

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/09-01/20**  
Date: **1 November 2021**

**THE PLENARY OF JUDGES  
OF THE INTERNATIONAL CRIMINAL COURT**

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public**

**Public redacted version of “Reasons for the Decision on the ‘Request for the Disqualification of Judge Miatta Maria Samba’ dated 17 September 2021 (ICC-01/09-01/20-173-Conf)”**

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

**The Office of the Prosecutor**

Mr James Stewart  
Mr Anton Steynberg

**Counsel for Defence**

Mr Michael G. Karnavas

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Other**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

All Judges  
Trial Chamber III

The plenary of judges of the International Criminal Court (the ‘Court’), with the exception of Judge Miatta Maria Samba, has before it the “Request for the Disqualification of Judge Miatta Maria Samba” filed on 17 September 2021 (the ‘Application’),<sup>1</sup> requesting that Judge Miatta Maria Samba be disqualified from Trial Chamber III in the case of *The Prosecutor v. Paul Gicheru*.<sup>2</sup>

## I. PROCEDURAL HISTORY

1. On 22 July 2021, the Presidency constituted Trial Chamber III, composed of Judge Miatta Maria Samba, and referred the case of *The Prosecutor v. Paul Gicheru* to it.<sup>3</sup>
2. On 18 August 2021, the Defence filed a request seeking information from Judge Samba concerning her previous employment as Field Operations Officer with the Office of the Prosecutor (the ‘OTP FOO’ and ‘OTP’, respectively) in the Uganda Field Office (the ‘Request for Information’).<sup>4</sup> On 25 August 2021, the OTP submitted that it did not have any observations or comments in response to the Request for Information and confirmed that all information available to the OTP with respect to Judge Samba’s employment as an OTP FOO had been provided to the Defence in earlier exchanges.<sup>5</sup>
3. On 27 August 2021, Judge Samba provided information as to her employment and related responsibilities,<sup>6</sup> thereby observing that her contact to witnesses was limited to logistical activities only.<sup>7</sup>

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<sup>1</sup> Defence for Mr Gicheru, *The Prosecutor v. Paul Gicheru*, Request for the Disqualification of Judge Miatta Maria Samba, 17 September 2021, ICC-01/09-01/20-173-Conf. A public redacted version was filed on 22 September 2021, ICC-01/09-01/20-1173-Red.

<sup>2</sup> Application, ICC-01/09-01/20-173-Conf, pp. 3, 22.

<sup>3</sup> Presidency, *The Prosecutor v. Paul Gicheru*, Decision constituting Trial Chamber III and referring to it the case of *The Prosecutor v. Paul Gicheru*, 22 July 2021, ICC-01/09-01/20-157, p. 4.

<sup>4</sup> Defence for Mr Gicheru, *The Prosecutor v. Paul Gicheru*, 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, 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>5</sup> OTP, *The Prosecutor v. Paul Gicheru*, Prosecution’s Submissions on the Defence’s Request for Information from Judge Miatta Maria Samba concerning Her Employment with the Office of the Prosecutor of the International Criminal Court, 25 August 2021, ICC-01/09-01/20-167, paras 1-2.

<sup>6</sup> Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on Defence Request for Information concerning Judge Samba’s Prior Employment, 27 August 2021, ICC-01/09-01/20-168, paras 3-14.

<sup>7</sup> Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on Defence Request for Information concerning Judge Samba’s Prior Employment, 27 August 2021, ICC-01/09-01/20-168, para. 6.

4. On 17 September 2021, the Defence for Mr Gicheru filed its Application pursuant to article 41(2)(b) of the Rome Statute (the ‘Statute’) and rule 34(1)(c) of the Rules of Procedure and Evidence (the ‘Rules’) seeking that Judge Samba be disqualified from Trial Chamber III, in light of her previous position as an OTP FOO.<sup>8</sup>
5. On 29 September 2021, pursuant to a procedural order,<sup>9</sup> the OTP filed its response to the Application (the ‘OTP Response’), and, on 4 October 2021, a corrigendum<sup>10</sup> and public redacted version<sup>11</sup> thereof were notified.
6. On 4 October 2021, the Defence filed a request for Leave to Reply to the Prosecution Response (the ‘Leave to Reply Request’).<sup>12</sup>
7. On 5 October 2021, Judge Samba transmitted her written observations on the Application to the Presidency (the ‘Observations’)<sup>13</sup> and the OTP filed a response to the Leave to Reply Request, submitting that the latter should be dismissed.<sup>14</sup>
8. On 8 October 2021, the plenary of judges of the Court, with the exception of Judge Samba, issued its decision denying the Leave to Reply Request and publicly notifying Judge Samba’s Observations.<sup>15</sup>

<sup>8</sup> Application, ICC-01/09-01/20-173-Conf, pp. 3, 22.

