

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 1 October 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 "Corrected version of "Prosecution response to the Defence 'Request for the Disqualification of Judge Miatta Maria Samba'", ICC-01/09-01/20-184-Conf, 1 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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**Detention Section**

**Victims Participation and Reparations  
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## I. INTRODUCTION

1. The Defence's Request for the Disqualification<sup>1</sup> of Judge Miatta Maria Samba<sup>2</sup> should be dismissed as there is no reasonable apprehension of bias on her part.
2. *First*, the Defence fails to satisfy the high and fact-specific standard of article 41(2)(a) of the Rome Statute. The Plenary must determine whether the present circumstances would lead a reasonable observer, properly informed, to reasonably and objectively apprehend bias on Judge Samba's part. Judge Samba's functions as a Field Operation Officer<sup>3</sup> for the Office of the Prosecutor<sup>4</sup> from October 2006 to October 2010 were limited to providing logistical and operational support to OTP activities in different situations under investigation. This included, on limited occasions, the Kenya situation.
3. As a FOO, Judge Samba was not involved in any investigative or advisory capacity in the Kenya situation, and had no access to evidence collected by OTP staff investigating that situation; nor was she provided with details concerning the profile of witnesses, or the nature and content of their evidence and information. Moreover, her involvement was limited to the main Kenya investigation, which related to crimes against humanity allegedly committed during the 2007-2008 post-election violence, and was unrelated to the charged article 70 offences of the *Gicheru* case allegedly committed as of 2013 – a time when Judge Samba had left the OTP.
4. *Second*, if the test set out above is fairly and objectively applied, the Defence's suggestion that the interests of justice would be served if Judge Samba is disqualified, cannot be sustained simply on the basis that she is the sole judge

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<sup>1</sup> ICC-01/09-01/20-173-Conf ("Defence Request"), ICC-01/09-01/20-173-Red.

<sup>2</sup> "Judge Samba".

<sup>3</sup> "FOO".

<sup>4</sup> "OTP" or "Prosecution".

assigned to try the case of *The Prosecutor vs. Paul Gicheru*,<sup>5</sup> or that no interlocutory appeals under article 82(1)(d) are allowed in article 70 proceedings.

## II. CONFIDENTIALITY

5. This response is filed confidentially, pursuant to regulation 23bis(2) of the Regulations of the Court, since it refers to the contents of a confidential filing. The Prosecution will file a public redacted version in due course.

## III. PROCEDURAL HISTORY

6. On 22 July 2021, the Presidency issued an order assigning Judge Samba as the Single Judge to Trial Chamber III to try the *Gicheru* case.<sup>6</sup>
7. On 26 July 2021, the Defence requested the OTP to provide information concerning Judge Samba's previous employment with the OTP and any involvement in the Kenyan cases.<sup>7</sup> The OTP responded on the same day that it was "aware of the issue" and "investigating the exact nature of Judge Samba's duties, inasmuch as these may impact on the current case" and that it would "revert with more information as soon as possible".<sup>8</sup>
8. On 29 July 2021, the OTP informed the Defence that from October 2006 until October 2010 Judge Samba worked in the OTP as FOO in the Operational Support Unit<sup>9</sup> ("OSU") of the Investigations Division ("ID") and was posted in the OTP Field Office in Uganda. The Prosecution further specified that during her employment, Judge Samba provided logistical and administrative support in relation to the Kenya investigations on a limited number of occasions.<sup>10</sup> However,

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<sup>5</sup> ICC-01/09/01/20 ("*Gicheru* case").

<sup>6</sup> ICC-01/09-01/20-157, p. 4.

<sup>7</sup> E-mail communication from the Defence to the OTP dated 26 July 2021 (10:41), Defence Request, Confidential Annex B, p. 1.

<sup>8</sup> E-mail communication from the OTP to the Defence dated 26 July 2021 (11:38), Defence Request, Confidential Annex B, p. 2.

<sup>9</sup> Subsequently re-named and presently called Operational Risk and Support Unit ("ORSU").

<sup>10</sup> Letter from the OTP to the Defence dated 29 July 2021, Defence Request, Confidential Annex B, pp. 6-8.

