witnesses in respect of, mainly, the Uganda situation and, to a much lesser degree, helped to maintain contact with witnesses for the [OTP] for the situations in Darfur and Kenya;"⁴⁵
- e. To "the best of [her] recollection," Judge Samba "participated in two missions to Arusha, Tanzania, in the period of April to August 2010;"⁴⁶
- f. Judge Samba "travelled to the northern part of Uganda on many occasions between October 2006 and September 2010 and, [she] believe[s], to Arusha, Tanzania, and to Kenya on two occasions between April and September 2010 to maintain contact with witnesses by collecting and exchanging logistical information with them," in preparation for meetings with OTP investigators;⁴⁷
- g. Judge Samba's role in supporting investigators' activities in the Kenya situation "was limited, as far as [she] can recall, to maintaining contact with the witnesses and facilitating contact between the witnesses and the investigators at headquarters in The Hague," which "must have occurred towards the end of [her] employment...;"⁴⁸
- h. Judge Samba "had contact with [OTP] witnesses or potential [OTP] witnesses" but "such contact was limited to logistical activities only and consisted of operational support of the investigations such as renting interview rooms and supporting the movement of witnesses to interview locations;"⁴⁹
- i. Judge Samba did not "actively participate in the gathering of evidence or the taking of a witness statement," "was also not privy to any witness statements taken by the [OTP] during its investigative activities," did not "have access to any electronic data banks containing evidence," and did not "have discussions with other members of the [OTP]

⁴⁴ *Id.*, para. 5.

⁴⁵ *Id.*, para. 7.

⁴⁶ *Id.*, para. 4.

⁴⁷ *Id.*, para. 5.

⁴⁸ *Id.*, para. 8.

⁴⁹ *Id.*, para. 6.

about the content of ongoing investigations, their investigation strategies or any other exchange related to the substance of investigative activities;”⁵⁰ and

- j. The Presidency was “aware of [Judge Samba’s] employment with the [OTP] and that [she] was assigned as a [FOO] to the field office in Kampala, Uganda.”⁵¹ There is no mention of Judge Samba having informed the Presidency of her involvement in the *Kenya* situation – as specifically asked of her twice: by letter and by formal submission.

14. Judge Samba could not recall or provide specifics on:

- a. The specific *Kenyan* case in which she assisted OTP investigators;⁵²
- b. The “names of investigators who went to the field office from headquarters who [she] supported logistically;”⁵³ or
- c. The details of “any witnesses with whom [she] interacted while providing operational support to investigators working on the Kenya situation or cases related to this situation.”⁵⁴

15. On 30 August 2021, given Judge Samba’s invitation to “further communicate with the [OTP] on any additional information it wishes to receive from the [OTP],”⁵⁵ the Defence emailed the OTP requesting it to “revisit the issue with the view of identifying and disclosing any further relevant information.”⁵⁶

16. On 1 September 2021, the OTP responded in an email that “should [it] identify any further relevant information on this matter, it will communicate this to the Defence as soon as practicable” and that it “would consider relevant any information which may alter or significantly add to the description of Judge Samba’s involvement with the Kenya investigation and it’s *[sic]* witnesses.”⁵⁷

⁵⁰ *Id.*

⁵¹ *Id.*, para. 13.

⁵² *Id.*, para. 8.

⁵³ *Id.*, para. 9.

⁵⁴ *Id.*, para. 11.

⁵⁵ *Id.*, para. 14.

⁵⁶ Email from the Defence entitled “Further request for information concerning Judge Samba,” 30 August 2021 at 11:04 (Annex B, p. 21).

⁵⁷ Email from the OTP entitled “RE: Further request for information concerning Judge Samba,” 1 September 2021 at 12:03 (Annex B, p. 22).