<sup>9</sup> Presidency, *The Prosecutor v. Paul Gicheru*, Order concerning the ‘Request for the Disqualification of Judge Miatta Maria Samba’ dated 17 September 2021 (ICC-01/09-01/20-173-Conf), 22 September 2021, ICC-01/09-01/20-178-Conf.

<sup>10</sup> OTP, *The Prosecutor v. Paul Gicheru*, Corrected version of “Prosecution response to the Defence “Request for the Disqualification of Judge Miatta Maria Samba””, ICC-01/09-01/20-184-Conf, 29 September 2021, 1 October 2021, ICC-01/09-01/20-184-Conf-Corr (notified on 4 October 2021).

<sup>11</sup> OTP, *The Prosecutor v. Paul Gicheru*, 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, 1 October 2021, ICC-01/09-01/20-184-Corr-Red (notified 4 October 2021).

<sup>12</sup> Defence for Mr Gicheru, *The Prosecutor v. Paul Gicheru*, Request for Leave to Reply to the Prosecution response to the Defence “Request for the Disqualification of Judge Miatta Maria Samba”, 4 October 2021, ICC-01/09-01/20-186-Conf.

<sup>13</sup> Judge Miatta Maria Samba, *The Prosecutor v. Paul Gicheru*, Memorandum to all the Judges of the Court, titled “Observations of Judge Miatta Maria Samba on the “Request for the Disqualification of Judge Miatta Maria Samba””, 8 October 2021, ICC-01/09-01/20-190-Anx, annexed to Plenary of Judges, *The Prosecutor v. Paul Gicheru*, Decision on the “Request for Leave to Reply to the Prosecution response to the Defence “Request for the Disqualification of Judge Miatta Maria Samba”” dated 4 October 2021 (ICC-01/09-01/20-186-Conf) and notification of Judge Samba’s Observations, 8 October 2021, ICC-01/09-01/20-190.

<sup>14</sup> OTP, *The Prosecutor v. Paul Gicheru*, 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, 5 October 2021, ICC-01/09-01/20-188-Conf.

<sup>15</sup> Plenary of Judges, *The Prosecutor v. Paul Gicheru*, Decision on the “Request for Leave to Reply to the Prosecution response to the Defence “Request for the Disqualification of Judge Miatta Maria Samba”” dated 4 October 2021 (ICC-01/09-01/20-186-Conf) and notification of Judge Samba’s Observations, 8 October 2021, ICC-01/09-01/20-190. Judge Samba’s Observations are annexed to the Decision on the Leave to Reply Request, 8 October 2021, ICC-01/09-01/20-190-Anx.

9. On 19 October 2021, the plenary of judges convened in accordance with article 41(2)(c) of the Statute and rule 4(2) of the Rules to consider the Application. The session was attended by Judges Piotr Hofma ski, Luz del Carmen Ibáñez Carranza, Antoine Kesia-Mbe Mindua, Marc Perrin de Brichambaut, Péter Kovács, Chang-ho Chung, Solomy Balungi Bossa, Tomoko Akane, Reine Alapini-Gansou, Kimberly Prost, Rosario Salvatore Aitala, Joanna Korner, Gocha Lordkipanidze, Sergio Gerardo Ugalde Gordínez and Althea Violet Alexis-Windsor. Judges Bertram Schmitt and María del Socorro Flores Liera were not present for the plenary session.
10. On 20 October 2021, the plenary of judges informed the parties of its decision to deny the Application, with reasons to follow.<sup>16</sup>