Judge Samba “had nothing to do with the investigations themselves, which were the responsibility of the OTP investigators, and she would have been under instructions not to engage with witnesses regarding their evidence”.<sup>11</sup>

9. On 18 August 2021, further to Judge Samba’s instructions,<sup>12</sup> the Defence filed a request for information concerning her previous employment with the OTP.<sup>13</sup>
10. On 25 August 2021, as directed,<sup>14</sup> the OTP filed its submissions confirming that it had no observations or comments to make in relation to the 18 August Defence request and that all information available to the OTP concerning Judge Samba’s previous employment with the OTP had been provided to the Defence on 29 July 2021.<sup>15</sup>
11. On 27 August 2021, Judge Samba provided further information in relation to her employment with the OTP responding to the questions posed by the Defence.<sup>16</sup>
12. On 30 August 2021, the Defence asked the OTP to “revisit the issue” of Judge Samba’s prior employment with the OTP “with the view of identifying and disclosing any further relevant information”.<sup>17</sup>
13. On 1 September 2021, the OTP responded that should it identify any further relevant information, it would provide the Defence with it as soon as practicable.<sup>18</sup>

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<sup>11</sup> *Ibid.*, p. 7.

<sup>12</sup> E-mail communication from Trial Chamber III to the Defence dated 17 August 2021 (14:06), Defence Request, Confidential Annex B, p. 14.

<sup>13</sup> ICC-01/09-01/20-163-Conf. A public redacted version was filed on 19 August 2021, ICC-01/09-01/20-163-Red.

<sup>14</sup> E-mail communication from Trial Chamber III to the OTP dated 20 August 2021 (08:22), Defence Request, Confidential Annex B, p. 18.

<sup>15</sup> ICC-01/09-01/20-167, paras. 1-2. *See also* e-mail communication from the OTP to Trial Chamber III dated 18 August 2021 (18:02), Defence Request, Confidential Annex B, p. 16.

<sup>16</sup> ICC-01/09-01/20-168.

<sup>17</sup> E-mail communication from the Defence to the OTP dated 30 August 2021 (11:04), Defence Request, Confidential Annex B, p. 21.

<sup>18</sup> E-mail communication from the OTP to the Defence dated 1 September 2021 (12:03), Defence Request, Confidential Annex B, p. 22. In the same communication, the OTP further clarified that it would consider “relevant” any information which may alter or significantly add to the description the OTP had already provided the Defence on 29 July about Judge Samba’s involvement in the Kenya investigations.

14. On 7 September 2021, the Defence sent a letter to the OTP requesting further particulars on Judge Samba's employment with the OTP.<sup>19</sup>
15. On 9 September 2021, the OTP reiterated to the Defence that it had reviewed all the records in its possession and provided those deemed relevant to the Defence.<sup>20</sup>
16. On 17 September 2021, the Defence filed the Defence Request seeking the disqualification of Judge Samba.
17. On 22 September 2021, the Presidency ordered the OTP to file its response to the Defence Request by 29 September 2021.<sup>21</sup>

#### IV. SUBMISSIONS

- 1. The Defence fails to satisfy the high and fact-specific standard of article 41(2)(a)**
  - (a) A high threshold is required to disqualify a judge under article 41(2)(a)*
18. The Defence Request falls short of the high threshold and fact-specific assessment required in article 41(2)(a).
19. Requesting the disqualification of a judge is not a step to be taken lightly. Judges enjoy a presumption of impartiality, which attaches to judicial office.<sup>22</sup> They are presumed to be professional judges who, by virtue of their experience and training, can decide on issues relying solely and exclusively on the evidence before them.<sup>23</sup> This presumption is not easily rebutted.<sup>24</sup>
20. A judge may be disqualified from participating in a specific case if a reasonable apprehension of bias is made out. The Plenary of judges has consistently held that

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<sup>19</sup> Letter from the Defence to the OTP dated 7 September 2021, Defence Request, Confidential Annex B, pp. 25-28.

<sup>20</sup> Letter from the OTP to the Defence dated 9 September 2021, Defence Request, Confidential Annex B, pp. 31-32.

<sup>21</sup> ICC-01/09-01/20-178-Conf, p. 3.

<sup>22</sup> See IACHR, *Poblete Vilches y otros vs. Chile*, Judgement, 8 March 2018, para. 196.