17. On 7 September 2021, having not received any further information from the OTP, the Defence sent a letter to the OTP requesting further particulars regarding Judge Samba's employment and the OTP's methodology for conducting its search, including:
- a. All records concerning Judge Samba's employment with the OTP, including her contract, duties and responsibilities and/or terms of reference, work reports and/or time sheets, supervisor evaluations, and all information referenced in support of the OTP's letter of 29 July 2021;
 - b. The procedure for monitoring FOOs, including whether Judge Samba reported to anyone other than the current head of the Operational Risk and Support Unit within the Investigation Division;
 - c. All records of Judge Samba's interactions with the witnesses, [REDACTED] or investigation reports and/or database entries noting the date, time, and nature of the contact with the witnesses;
 - d. All information that may have been provided to Judge Samba concerning the background of the witnesses she interacted with, including: (1) threats or intimidation against these witnesses; and (2) [REDACTED];
 - e. All information that may have been provided to Judge Samba regarding the [REDACTED];
 - f. All information that may have been provided to Judge Samba regarding evidence of [REDACTED];
 - g. Any comments or observations the OTP may have regarding Judge Samba's answers to the Defence request for information;
 - h. What databases and records are being searched by the OTP;
 - i. What concrete information is being searched for;
 - j. Whether the OTP checked with Judge Samba's supervisor, the current Head of the Operational Risk and Support Unit in the Investigation Division, whether any further records exist concerning Judge Samba's interactions with witnesses and investigators in the *Kenya* situation;

- k. Whether the OTP checked the SCMS, [REDACTED], “[REDACTED], Trim, or Ringtail for any information regarding Judge Samba’s contacts with witnesses and investigators and exposure to evidence in the *Kenya* situation;
- l. Whether the OTP checked records of emails to which Judge Samba was copied to determine whether she had been in contact with investigators or exposed to information regarding the substance of the *Kenya* investigations or its witnesses, including security related issues; and
- m. Whether the OTP checked any other internal databases to which Judge Samba, as “the custodian of exhibits for the [OTP],” may have had access.⁵⁸

18. On 9 September 2021, the OTP informed that it:

- a. “already provided the Defence with all the information in its possession that it considers relevant to this issue;”
- b. “does not consider it necessary or appropriate to share with the Defence details of how it conducted its review, including which records it reviewed or who precisely it consulted in the process,” “[a]bsent a concrete showing of negligence or bad faith;”
- c. “does not consider it necessary or appropriate to comment on alleged discrepancies between the information it has provided and Judge Samba’s observations or other information and statements attributed to her;”
- d. “takes note of these alleged discrepancies and should it have any further information in its possession relevant to the same, it will of course disclose this to the Defence;” and
- e. “will make its submissions as necessary” on any discrepancies “[s]hould this issue become relevant in any litigation on this issue.”⁵⁹

II. LAW

19. Article 41(2)(a) of the Rome Statute provides that “[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground.” Under Article 41(2)(a), a Judge “shall be disqualified from a case ... if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related

⁵⁸ Letter from the Defence to OTP entitled: “Further request for information concerning Judge Samba,” 7 September 2021 at 16:23 (Annex B, pp. 25-8).

⁵⁹ Letter from the OTP to Defence entitled: “RE: Your letter dated 07 September 2021,” 9 September 2021 at 14:29 (Annex B, pp. 31-2).

criminal case at the national level involving the person being investigated or prosecuted,” or “on such other grounds as may be provided for in the Rules of Procedure and Evidence.”