## II. SUBMISSIONS

### A. The Application

11. The Application alleges the risk of an appearance of bias and actual bias based on Judge Samba's prior position as an OTP FOO from 2006 to 2010 at the OTP Field Office in Uganda, in which she assisted the OTP in, *inter alia*, the *Kenya* situation.<sup>17</sup> [REDACTED].<sup>18</sup>
12. Mr Gicheru submits five grounds on the basis of which a reasonable observer would objectively apprehend bias on the part of Judge Samba. First, Mr Gicheru submits that Judge Samba would apprehend bias due to her previous involvement in the *Kenya* situation before Court<sup>19</sup> and that this situation provides a 'significant degree of congruence' between the legal and factual issues arising from the *Kenya* situation and the *Gicheru* case.<sup>20</sup> Further, Mr Gicheru provides that Judge Samba will have [REDACTED]<sup>21</sup> [REDACTED] to weigh and assess evidence concerning witness

<sup>16</sup> Plenary of Judges, *The Prosecutor v. Paul Gicheru*, Decision on the 'Request for the Disqualification of Judge Miatta Maria Samba' dated 17 September 2021 (ICC-01/09-01/20-173-Conf), 20 October 2021, ICC-01/09-01/20-191.

<sup>17</sup> Application, ICC-01/09-01/20-173-Conf, p. 3, paras 27, 49.

<sup>18</sup> [REDACTED].

<sup>19</sup> Application, ICC-01/09-01/20-173-Conf, para. 28.

<sup>20</sup> Application, ICC-01/09-01/20-173-Conf, para. 30.

<sup>21</sup> [REDACTED].

interference in the *Kenya* situation.<sup>22</sup> Mr Gicheru highlights that Judge Samba was not acting neutrally as an OTP FOO, but rather acted on behalf of the OTP.<sup>23</sup>

13. The second ground contained in the Application is that 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,<sup>24</sup> Mr Gicheru submits that Judge Samba was employed with the OTP while the latter received reports concerning interference [REDACTED].<sup>25</sup> [REDACTED].<sup>26</sup> [REDACTED].<sup>27</sup> [REDACTED].<sup>28</sup>

14. The third ground is that Judge Samba is unable to provide additional information concerning her employment with the OTP to dispel the appearance of bias, arguing that she answered defence's queries unsatisfactorily<sup>29</sup> and that this lack of information magnifies the reasonable observer's apprehension of bias.<sup>30</sup> Finally, as fourth and fifth ground, Mr Gicheru submits that Judge Samba's apprehension of bias would be magnified by her alleged failure to have requested excusal once she had reason to believe that grounds for disqualification existed<sup>31</sup> and by the fact that she is the sole judge of Trial Chamber III pursuant to rule 165 of the Rules, without a possibility of interlocutory appeals.<sup>32</sup>

## **B. The OTP Response**

15. The OTP submits that the Application should be dismissed as there is no reasonable apprehension of bias on Judge Samba's part<sup>33</sup> and the defence fails to satisfy the high and fact-specific standard of article 41(2)(a) of the Statute.<sup>34</sup> The OTP further submits that Mr Gicheru did not present any information which would rebut the ordinary presumptions

<sup>22</sup> [REDACTED].

<sup>23</sup> Application, ICC-01/09-01/20-173-Conf, para. 32.

<sup>24</sup> Application, ICC-01/09-01/20-173-Conf, paras 27, 33.

<sup>25</sup> [REDACTED].

<sup>26</sup> [REDACTED].

<sup>27</sup> [REDACTED].

<sup>28</sup> [REDACTED].

<sup>29</sup> Application, ICC-01/09-01/20-173-Conf, paras 38-39.

<sup>30</sup> Application, ICC-01/09-01/20-173-Conf, para. 42.

<sup>31</sup> Application, ICC-01/09-01/20-173-Conf, paras 43-46.

<sup>32</sup> Application, ICC-01/09-01/20-173-Conf, paras 32, 48.

<sup>33</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 1.

<sup>34</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, paras 2, 18.

of judicial impartiality.<sup>35</sup> The OTP elaborates that Judge Samba's functions as an OTP FOO were limited to logistical and operational support to OTP activities<sup>36</sup> in various situations under investigation, including, on limited occasions, the *Kenya* situation.<sup>37</sup> The OTP highlights that in relation to the management of witnesses, Judge Samba's role as an OTP FOO was limited to logistical, administrative and security aspects only,<sup>38</sup> as she was, *inter alia*, tasked to take care of all logistical arrangements, including transportation, accommodation and provision of field equipment to assist members of the investigation teams.<sup>39</sup> The OTP further clarified that Judge Samba was not involved in any investigative or advisory capacity in the *Kenya* situation<sup>40</sup> and had no access to OTP evidence<sup>41</sup> or related systems,<sup>42</sup> nor was she provided with details on witness profiles or the content and nature of their evidence.<sup>43</sup> The OTP submits that Judge Samba's connection to the *Kenya* situation was tangential and exclusively limited to providing logistical support to OTP operations.<sup>44</sup>