<sup>23</sup> ICC-01/04-01/06-3154-AnxI, para. 29 (citations omitted). See also ICC-01/12-01/18-458-Conf-AnxI, ICC-01/12-01/18-458-AnxI-Red, para. 23; ICC-01/05-01/13-511-Anx, paras. 15-18; ICC-02/05-01/09-76-Anx2, p. 6.

<sup>24</sup> See ICC-01/04-01/06-3154-AnxI, para. 29 and fn. 50.

“[t]he question of impartiality should be viewed from the objective perspective of whether a fair-minded and informed observer, having considered all the facts and circumstances, would reasonably apprehend bias in the judge. Such fair minded person is an objective observer (...) whose consideration of facts and circumstances includes an understanding of the nature of a judge's profession”.<sup>25</sup> A case-by-case examination is thus needed, taking into account the specific circumstances of each case.<sup>26</sup>

21. Article 41 governs the disqualification of judges. Together with rule 34 of the Rules of Procedure and Evidence, it provides a non-exhaustive list of grounds requiring disqualification.

Article 41(2)(a) provides:

“A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. [...]”

Rule 34(1)(c) provides, as a ground for disqualification:

“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*

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<sup>25</sup> ICC-01/12-01/18-398-AnxI, para. 20; ICC-02/05-03/09-344-Anx, para. 11; ICC-01/04-01/06-3154-AnxI, para. 28; ICC-01/05-01/13-511-Anx, para. 28; ICC-01/04-01/06-3040-Anx, para. 10; ICC-02/05-03/09-344-Anx, para. 13. *See also* ICTY, *Prosecutor v Mladić*, MICT-13-56-A, Decision on Defence Motions for Disqualification of Judges Theodor Meron, Carmel Agius and Liu Daqun, 3 September 2018 (“*Mladić* Disqualification Decision”), para. 19 (“A ‘reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality [...] and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.’”); ICTY, *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 683.

<sup>26</sup> ICC-01/04-02/06-2355-Conf-AnxI, para. 36; ICC-01/05-01/13-1329-AnxI, p. 3; ICC-01/04-01/06-3040-Anx, para. 48. *See also* *Mladić* Disqualification Decision, para. 24 (citing ECtHR cases).

*their legal representatives* that, objectively, could adversely affect the required impartiality of the person concerned”.<sup>27</sup>

22. Unless expressly prohibited in the ICC legal framework,<sup>28</sup> article 41(2)(a) should not be interpreted as automatically barring all judges who were previously involved in any capacity with some aspects of a situation or case from sitting in subsequent proceedings of the same or a related case.<sup>29</sup> A case-by-case determination is required to establish whether “[the judge’s] impartiality can be reasonably doubted”.<sup>30</sup> In so doing, the Presidency has considered whether the judge’s previous participation in the case was likely to be *directly related* to the issue at hand so as to doubt their impartiality.<sup>31</sup> Ultimately, assessing requests for disqualification based on a judge’s previous involvement in a case turns on whether there is a “degree of congruence between the legal issues” or whether “the factual determinations” would be “based on the same evidence”.<sup>32</sup>
23. Previous decisions of the Plenary illustrate situations where a judge’s prior involvement in a case or related case would not lead to a reasonable apprehension of bias:
- The Presidency allowed Judge de Gurmendi, a former senior OTP staff who had headed the Jurisdiction, Complementarity and Cooperation Division (“JCCD”) for over three years, to participate in the review proceedings concerning the reduction of Lubanga’s sentence despite her involvement in

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<sup>27</sup> Emphasis added.

<sup>28</sup> See for example rule 173(1) with respect to requests for compensation: “Anyone seeking compensation on any of the grounds indicated in article 85 shall submit a request, in writing, to the Presidency, which shall designate a Chamber composed of three judges to consider the request. These judges shall not have participated in any earlier judgement of the Court regarding the person making the request”.

<sup>29</sup> Regulation 12 of the Regulations of the Court must be read as referring to the same proceedings: “[...] Under no circumstances shall a judge who has participated in the pre-trial or trial phase of a case be eligible to sit on the Appeals Chamber hearing that case; nor shall a judge who has participated in the appeal phase of a case be eligible to sit on the pre-trial or trial phase of that case”.