20. Rule 34(1)(c) provides that a Judge may be disqualified due to the “[p]erformance 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.”
21. Rule 35 requires Judges to request recusal when they have “reason to believe that a ground for disqualification exists in relation to him or her” and “shall not wait for a request for disqualification” from the parties.
22. Article 4 of the ICC Code of Judicial Ethics requires Judges to “be impartial and ensure the appearance of impartiality in the discharge of their judicial functions” and to “avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest.”⁶⁰
23. *The standard for disqualification for the appearance of bias.* An applicant seeking disqualification of a Judge need not show actual bias; “rather, the *appearance* of grounds to doubt [the Judge’s] impartiality will be sufficient.”⁶¹ The standard for disqualification on grounds of appearance of bias is “whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge.”⁶² The standard is concerned with “whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the actual circumstances to make a reasonable judgement) would be that [the Judge in question] ... might not bring an impartial and unprejudiced mind.”⁶³ In other words, it is not concerned with “whether a reasonable person *could* apprehend bias, but whether any such apprehension was *objectively* reasonable.”⁶⁴
24. *The reasonable observer.* The reasonable observer is “an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.”⁶⁵ This “fair-minded and objective observer is not to be

⁶⁰ [ICC Code of Judicial Ethics](#), Art. 4.

⁶¹ [ICC-01/04-01/06-3040](#), para. 9 (emphasis in original); [ICC-02/05-03/09-344](#), para. 11.

⁶² [ICC-01/04-01/06-3040](#), para. 9; [ICC-02/05-03/09-344](#), para. 11. See also [Furundžija Judgement](#), para. 189.

⁶³ [Furundžija Judgement](#), fn. 257 quoting with approval [Brđanin and Talić Decision](#), para. 15.

⁶⁴ [ICC-02/05-03/09-344](#), para. 13 (emphasis added); [ICC-01/04-01/07-3504](#), para. 39; [ICC-01/04-01/06-3040](#), para. 10; [ICC-01/05-01/13-511](#), para. 17.

⁶⁵ [Furundžija Judgement](#), para. 190.

confused with the views of the person making the complaint,”⁶⁶ he or she “is by implication someone from the outside who, as an *observer* (and not a party) recognises and understands the circumstances well enough to tell whether or not the public sense of Justice would be challenged by the presence of a particular Judge on the bench in the case.”⁶⁷

25. ***An objectively reasonable apprehension of bias.*** In order for the apprehension of bias to be “objectively reasonable,” the reasonable observer’s consideration of facts must include the nature of a Judge’s profession⁶⁸ as well as “all the circumstances of the case,” for instance, “whether the impugned judge is the sole judge to render the ultimate decision, or whether he or she sits in a panel among other judges.”⁶⁹

26. ***The presumption of impartiality is rebuttable.*** While “it is presumed that the judges of the Court are professional judges, and ... by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in a particular case,”⁷⁰ this presumption is rebuttable with “proof to the contrary.”⁷¹ While the ICTY President has held that the standard of proof required to rebut the presumption of impartiality is “sufficient evidence,”⁷² the ICC Plenaries have not defined the standard of proof.

III. ARGUMENT

27. A reasonable observer, “with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality ... that Judges swear to uphold,”⁷³ would, objectively,⁷⁴ apprehend bias on the part of Judge Samba because:

- a. Judge Samba was previously involved in the *Kenya* situation before the Court;
- b. Judge Samba performed functions as an OTP FOO that would invariably cause her to form an opinion on the *Gicheru* case, objectively and adversely affecting her impartiality;

⁶⁶ [ICC-01/04-02/06-2355](#), para. 32; [ICC-01/04-01/06-3040](#), para. 35.

⁶⁷ [Norman Decision](#), para. 27 (emphasis in original).

⁶⁸ [ICC-01/04-01/06-3040](#), para. 36, citing [President of the Republic of South Africa v. South Africa Rugby Football Union](#) 1999 (7) BCLR 725 (CC) at 753.

⁶⁹ [ICC-01/04-01/07-3504](#), para. 58 (separate opinion of Judge Eboe-Osuji).

⁷⁰ [ICC-02/05-03/09-344](#), para. 14.

⁷¹ [Furundžija Judgement](#), para. 45.

⁷² [Prlić Decision](#), para. 7; [Mladić Decision on Judge Pocar](#), para. 11; [Mladić Decision on Judge Agius](#), para. 11.