16. The OTP submits that there is no bias or appearance of bias on part of Judge Samba, considering that her support to OTP field activities were of logistical and operational nature only and that she did not participate nor was she responsible for any substantive aspect of the OTP investigations in the *Kenya* situation.<sup>45</sup> The OTP also highlights that Judge Samba's involvement was limited to the main *Kenya* investigation on crimes allegedly committed during the 2007-2008 post-election violence and was unrelated to the charged article 70 offences of the *Gicheru* case, which were allegedly committed as of 2013,<sup>46</sup> when Judge Samba had already left the OTP.<sup>47</sup> The OTP submits that consequently, Judge Samba could not be reasonably expected to have formed an opinion on any potential case involving the commission of article 70 offences, given the lack of temporal and substantive overlap between the main *Kenya* investigations and the *Gicheru*

<sup>35</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 32.

<sup>36</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, paras 2, 24.

<sup>37</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 2.

<sup>38</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 25.

<sup>39</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 24.

<sup>40</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, paras 3, 28.

<sup>41</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, paras 3, 26.

<sup>42</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 26.

<sup>43</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 3.

<sup>44</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 28.

<sup>45</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 29.

<sup>46</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 3.

<sup>47</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, paras 3, 27(a).

case.<sup>48</sup> In this context, the OTP points out that it does not intend to call in the present case any of the [REDACTED] witnesses, [REDACTED]<sup>49</sup> and that it has disclosed their identities to Mr. Gicheru's defence.<sup>50</sup> [REDACTED].<sup>51</sup>

17. Further, the OTP points out that it is not in the interest of justice to disqualify Judge Samba<sup>52</sup> simply because she is the sole judge in Trial Chamber III in the *Gicheru* case and that no interlocutory appeals is allowed.<sup>53</sup> The OTP submits that a standard right to appeal decisions of acquittal or conviction remain applicable under article 81 of the Statute.<sup>54</sup>

### C. Judge Samba's Observations

18. Judge Samba observes that, after careful consideration, there is no need to seek excusal from the *Gicheru* case, since she considers herself able to retain an independent and open mind.<sup>55</sup> She considers that the Application is based on a fundamental misunderstanding of the OTP FOO's role and refers to a prior decision in which she laid out her duties and functions in her previous role as an OTP FOO in more detail.<sup>56</sup> She points out that her duties were exclusively limited to logistical activities only.<sup>57</sup> She clarifies that she never participated in the gathering of evidence or any other investigative activities, nor did she have any discussions with members of the OTP on the content of any investigations.<sup>58</sup> She further observes that she played no part in investigation or evidence gathering in the *Kenya* situation nor had she access to evidence or OTP databases.<sup>59</sup> She provides that as an OTP FOO she was not aware of any suspected problems of witness interference in the *Kenya* situation, nor had she heard of Mr. Gicheru.<sup>60</sup> She provides that her employment

<sup>48</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 31.

<sup>49</sup> [REDACTED].

<sup>50</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 27(a).

<sup>51</sup> [REDACTED].

<sup>52</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, paras 4, 33.

<sup>53</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 4.

<sup>54</sup> OTP Response, ICC-01/09-01/20-184-Conf-Corr, para. 34.

<sup>55</sup> Observations, ICC-01/09-01/20-190-Anx, para. 7.

<sup>56</sup> Observations, ICC-01/09-01/20-190-Anx, para. 12, *referring to* Trial Chamber III, *The Prosecutor v. Paul Gicheru*, Decision on Defence Request for Information concerning Judge Samba's Prior Employment, 27 August 2021, ICC-01/09-01/20-168.

<sup>57</sup> Observations, ICC-01/09-01/20-190-Anx, para. 13.

<sup>58</sup> Observations, ICC-01/09-01/20-190-Anx, para. 13.

<sup>59</sup> Observations, ICC-01/09-01/20-190-Anx, para. 14.