<sup>30</sup> ICC-01/04-01/06-2138-AnxIII, pp. 4-7. See e.g., ICC-01/04-01/10-503-AnxII, p. 3; ICC-02/11-01/15-142-AnxI, p. 4; ICC-01/04-02/06-925-AnxI, p. 3; ICC-01/05-01/13-1329-AnxI, p. 3; ICC-01/04-01/06-3154-AnxI, para. 30.

<sup>31</sup> See also ICC-01/04-02/06-162-Anx2, pp. 2-3.

<sup>32</sup> ICC-02/11-01/15-142-AnxI, p. 4; ICC-01/05-01/13-1329-AnxI, p. 3; ICC-01/04-01/06-3154-AnxI, para. 31.



early stages of the *Lubanga* case, including in general discussions and approval of the main legal and strategic documents and major investigative and prosecution activities in that case.<sup>33</sup> The Plenary's absolute majority found that "the functions performed by the Judge [...] appear to have been [...] relatively removed from the details of the case against Mr Lubanga".<sup>34</sup>

- The Presidency further allowed Judge Monageng to participate in a decision reconsidering whether a warrant of arrest for genocide should be issued against Al Bashir despite her previous experience as Commissioner to the African Commission on Human and Peoples' Rights and her role in preparing the report of the fact-finding mission to Darfur, Sudan.<sup>35</sup> Critically, the Presidency stated, in this context, that: "when assessing the appearance of bias in the eyes of the reasonable observer, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, are capable of deciding on the issue before them *while relying solely and exclusively on the evidence adduced in the particular case, whilst excluding any information that was available to them in other capacity*".<sup>36</sup>
- Most recently, the Plenary allowed Judge Alapini-Gansou to participate in the confirmation proceedings of the *Al Hassan* case notwithstanding her previous participation in fact-finding and observation missions, her drafting reports and attending seminars about the events in Mali, including on war crimes and crimes against humanity. The Plenary's absolute majority found that, *inter alia*, it was not shown that Judge Alapini-Gansou had met with [REDACTED] and discussed the Accused with them.<sup>37</sup> Significantly, the Plenary held that a judge

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<sup>33</sup> ICC-01/04-01/06-3154-AnxI, paras. 4, 19 (fn.31), 42.

<sup>34</sup> ICC-01/04-01/06-3154-AnxI, para. 38.

<sup>35</sup> ICC-02/05-01/09-76-AnxII, pp. 1-6.

<sup>36</sup> ICC-02/05-01/09-76-AnxII, p. 6 (emphasis added). *See also* ICC-01/12-01/18-398-Anx1, para. 23.

<sup>37</sup> ICC-01/12-01/18-458 + Conf-AnxI para. 36.

does not come to the Court in a state of *tabula rasa*.<sup>38</sup> The existence of prior experience or expertise does not, of itself, lead to a reasonable appearance that a judge may be unable to perform her or his judicial role impartially. Ordinarily, a judge “is able to place to one side information or knowledge acquired from any other source and determine a case entirely on the evidence adduced”.<sup>39</sup>

*(b) Judge Samba’s former role in the Office of the Prosecutor*

24. From 17 October 2006 to 28 October 2010,<sup>40</sup> Judge Samba was employed by the OTP as a FOO in the then OSU of the ID. During this time, Judge Samba was posted in Kampala, Uganda, where the OTP had a Field Office to support its investigations in that situation country.<sup>41</sup> As FOO, Judge Samba’s duties and responsibilities were logistical and operational in nature and included, among others: taking care of all logistical arrangements, including transportation, accommodation and provision of field equipment to assist members of the investigation teams deployed from the ICC headquarters in The Hague to the field; monitoring compliance with security instructions and tracking OTP staff deployment in the field; guiding, training and instructing staff in logistics requirements, field craft, policies and procedures; coordinating with the then Victims and Witnesses Unit (“VWU”) and Safety and Security Section of the

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<sup>38</sup> ICC-01/12-01/18-398-AnxI, para. 42. See also ICTY, *Prosecutor v. Furundžija*, IT-95-17/1, Appeal Judgment, 21 July 2000, para. 205 (“The Appeals Chamber does not consider that a Judge should be disqualified because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements. [...] The possession of this experience is a statutory requirement for Judges to be elected to this Tribunal. It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias. [...]”).