⁷³ [Furundžija Judgement](#), para. 190; [ICC-02/05-03/09-344](#), para. 11; [ICC-01/04-01/06-3040](#), para. 9; [ICC-01/04-02/06-2355](#), para. 32; [ICC-01/12-01/18-398](#), para. 20.

⁷⁴ [Furundžija Judgement](#), para. 189; [ICC-01/04-02/06-2336](#), p. 3; [ICC-02/05-03/09-344](#), para. 13; [ICC-01/04-01/07-3504](#), para. 39; [ICC-01/04-01/06-3040](#), para. 10; [ICC-01/05-01/13-511](#), para. 17.

- c. Judge Samba is unable to provide further information to dispel the appearance of bias;
- d. Once Judge Samba had reason to believe that grounds for disqualification exist, she should have requested recusal; and
- e. Judge Samba is the Single Judge on Trial Chamber III under Provisional Rule 165.

28. *Judge Samba was previously involved in the Kenya situation before the Court.* Judge Samba, in her capacity as an OTP FOO, was previously involved in the *Kenya* situation.⁷⁵ According to the OTP's records,⁷⁶ 48 days after Judge Samba departed from the OTP, it sought warrants of arrests for six Kenyan nationals and the opening of the *Ruto, Kosgey, and Sang*⁷⁷ and *Muthaura, Kenyatta, and Ali*⁷⁸ cases.

29. Article 41(2)(a) of the Rome Statute applies when a Judge has been involved in a "situation" as well as a "case" before the Court.⁷⁹ Pursuant to Article 41(1) and Rule 33(1), Judge Fernández de Gurmendi requested to be recused from sitting in all appeals in the *Bemba* case due to her prior involvement in the *Central African Republic* ("CAR") situation as Head of the Jurisdiction, Complementary, and Cooperation Division ("JCCD") of the OTP.⁸⁰ Noting that her previous involvement was in a "situation" as opposed to a "case," Judge Fernández de Gurmendi considered that "in the particular context of the CAR situation and the findings that were made at the preliminary examination stage," her "involvement is 'equivalent to previous involvement in the case within the meaning article 41(2) of the Statute.'"⁸¹ The Presidency found the request well founded, considering that there was a significant degree of congruence between the legal issues and factual determinations made during the preliminary examination and appeals in the *Bemba* case that it "may reasonably appear to an objective observer that Judge Fernández de Gurmendi lacks impartiality both with respect to pending and future appeals in the case."⁸²

30. There is a significant degree of congruence between the legal and factual issues arising from the *Kenya* situation and the *Gicheru* case. Judge Samba interacted with witnesses in the

⁷⁵ Letter from OTP to Defence entitled "Re: Appointment of Judge Miatta Maria Samba," 29 July 2021 at 14:56 (Annex B, pp. 6-8).

⁷⁶ See *supra*, paras. 5(a), 13(a). Judge Samba claims she departed from the OTP in September 2010, while the OTP claims Judge Samba departed from the OTP on 28 October 2010.

⁷⁷ [ICC-01/09-01/11-26](#).

⁷⁸ [ICC-01/09-02/11-35](#).

⁷⁹ [ICC-01/05-01/08-3245](#).

⁸⁰ *Id.*, p. 2.

⁸¹ *Id.*

⁸² *Id.*, pp. 3-4.

Kenya situation [REDACTED],⁸³ [REDACTED], she was presumably the OTP’s “custodian of exhibits,” [REDACTED].⁸⁴ The congruence is as evident as it is significant.