<sup>60</sup> Observations, ICC-01/09-01/20-190-Anx, para. 14.



as an OTP FOO was more than a decade ago, and while she does not have any recollection of which witnesses she was in contact with as an OTP FOO, she can confirm that she never went outside the scope of her duties.<sup>61</sup> She observes that as an OTP FOO, she did not had the opportunity to form an opinion on the documentary evidence forming part of the present OTP case, given the restricted and limited nature of her responsibilities.<sup>62</sup> Finally she considers that regardless whether a judge sits alone or as part of a panel, he or she is bound by the same standards or independence and impartiality.<sup>63</sup>

### III. RELEVANT LAW

19. Article 41 (2) of the Statute provides:

- (a) 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. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.
- (b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.
- (c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

20. Rule 34(1) of the Rules provides in relevant parts:

In addition to the grounds set out in article 41, paragraph 2, and article 42, paragraph 7, the grounds for disqualification of a judge, the Prosecutor or a Deputy Prosecutor shall include, *inter alia* the following:

[...]

<sup>61</sup> Observations, ICC-01/09-01/20-190-Anx, para. 15.

<sup>62</sup> Observations, ICC-01/09-01/20-190-Anx, para. 16.

<sup>63</sup> Observations, ICC-01/09-01/20-190-Anx, para. 17.

- (c) 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.

#### IV. DETERMINATION OF THE PLENARY OF JUDGES

##### A. Applicable Legal Standards

21. The plenary of judges notes its previous assessment that the disqualification of a judge is not a step to be undertaken lightly and that a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office.<sup>64</sup> Unless rebutted, it is presumed that the judges of the Court are professional judges capable of deciding on issues before them while relying solely and exclusively on the evidence submitted in a

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<sup>64</sup> Decision of the plenary of judges on the “Defence Request for the Disqualification of a Judge” of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344-Anx, para. 14 (the ‘Banda & Jerbo Disqualification Decision 5 June 2012’); Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 37 (the ‘Lubanga Disqualification Decision 11 June 2013’); Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 20 June 2014, ICC-01/05-01/13-511-Anx, para. 18 (the ‘Bemba et al Disqualification Decision 20 June 2014’); *Lubanga Disqualification Decision* 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 29; Decision of the Plenary of Judges on the Defence Request for the Disqualification of Judge Kuniko Ozaki from the case of *The Prosecutor v. Bosco Ntaganda*, 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 31 (the ‘Ntaganda Disqualification Decision 20 June 2019’); Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Marc Perrin de Brichambaut from the case *The Prosecutor v. Thomas Lubanga Dyilo*, 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 26 (the ‘Lubanga Disqualification Decision 28 June 2019’); Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Marc Perrin de Brichambaut from the case *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 19 (the ‘Al Hassan Disqualification Decision 8 July 2019’); Public redacted version of the Decision of the Plenary of Judges on the Defence Application for the Disqualification of judges of Pre-Trial Chamber I from the case *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 23 (the ‘Al Hassan Disqualification Decision 12 September 2019’); Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Lordkipanidze from the case *The Prosecutor v. Bosco Ntaganda*, 29 September 2021, ICC-01/04-02/06-2711-Anx, para. 19 (the ‘Ntaganda Disqualification Decision 29 September 2021’).

case.<sup>65</sup> It is presumed that judges can disabuse themselves of any irrelevant personal beliefs or predispositions.<sup>66</sup>

22. The plenary of judges notes that the Application is framed in terms of a reasonable apprehension of bias, although it also contains allegations which amount to actual bias.<sup>67</sup> It is not necessary for an applicant seeking to disqualify a judge to show actual bias on behalf of the judge; rather, the appearance of grounds to doubt her or his impartiality is sufficient.<sup>68</sup> The plenary of judges recalls that justice must not only be done, but must additionally be seen to be done.<sup>69</sup>
23. The plenary of judges has consistently considered that the 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.<sup>70</sup> It has regularly been emphasised that such fair-minded person is an

<sup>65</sup> *Banda & Jerbo* Disqualification Decision 5 June 2012, ICC-02/05-03/09-344-Anx, para. 14, referring to, Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, 19 March 2010, ICC-02/05-01/09-76-Anx2, page 7; *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 10; *Bemba et al* Disqualification Decision 20 June 2014, ICC-01/05-01/13-511-Anx, para. 18; *Katanga* Disqualification Decision 22 July 2014, ICC-01/04-01/07-3504-Anx, para. 45; *Lubanga* Disqualification Decision 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 29; *Lubanga* Disqualification Decision 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 26; *Al Hassan* Disqualification Decision 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 19; *Al Hassan* Disqualification Request 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 23; *Ntaganda* Disqualification Decision 29 September 2021, ICC-01/04-02/06-2711-Anx, para. 19.