<sup>39</sup> ICC-01/12-01/18-398-AnxI, para. 42. See also ICTR, *Ntawukulilyayo v. The Prosecutor*, Case No. ICTR-05-82-A, Decision on Motion for Disqualification of Judges, 8 February 2011, para. 12 (“[...] It is assumed, in the absence of evidence to the contrary, that, by virtue of their training and experience, the Judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case [...] ‘a judge is not disqualified from hearing two or more criminal trials arising out of the same series of events, where he is exposed to evidence relating to these events in both cases.’”)

<sup>40</sup> The OTP confirms that according to its records Judge Samba resigned from the OTP’s employment with effect from 29 October 2010.

<sup>41</sup> Letter from the OTP to the Defence dated 29 July 2021, Defence Request, Confidential Annex B, p. 6; ICC-01/09-01/20-168, para. 4.

Registry to determine and implement specific risk mitigation factors to enhance the safety and security of staff and witnesses.

25. Additionally, Judge Samba's duties included managing witnesses in relation to logistical, administrative and security aspects only.<sup>42</sup> In their interaction with witnesses, all FOOs – including Judge Samba – were prohibited to discuss their evidence or the investigations.<sup>43</sup>
26. [REDACTED]<sup>44</sup> [REDACTED],<sup>45</sup> Judge Samba's responsibilities did *not* include participating in OTP evidence-gathering activities;<sup>46</sup> accessing the content of any evidence<sup>47</sup> collected during an investigation;<sup>48</sup> being appraised of the evolution, direction or strategy of an investigation or prosecution, receiving and accessing investigative, analytical or legal reports and memorandums, or receiving other similar information regarding the facts and circumstances of an investigation or case. Similarly, Judge Samba had no access rights to the then-existing systems to store, manage and retrieve evidence, contacts and court records (*i.e.* Ringtail, SCMS, E-court, TRIM).<sup>49</sup>
27. Judge Samba's limited involvement in the Kenya situation was also not the product of a specific assignment, but rather of a practical limitation: on 31 March 2010, the OTP opened an investigation into the situation in the Republic of Kenya in relation to crimes against humanity,<sup>50</sup> but did not set up a field office or physical presence there. As a result, when the operational needs of the Kenya investigation required it, the OTP had to rely on the logistical and administrative support of

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<sup>42</sup> Letter from the OTP to the Defence dated 29 July 2021, Defence Request, Confidential Annex B, pp. 6-7; ICC-01/09-01/20-168, para. 6.

<sup>43</sup> Letter from the OTP to the Defence dated 29 July 2021, Defence Request, Confidential Annex B, p. 7.

<sup>44</sup> Defence Request, para. 30.

<sup>45</sup> *Ibid.*, para. 32.

<sup>46</sup> Such as screening or interviewing witnesses.

<sup>47</sup> Such as written or audio visual records of witness interview.

<sup>48</sup> Letter from the OTP to the Defence dated 29 July 2021, Defence Request, Confidential Annex B, pp. 7-8.

<sup>49</sup> Letter from the OTP to the Defence dated 29 July 2021, Defence Request, Confidential Annex B, p. 7; ICC-01/09-01/20-168, para. 6.

<sup>50</sup> ICC-01/09-19-Corr, p. 83.

[REDACTED] other field areas including, on a limited number of occasions, Judge Samba. As such, for approximately six months until her departure in late October 2010, as FOO Judge Samba provided logistical support to a discrete number of OTP activities related to the Kenya investigation.<sup>51</sup> These activities were:

- a. A [REDACTED] field operation [REDACTED]<sup>52</sup> [REDACTED]. Given its logistical and security-related complexity, the operation was time and resource-intensive. As such, [REDACTED] Judge Samba who went to [REDACTED] in April and August 2010.<sup>53</sup> During this operation, as FOO Judge Samba provided logistical support to the investigators and witnesses such as arranging for their secure transportation, communications and sustenance.<sup>54</sup> It is in this operational context only that Judge Samba interacted with the witnesses, under the general instruction not to discuss their evidence.<sup>55</sup>