31. Mr. Gicheru is alleged to have been involved in a common plan to undermine the OTP’s case in the *Ruto and Sang* case by preventing OTP witnesses and potential witnesses from testifying.⁸⁵ [REDACTED]⁸⁶ Unquestionably, Judge Samba will have to decide on [REDACTED], and weigh and assess evidence concerning witness interference in the *Kenya* situation.
32. Unlike officers in the Victims and Witnesses Section,⁸⁷ or a Judge who hears a discrete procedural issue in the Pre-Trial Chamber and later sits on the same case in the Appeals Chamber,⁸⁸ Judge Samba was not acting impartially during her involvement in the *Kenya* situation while acting on behalf of the OTP. From a reasonable observer’s point of view, Judge Samba’s previous involvement in the *Kenya* situation as an OTP FOO, [REDACTED], prior contacts with the witnesses, and potential exposure to the evidence – especially in light of her understanding that she was “promot[ing] the rights of witnesses and survivors who were participating in an accountability process”⁸⁹ – creates an objectively reasonable apprehension of bias since Judge Samba will be making the ultimate determination on Mr. Gicheru’s guilt or innocence on the Article 70 charges.⁹⁰ Simply, Judge Samba will be presiding as the sole Judge with no possibility of interlocutory appeals in a case in which she would invariably come with preconceived opinions.
33. ***Judge Samba performed functions as an OTP FOO that would invariably cause her to form an opinion on the Gicheru case, objectively and adversely affecting her impartiality.*** During the period of Judge Samba’s employment with the OTP, it received several reports concerning interference [REDACTED],⁹¹ [REDACTED],⁹² [REDACTED].⁹³ [REDACTED].

⁸³ See *infra*, paras. 34-5.

⁸⁴ See *supra*, paras. 2(c), 5(e)-(f), 13(h).

⁸⁵ [ICC-01/09-01/20-153](#), para. 181.

⁸⁶ [REDACTED].

⁸⁷ The Victims and Witnesses Section is an organ of the Registry and independent of the parties. See Rome Statute, Art. 43(6).

⁸⁸ See e.g., [ICC-01/04-01/06-2138](#), p. 7.

⁸⁹ See *supra*, para. 2(e).

⁹⁰ C.f. [ICC-01/04-01/06-3154](#), para. 36.

⁹¹ [REDACTED].

⁹² [ICC-01/09-01/20-153](#), paras. 188, 191.

⁹³ [REDACTED].

34. [REDACTED],⁹⁴ [REDACTED]⁹⁵ [REDACTED],⁹⁶ [REDACTED]⁹⁷ [REDACTED]⁹⁸
[REDACTED]⁹⁹ [REDACTED].¹⁰⁰
35. [REDACTED]¹⁰¹ [REDACTED],¹⁰² [REDACTED].¹⁰³ [REDACTED].¹⁰⁴
[REDACTED].¹⁰⁵
36. In *Lubanga*, the Plenary deciding on the Defence request for Judge Fernández de Gurmendi’s disqualification from the Sentencing Review Panel in the *Lubanga* case considered that the functions she performed in the JCCD were “strategic, high-level and relatively removed from the details of the case” and were irrelevant to the assessment she would conduct on the Panel (assessing facts that follow a conviction and sentence).¹⁰⁶ By contrast, Judge Samba performed functions as an OTP FOO that concerned the OTP’s investigation and its witnesses – [REDACTED].¹⁰⁷
37. From a reasonable observer’s point of view, Judge Samba’s performance of functions in the OTP in the *Kenya* situation creates an objectively reasonable apprehension of bias since Judge Samba’s interactions with witnesses and potential exposure to evidence would invariably lead her to form an opinion on the oral and documentary evidence forming part of the OTP’s case. [REDACTED], no specific reference to the Accused is required to substantiate the existence of an unacceptable appearance of bias.¹⁰⁸
38. ***Judge Samba is unable to provide further information to dispel the appearance of bias.*** By exercising its due diligence¹⁰⁹ and seeking further information from Judge Samba – without casting insinuations or aspersions – the Defence sought to transparently lift the cloud of suspicion of potential bias on Judge Samba. Unfortunately, citing the passage of

⁹⁴ [ICC-01/09-01/20-153](#), para. 140.

⁹⁵ *Id.*, para. 141.