<sup>66</sup> *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 36, citing *President of the Republic of South Africa v. South Africa Rugby Football Union* 1999 (7) BCLR 725 (CC) at 753. See also *Al Hassan* Disqualification Decision 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 19. *Al Hassan* Disqualification Decision 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 23; *Ntaganda* Disqualification Decision 29 September 2021, ICC-01/04-02/06-2711-Anx, para. 19.

<sup>67</sup> Application, , ICC-01/09-01/20-173-Conf, p. 3, paras 27, 33-37.

<sup>68</sup> *Banda & Jerbo* Disqualification Decision 5 June 2012, ICC-02/05-03/09-344-Anx, para. 11; *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 9; *Bemba et al* Disqualification Decision 20 June 2014, ICC-01/05-01/13-511-Anx, para. 16; *Katanga* Disqualification Decision 22 July 2014, ICC-01/04-01/07-3504-Anx, para. 38; *Lubanga* Disqualification Decision 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 28; *Ntaganda* Disqualification Decision 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 32; *Lubanga* Disqualification Decision 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Decision 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 20; *Al Hassan* Disqualification Decision 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 24; *Ntaganda* Disqualification Decision 29 September 2021, ICC-01/04-02/06-2711-Anx, para. 20.

<sup>69</sup> *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 67, referring to United Kingdom, King's Bench Division, *The King v. Sussex Justices*, Ex parte McCarthy, 9 November 1923 [1924] 1 K.B. 256, p. 259; See also *Lubanga* Disqualification Decision 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Decision 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 24; *Ntaganda* Disqualification Decision 29 September 2021, ICC-01/04-02/06-2711-Anx, para. 20.

<sup>70</sup> *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 34; *Bemba et al* Disqualification Decision 20 June 2014, ICC-01/05-01/13-511-Anx, para. 44; *Ntaganda* Disqualification Decision 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 32; *Lubanga* Disqualification Decision, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Decision 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 20; *Al*

objective observer, not to be confused with the applicant,<sup>71</sup> whose consideration of facts and circumstances includes an understanding of the nature of a judge's profession.<sup>72</sup> The plenary of judges specifies that, in forming a view regarding the appearance of bias, the fair-minded observer should take into account the entire context of the case.<sup>73</sup> The plenary of judges explicitly recalls that it is for the party requesting the disqualification to demonstrate the appearance of bias.<sup>74</sup>

## B. Merits

24. Having considered all relevant information before it, the plenary of judges, consisting of Judges Piotr Hofmański, Luz Ibáñez Carranza, Antoine Kesia-Mbe Mindua, Marc Perrin de Brichambaut, Péter Kovács, Chang-ho Chung, Solomy Balungi Bossa, Tomoko Akane, Reine Alapini-Gansou, Kimberly Prost, Rosario Salvatore Aitala, Joanna Korner, Gocha Lordkipanidze, Sergio Gerardo Ugalde Gordínez and Althea Violet Alexis-Windsor, acting unanimously, denies the Application.
25. The plenary of judges emphasises the well-established principle that the onus of demonstrating the existence of actual bias or, at minimum, a reasonable appearance of bias in the eyes of an objective and well-informed observer, lies with the party requesting

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*Hassan* Disqualification Decision 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 25; *Ntaganda* Disqualification Decision 29 September 2021, ICC-01/04-02/06-2711-Anx, para. 21.

<sup>71</sup> *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 35, referring to *Helow v. Secretary of State for the Home Department and another (Scotland)* [2008] UKHL 62, para. 2. See also *Ntaganda* Disqualification Request 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 32; *Lubanga* Disqualification Request 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Request 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 20; *Al Hassan* Disqualification Decision, 12 September 2019, ICC-01/12-01/18-458-AnxI-Red; para. 25; *Ntaganda* Disqualification Decision 29 September 2021, ICC-01/04-02/06-2711-Anx, para. 21.

<sup>72</sup> *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 36; *Ntaganda* Disqualification Decision 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 32; *Lubanga* Disqualification Decision 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Decision 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 20; *Al Hassan* Disqualification Request 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 25; *Ntaganda* Disqualification Decision 29 September 2021, ICC-01/04-02/06-2711-Anx, para. 21.