With respect to this field operation, the Prosecution notes that i) Judge Samba did not participate in the interviews of the witnesses concerned, which were conducted exclusively by OTP investigators; and ii) at that time, the Kenya investigation was in its preliminary stages and focused on the crimes committed in the context of the 2007-2008 post-election violence. The [REDACTED] witnesses in question were interviewed and provided evidence about those events. Only subsequently, as of 2011 onwards and after Judge Samba had left the OTP, did the Prosecution commence investigations into possible offences against the administration of justice under article 70.<sup>56</sup> Furthermore, iii) the Prosecution does not

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<sup>51</sup> Letter from the OTP to the Defence dated 29 July 2021, Defence Request, Confidential Annex B, p. 7; ICC-01/09-01/20-168, para. 7.

<sup>52</sup> [REDACTED].

<sup>53</sup> Further to its Letter to the Defence dated 29 July 2021 (*see* Defence Request, Confidential Annex B, p. 7), the Prosecution clarifies that Judge Samba's deployment lasted 8 (eight) days.

<sup>54</sup> Letter from the OTP to the Defence dated 29 July 2021, Defence Request, Confidential Annex B, p. 7.

<sup>55</sup> See *supra* para. 25.

<sup>56</sup> Letter from the OTP to the Defence dated 29 July 2021, Defence Request, Confidential Annex B, p. 8.

intend to call any of these [REDACTED] witnesses to testify in the *Gicheru case* and has disclosed their identity to the Defence.

- b.* A field mission of a staff member [REDACTED] of the OTP to Kenya in [REDACTED] 2010. Judge Samba was tasked to obtain and hand over to this staff member a set of mobile devices [REDACTED].<sup>57</sup>

The Prosecution notes that in this instance, Judge Samba's involvement was limited to purchasing mobile phones [REDACTED] only and did not involve meeting [REDACTED].<sup>58</sup>

- c.* [REDACTED]The Prosecution has no record that Judge Samba handled any call from Kenya witnesses. Judge Samba was further ii) instructed to [REDACTED]for 13 witnesses [REDACTED].<sup>59</sup> [REDACTED] [REDACTED]. Judge Samba would have followed the same method when [REDACTED]for 13 witnesses in the Kenya situation.

- d.* A [REDACTED] mission to Kenya in early October 2010, which did not involve meeting witnesses or collecting evidence. Judge Samba was copied on messages respecting the preparation of this mission, but did not take part in it.<sup>60</sup>

- e.* A mission to various locations of interest to the 2008 post-election investigation in Kenya in early September 2010 to conduct risk assessments in relation to possible OTP field operations, including by coordinating with relevant international agencies and entities, and fiscal management in relation to operational funds. The mission did not involve meeting prospective or actual OTP witnesses or collecting evidence.

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<sup>57</sup> Letter from the OTP to the Defence dated 29 July 2021, Defence Request, Confidential Annex B, p. 7.

<sup>58</sup> Letter from the OTP to the Defence dated 29 July 2021, Defence Request, Confidential Annex B, p. 7.

<sup>59</sup> *Ibid.* See also ICC-01/09-01/20-168, para. 8. [REDACTED].

<sup>60</sup> *Ibid.*

28. In sum, during her employment as FOO for the OTP, Judge Samba was not involved in any investigative or advisory capacity in any of the cases in the Kenya situation nor was she privy to any substantive information in that respect. Rather, Judge Samba's connection to the Kenya investigation was tangential and exclusively limited to providing logistical support to OTP operations in the field on a limited number of occasions, for a short period of time and significantly prior to when the crimes charged in the *Gicheru* case are alleged to have been committed.

*(c) There is no bias or appearance of bias*

29. OSU was a division of the OTP entrusted with providing logistical and operational support to OTP field activities only.<sup>61</sup> As a staff member of this Unit, Judge Samba never participated in or was responsible for any substantive aspect of the investigations and prosecutions in the Kenya situation. Moreover, Judge Samba's involvement with the Kenya investigation was peripheral, her duties and functions limited to provide logistical and administrative assistance to OTP missions, deployments and operations.

30. Even assuming *arguendo* that Judge Samba interacted with some witnesses in the main Kenya investigation who provided evidence about the 2008 post-election violence, none of them will be called to testify at trial by the Prosecution in the *Gicheru* case. Moreover, it must be presumed that when Judge Samba interacted with these witnesses she did so within the framework of her assigned functions and duties as FOO, which included refraining from discussing evidence-related matters with them. The Defence has not provided any proof to the contrary.