⁹⁶ *Id.*, para. 143.

⁹⁷ *Id.*, para. 153.

⁹⁸ *Id.*, para. 158.

⁹⁹ *Id.*, para. 159.

¹⁰⁰ *Id.*, para. 160.

¹⁰¹ [ICC-01/09-01/20-171](#).

¹⁰² [ICC-01/09-01/20-125](#), para. 41(a).

¹⁰³ [ICC-01/09-01/20-153](#), paras. 140-1, 143, 153. [KEN-OTP-0159-0986-R01](#), paras. 244-60.

¹⁰⁴ [ICC-01/09-01/20-153](#), paras. 158-60.

¹⁰⁵ Rome Statute, Art. 67(1)(e).

¹⁰⁶ [ICC-01/04-01/06-3154](#), paras. 36, 38.

¹⁰⁷ *See supra*, para. 5(e)-(f).

¹⁰⁸ [Šešelj Decision](#), para. 12.

¹⁰⁹ [ICC Code of Conduct for Counsel](#), Art. 5.

time and security and confidentiality reasons, Judge Samba is unable to provide further information concerning her employment with the OTP to dispel the appearance of bias.¹¹⁰

39. Regrettably, Judge Samba’s answers to the Defence’s queries are unsatisfactory. Putting aside Judge Samba’s lack of recollection and records, Judge Samba’s answer as to “[w]hether upon her appointment Judge Samba brought to the Presidency’s attention her employment with the ICC OTP and involvement in the Kenya investigations,”¹¹¹ is wanting. The Presidency would have been “aware of [her] employment with the [OTP] and that [she] was assigned as a [FOO] to the field office in Kampala, Uganda,”¹¹² since this information is publicly available on the ICC’s website.¹¹³
40. When the Defence sought further information from the OTP per Judge Samba’s invitation,¹¹⁴ it responded that it would communicate any further information it finds that *it* deems “relevant.”¹¹⁵ When the Defence followed up with the OTP, it tersely claimed that all “relevant” information was provided,¹¹⁶ without the slightest inkling of answering any of the *relevant* queries concerning its recordkeeping and efforts in discerning Judge Samba’s full involvement in the *Kenya* situation. Bluntly, the OTP’s opacity and coyness is as unbecoming as it is disquieting.
41. As a structured and bureaucratic organ whose mandate entails searching for, collecting, preserving, cataloging, and testing evidence in preparation for seeking warrants of arrest and confirmation of charges for trials that occur months, if not years, after preliminary investigations are conducted, it logically follows that the OTP is an organ of the ICC that lives and dies by protocols and best practices for recordkeeping and archiving. It certainly has the capacity, tools, and wherewithal. It is not presumptuous to reason that the OTP has records meticulously catalogued and readily accessible for all preliminary examinations, investigations, pre-trial, and trial activities of all its staff and others it employs or relies on. By failing to fully and openly provide the information sought by the Defence in keeping with its due diligence obligations and in ensuring Mr. Gicheru’s full enjoyment of his fair

¹¹⁰ [ICC-01/09-01/20-168](#), paras. 10-1.

¹¹¹ [ICC-01/09-01/20-163](#), para. 9.

¹¹² [ICC-01/09-01/20-168](#), para. 13.

¹¹³ [ICC Website](#), SAMBA, Miatta Maria, updated on 2 March 2020.

¹¹⁴ [ICC-01/09-01/20-168](#), para. 14.

¹¹⁵ Email from the OTP entitled “RE: Further request for information concerning Judge Samba,” 1 September 2021 at 12:03 (Annex B, p. 22).

¹¹⁶ Letter from the OTP to Defence entitled: “RE: Your letter dated 07 September 2021,” 9 September 2021 at 14:29 (Annex B, pp. 31-2).

trial rights,¹¹⁷ the OTP places the Defence at a distinct disadvantage both in seeking the righteous disqualification of Judge Samba *and* at trial should she *not* be disqualified.