<sup>73</sup> *Lubanga* Disqualification Decision 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 38; *Lubanga* Disqualification Decision 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Decision 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 20; *Al Hassan* Disqualification Decision 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 25; *Ntaganda* Disqualification Decision 29 September 2021, ICC-01/04-02/06-2711-Anx, para. 21.

<sup>74</sup> *Ntaganda* Disqualification 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 33; *Lubanga* Disqualification Decision 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27; *Al Hassan* Disqualification Decision 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 20; *Al Hassan* Disqualification Decision 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, para. 25; *Ntaganda* Disqualification Decision 29 September 2021, ICC-01/04-02/06-2711-Anx, para. 21.

disqualification. This requires the production of evidence which is material to establishing actual bias or the appearance of bias. In the absence of material evidence, circumstantial facts may inform the existence of reasonable appearance of bias, but it is expected that temporal and substantive elements be established to a high degree of certainty. The plenary of judges further emphasises its previous observation that many judges of the Court have had prior roles of relevance to the Court's work, including in other organs of the Court, together with its finding that such prior professional expertise does not, without more, suffice to substantiate the very specific risk set out in rule 34(1)(c) of the Rules that a judge may have formed an opinion on the case in question.<sup>75</sup>

26. The Application relies on circumstantial facts connected to Judge Samba having performed the role of OTP FOO between 2006 and 2010.<sup>76</sup> The arrest warrant against Mr Gicheru was issued on 10 March 2015<sup>77</sup> and the offences in respect of which charges have been confirmed pertain to alleged actions between April 2013 and 10 September 2015.<sup>78</sup> The plenary of judges considers that it is temporally impossible that Judge Samba's work as an OTP FOO could thus have led her to have formed an opinion on the case in question, within the meaning of rule 34(1)(c) of the Rules, given that the case did not exist during her tenure at the OTP.

27. In addition to being temporally lacking, the plenary of judges considers the purely circumstantial case presented by Mr Gicheru to be substantively lacking. The plenary of judges finds convincing the explanation of Judge Samba, fully supported by the OTP, that the functions performed by her as an OTP FOO involved the provision of operational and logistical support.<sup>79</sup> The Application offers no material evidence in support of its assertions that Judge Samba [REDACTED].<sup>80</sup> Judge Samba's Observations are entirely clear in this regard, indicating that she had no substantive role in respect of the investigation or prosecution phase in the *Kenya* situation, meaning that she played no part in the investigation or gathering of evidence and had no access to evidential

<sup>75</sup> *Ntaganda* Disqualification Decision 29 September 2021, ICC-01/04-02/06-2711-Anx, para. 27.

<sup>76</sup> Application, ICC-01/09-01/20-173-Conf, p. 3, paras 2(a), 5(a), 27, 49.

<sup>77</sup> Pre-Trial Chamber II, *The Prosecutor v. Paul Gicheru and Philip Kipkoech Bett*, Decision on the "Prosecution's Application under Article 58(1) of the Rome Statute", 10 March 2015, ICC-01/09-01/15-1-Red.

<sup>78</sup> Pre-Trial Chamber A, *The Prosecutor v. Paul Gicheru*, Decision on the confirmation of charges against Paul Gicheru, 15 July 2021, ICC-01/09-01/20-153-Red, para. 180.

<sup>79</sup> Observations, ICC-01/09-01/20-190-Anx, paras 13-15 ; OTP Response, ICC-01/09-01/20-184-Conf-Corr, paras 2, 8, 24, 25, 27-29.

<sup>80</sup> [REDACTED].

material.<sup>81</sup> [REDACTED],<sup>82</sup> yet, such interactions were entirely logistical in nature, being limited to supporting an [REDACTED] by providing transportation, communication and sustenance<sup>83</sup> [REDACTED].<sup>84</sup> The plenary of judges considers it entirely evident that such limited logistical interactions could not have lead Judge Samba to have formed an opinion on the case nor to have otherwise undermined her impartiality in the eyes of a reasonable observer. The plenary of judges further emphasises that the Court's legal framework in no way requires a judge to have never had any previous interaction with a potential witness.