31. Furthermore, Judge Samba could not be reasonably expected to have formed an opinion on any potential case involving the commission of article 70 offences in Kenya by Gicheru or any other individual as, at the time of her interaction with the witnesses in the Kenya situation and/or OTP investigators, the focus of the

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<sup>61</sup> Regulation 8 of the Regulations of the Office of the Prosecutor.

investigation was the commission of crimes against humanity in the 2007-2008 post-election violence. Conversely, the *Gicheru* case relates to offences against the administration of justice as of 2013. Hence, there is no temporal or substantive overlap between the *Gicheru* case and the main Kenya investigation. As previously mentioned, witnesses for article 70 offences case were contacted and questioned only *after* Judge Samba had left the OTP's employment.

32. In light of the above, a reasonable well-informed and fair-minded observer, taking into consideration all relevant information, would not conclude that Judge Samba has previously been involved in any capacity – investigative, advisory or substantive – in the OTP investigations or prosecutions in the Kenya situation, nor would such observer conclude that her appearance of impartiality is undermined to try the *Gicheru* case. The Defence has not presented any information which would rebut the ordinary presumptions of judicial impartiality.

## **2. Judge Samba's disqualification is not in the interest of justice**

33. Contrary to the Defence's assertion, Judge Samba's disqualification is not in the interest of justice.<sup>62</sup> The Defence effectively argues that the ASP's amendment of the rules applicable to article 70 offences contributes to creating an appearance of bias. These arguments should be dismissed.
34. The inapplicability of interlocutory appeals to article 70 proceedings pursuant to rule 165 does not "magnif[y] the reasonable observer's apprehension of bias"<sup>63</sup> as the parties still retain the standard right to appeal decisions of acquittal or conviction entered at the end of the proceedings, under article 81.<sup>64</sup> In fact, rule 165(2) only limits the possibility of the parties to appeal interlocutory decisions by the Pre-Trial or Trial Chamber that fall within the scope of article 82(1)(d).<sup>65</sup> The

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<sup>62</sup> Defence Request, paras. 47-48.

<sup>63</sup> Defence Request, para. 48.

<sup>64</sup> Rule 165(2). *See also* ICC-ASP/15/24, Report of the Working Group on Amendments, 8 November 2016, para. 33. *See also* ICC-01/09-01/15-61, paras. 52-53.

<sup>65</sup> Rule 165(2).

parties' right to appeal decisions under article 81 remains intact and the appeal proceeding that may ensue from the exercise of this right is entirely governed by a panel of three judges who will have access to the full record of the case tried before the Trial Chamber composed of a Single Judge.

35. Likewise, that Judge Samba is the sole judge to try the *Gicheru* case does not require her disqualification. As outlined above, all judges (be in a panel of five, three or a single judge) enjoy the same presumption of impartiality,<sup>66</sup> which the Defence has not rebutted in this case; instead, the Defence Request has failed to clear the high threshold test required for the disqualification of a judge.
36. Therefore, no interest of justice considerations arise from the procedural regime under rule 165 that would justify Judge Samba's disqualification.

## V. CONCLUSION

37. The issue before the Presidency is whether from an objective perspective a fair-minded and informed observer would reasonably apprehend bias on the part of Judge Samba only because she provided logistic support to some field activities in the early stages of the Kenya investigation. The Prosecution submits that (1) considering the presumption of judges' impartiality, and (2) Judge Samba's operational and relatively circumscribed role in the Office of the Prosecutor during the early stages of the Kenya investigation, a reasonable and well-informed observer would not reasonably apprehend bias that she was biased, such that she could not try the *Gicheru* case impartially and solely on the evidence to be adduced at the trial. Moreover, the procedural regime under provisional rule 165 has no impact on this assessment by a reasonable observer that would justify Judge Samba's disqualification in the interest of justice.

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<sup>66</sup> See *supra* para. 19.



38. For the above reasons, the Prosecution requests that the Defence Request be dismissed.



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**James Stewart, Deputy Prosecutor**

Dated this 1<sup>st</sup> day of October 2021  
At The Hague, The Netherlands