42. Judge Samba’s lapse in memory and the OTP’s inability or unwillingness to provide adequate information from its records – as opposed to opaque representations of marginal value – should not enure to the detriment of Mr. Gicheru in seeking Judge Samba’s disqualification. The fundamental and time-honored principle behind disqualification is that: “justice should not only be done, *but should manifestly and undoubtedly seem to be done.*”¹¹⁸ Judge Samba’s interactions with witnesses and investigators in the *Kenya* situation were consequential and significant enough to give rise to the appearance of bias. The lack of information magnifies the reasonable observer’s apprehension of bias.¹¹⁹
43. ***Once Judge Samba had reason to believe that grounds for disqualification exist, she should have requested recusal.*** Upon her assignment to Trial Chamber III, Judge Samba should have known from the public redacted version of the confirmation decision¹²⁰ that the *Gicheru* case involves allegations of witness interference during the *Ruto and Sang* case. It does not appear, from the material available to the Defence, that Judge Samba made any efforts upon her nomination to search for information relevant to her involvement in the case. After becoming aware that grounds for disqualification exist through the Defence’s letter and request for information, Judge Samba did not inform the Presidency and/or seek an opinion from the Plenary on whether she should be recused. Instead, Judge Samba issued a decision to allow the parties to “form their own opinion” as to her impartiality,¹²¹ prompting this request for disqualification.
44. At least eight ICC Judges have requested recusal even when they thought the facts did not warrant recusal.¹²² Illustrative is Judge Ušacka’s request in *Lubanga*. Following the confirmation of charges, Judge Ušacka temporarily sat in the Pre-Trial Chamber until she was assigned to the Appeals Chamber and participated in a decision denying a request by the Defence to correct a transcript of the proceedings.¹²³ She brought this to the attention of the Presidency but stated that her impartiality would not be doubted since the Pre-Trial Chamber was not seized of the case at the time the decision was made and that the decision

¹¹⁷ In exercising its due diligence obligations, the Defence requested from the OTP all records concerning Judge Samba’s employment with the OTP and its methodology for its search. *See supra*, para. 17.

¹¹⁸ *R. v. Sussex Justices*, ex parte McCarthy [1924] 1 K.B. 256, at 259 (emphasis added).

¹¹⁹ *See e.g. Karemera Decision*, para. 67.

¹²⁰ [ICC-01/09-01/20-153](#). The public redacted version was issued on the same date.

¹²¹ [ICC-01/09-01/20-168](#), para. 3.

¹²² [ICC-01/04-01/06-2138](#); [ICC-01/04-02/06-162](#); [ICC-01/04-02/06-2336](#); [ICC-02/17-99](#); [ICC-01/11-01/11-361](#); [ICC-01/04-02/06-2326](#); [ICC-01/04-02/06-2336-Anx2](#).

¹²³ [ICC-01/04-01/06-2138](#), p. 3.

did not require an assessment of the facts or determination of guilt, innocence, or legal arguments.¹²⁴ The Presidency agreed that recusal was not warranted because the decision Judge Ušacka participated in was limited.¹²⁵

45. In her response to the Advisory Committee’s questionnaire, Judge Samba stated that Judges “must uphold the credibility and integrity of the Court and avoid any perception of bias” and that “in order to avoid the perception of bias, it will be prudent for a Judge of the ICC to recuse him/herself from participating in a trial involving a national from his or her country of origin.”¹²⁶

46. While having the same nationality of the accused or victims does not warrant disqualification,¹²⁷ having “been previously involved in any capacity” in a case before the Court¹²⁸ and the “[p]erformance of functions ... during which [the Judge] could be expected to have formed an opinion on the case”¹²⁹ are grounds for disqualification. The more prudent approach for Judge Samba would have been to “step aside so as to protect the judicial process from the charge of bias.”¹³⁰ Judge Samba’s failure to request recusal as soon as she became aware that grounds for her disqualification exist magnifies the reasonable observer’s apprehension of bias.