28. In addition to finding the Application to be both temporally and substantively lacking, the plenary of judges finds the Application to lack legal merit. The plenary of judges observes that the Court has already established clear guidance on the extent to which previous involvement in a case, within the meaning of article 41(2)(a) of the Statute, might give rise to a need for excusal or disqualification. While observing, at the outset that Judge Samba has had no previous involvement in the *Gicheru* case whatsoever, the plenary of judges went on to assess a previous decision by which the plenary of judges observed that Judge Fernández de Gurmendi, who had previously performed the function of Special Adviser to the former Prosecutor and Head of the Jurisdiction, Complementarity and Cooperation Division in the OTP, was not precluded from participating in sentence review functions under article 110 of the Statute, with it being noted that her functions at the OTP had been strategic, high-level and removed from the details of the case.<sup>85</sup> In the present Application, the plenary of judges emphasises that the prior functions performed by Judge Samba involved an even lesser degree of involvement in any substantive aspect of the case or situation, with Judge Samba having no involvement, control or influence over the OTP's investigation in the *Kenya* situation. The plenary of judges also considers that the present Application is readily distinguishable from a prior decision of the Presidency in the context of excusal, in which Judge Fernández de Gurmendi was excused from appeals in the *Bemba* case owing to her previous involvement in the situation in the Central African Republic.<sup>86</sup> The reasoning in

<sup>81</sup> Observations, ICC-01/09-01/20-190-Anx, para. 14.

<sup>82</sup> [REDACTED].

<sup>83</sup> [REDACTED].

<sup>84</sup> [REDACTED].

<sup>85</sup> *Lubanga* Disqualification Decision 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 38.

<sup>86</sup> Presidency, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the request for excusal from Appeals Chamber in all pending and future appeals in *The Prosecutor v. Jean-Pierre Bemba Gombo*, 20 March 2015, ICC-01/05-01/08-3245-AnxI, *annexed to* Presidency, Decision replacing a judge in the Appeals Chamber, 20 March 2015, ICC-01/05-01/08-3245, p. 4 (notified 23 March 2015).

that decision was based on her leading and high level role in the preliminary examination.<sup>87</sup> The minimal logistical role which was played by Judge Samba bears no correlation to the type of involvement which informed the Presidency's decision in question.

29. In sum, the plenary of judges considers that the Application fails to demonstrate any breach of the standard of impartiality established by article 41(2) of the Statute and rule 34 of the Rules, considering the information presented by Mr Gicheru as failing to support a claim of either actual bias or the existence of a reasonable apprehension of bias in the eyes of a well-informed objective observer.
30. Finally, the plenary of judges briefly concludes that it does not consider any of the further grounds in the Application, which were unrelated to functions performed by Judge Samba, as having merit. The third ground, which suggests that it is problematic that Judge Samba has failed to provide information to dispel the appearance of bias,<sup>88</sup> appears to inappropriately attempt to reverse the burden of proof by effectively suggesting that the onus is on Judge Samba and the OTP to demonstrate that she is not biased, rather than acknowledging that the obligation to displace the presumption of judicial impartiality falls on the party bringing the allegation. The fourth ground, which insinuates that Judge Samba should have pre-emptively sought excusal even if she did not consider it necessary,<sup>89</sup> disregards the Court's legal framework which in no way requires a judge who considers that there is no reason to doubt her or his impartiality to do so. The fifth ground, which suggests that because Judge Samba is the sole judge in the case, the apprehension of bias is magnified and also notes the lack of availability of interlocutory appeals,<sup>90</sup> appears to fail to consider that *even if* it were accepted that partiality in one member of a panel of judges does not necessarily impact on the integrity of a decision of the panel as a whole, it does not follow that a different standard of impartiality applies to judges sitting alone or in panels. The plenary of judges emphasises that the obligation to

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<sup>87</sup> Presidency, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the request for excusal from Appeals Chamber in all pending and future appeals in *The Prosecutor v. Jean-Pierre Bemba Gombo*, 20 March 2015, ICC-01/05-01/08-3245-AnxI, pp. 2-3.

<sup>88</sup> Application, ICC-01/09-01/20-173-Conf, paras 38-42.

<sup>89</sup> Application, ICC-01/09-01/20-173-Conf, paras 43-46.

<sup>90</sup> Application, ICC-01/09-01/20-173-Conf, paras 47-48.

act impartially applies equally to all judges of the Court, regardless of the size of the Chamber in which a judge serves.

**V. Disposition**

31. The plenary of judges, acting unanimously, denies the Application.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Hofma ski', with a large, stylized flourish at the end.

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**Judge Piotr Hofma ski**  
**President**

Dated this 1 November 2021

At The Hague, The Netherlands