47. *Judge Samba is the Single Judge on Trial Chamber III under Provisional Rule 165.* The Plenary, like the reasonable observer, must take into account “all the circumstances of the case,” for instance, whether Judge Samba “is the sole judge to render the ultimate decision, or whether ... she sits in a panel among other judges.”¹³¹ Illustrative is the Supreme Court of Canada’s decision in *Wewaykum Indian Band v. Canada*, relied on by former ICC President Chile Eboe-Osuji in his separate opinion on the request for Judge Song’s disqualification in *Lubanga*:

A reasonable observer fully informed of the independence of mind and the presumption of integrity of each judge would not accept that the decision of the entire panel was corrupted by the taint of participation of one of its members against whom an allegation of impartiality was levelled, especially when the entire panel had been put on notice of that allegation ahead of time.¹³²

¹²⁴ *Id.*, p. 6.

¹²⁵ *Id.*, p. 4.

¹²⁶ Judge Miatta Maria Samba, [Advisory Committee on Nomination of Judges Questionnaire](#), 3 July 2020, p. 3.

¹²⁷ [ICC-02/05-03/09-344](#), para. 16.

¹²⁸ Rome Statute, Art. 41(2)(c).

¹²⁹ Rule 34(1)(c) of the Rules.

¹³⁰ [ICC-01/04-01/06-3154](#), para. 39.

¹³¹ [ICC-01/04-01/07-3504](#), para. 58 (separate opinion of Judge Eboe-Osuji).

¹³² [ICC-01/04-01/06-3040](#), para. 57 (separate opinion of Judge Eboe-Osuji).

48. As Judge Eboe-Osui explained, “[t]he validity of apprehension of bias is markedly evident when the ultimate decision is to be rendered by the same judge – alone – against whom bias is suspected.”¹³³ In his opinion, the same conclusion does not necessarily follow in the ultimate decision of a *panel* of Judges, since “[e]ach of the other judges, who act independently and enjoy a presumption of integrity, would be duly mindful of any potential influence.”¹³⁴ The fact that Judge Samba is the *sole* Judge to decide on Mr. Gicheru’s guilt or innocence and that there is no possibility of interlocutory appeals under Provisional Rule 165 magnifies the reasonable observer’s apprehension of bias.

IV. CONCLUSION AND RELIEF SOUGHT

49. As the sole Judge of Trial Chamber III and with no possibility of interlocutory appeals, Judge Samba’s previous involvement in the *Kenya* situation, interactions with witnesses and investigators and potential exposure to evidence, inability to provide further information, and failure to request recusal once she had reason to believe that grounds for her disqualification exist lead to a reasonable and objective apprehension of bias. At a minimum, out of an abundance of caution and judicial prudence, the Plenary should find that it is in the interests of justice and to the benefit of the ICC, as an institution expected to exercise the highest international standards, to find that Judge Samba is better suited to preside over or participate in a different case where no questions can be raised concerning her prior involvement and knowledge of the case. Her extensive involvement in and knowledge derived from her employment with the OTP in the *Kenya* situation, regrettably, lead any objective observer, and certainly any Accused in Mr. Gicheru’s shoes, to apprehend, in no small measure, an appearance of bias by Judge Samba – casting a sustained and unyielding dark shadow over the proceedings, with Mr. Gicheru precariously having to wonder whether his right to a fair and impartial hearing will be afforded.

WHEREFORE, the Defence requests the disqualification of Judge Samba.

Respectfully submitted, 22 September 2021,

In The Hague, the Netherlands.



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¹³³ [ICC-01/04-01/07-3504](#), para. 58 (separate opinion of Judge Eboe-Osui).

¹³⁴ [ICC-01/04-01/06-3040](#), para. 52 (separate opinion of Judge Eboe-Osui).