

**Cour
Pénale
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**International
Criminal
Court**

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No.: ICC-01/09-01/20
Date: **29 November 2022**

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 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

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
 Ms. Nazhat Shameen Khan
 Mr. Anton Steynberg

Counsel for the Defence
 Mr. Michael G. Karnavas
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Legal Representatives of the Victims**Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims****The Office of Public Counsel for the
Defence****States' Representatives****Other****REGISTRY**

Registrar
 Mr. Peter Lewis

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

Mr. Gicheru, through his Counsel (“the Defence”), pursuant to Regulations 24(5)¹ and 34(c)² of the Regulations of the Court, hereby seeks leave to reply to the Office of the Prosecution (“OTP”) response to the Defence Request for the Disqualification of Judge Mitta Maria Samba.³ The OTP: (a) misrepresents ICC jurisprudence on recusal and disqualification;⁴ (b) misrepresents Defence arguments;⁵ (c) misdirects with irrelevant factors;⁶ and (d) relies on information that was not available to the Defence at the time of its request.⁷ The Defence could not have anticipated these OTP lapses, which, as explained herein, warrant the granting of leave to reply.⁸ This Request is filed confidentially pursuant to Regulation 23*bis*(2) of the Regulations of the Court since it seeks leave to reply to a confidential submission.

1. ***The OTP misrepresents ICC jurisprudence on recusal and disqualification.*** The OTP ignores distinguishing factors in claiming that the reasoning in its cited cases “where a judge’s prior involvement in a case would not lead to a reasonable apprehension of bias” can be applied to Judge Samba.⁹ The OTP’s misrepresentations of jurisprudence could not have been anticipated prior to the response.
2. Should leave to reply be granted, the Defence would submit that:
 - a. The Majority of the Plenary deciding on the request for Judge Fernández de Gurmendi’s disqualification in *Lubanga* considered that her functions were “relatively removed from the details of the case” *because* her functions as Director of the Jurisdiction, Complementary and Cooperation Division were “strategic” and “high level.”¹⁰ Judge Fernández de Gurmendi was also not assessing criminal responsibility on the Sentence Review Panel but factors that arise *after* a conviction and sentence.¹¹ By contrast, Judge Samba performed functions as an Field Operations Officer that concerned the OTP’s

¹ Regulation 24(5) of the Regulations of the Court provides that Participants may reply to a response “with the leave of the Chamber” and that “[u]nless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.”

² Regulation 34(c) of the Regulations of the Court provides that “[a] request for leave to reply shall be filed within three days of notification in accordance with regulation 31 of the response.”

³ *Prosecutor v. Gicheru*, [ICC-01/09-01/20-184-Conf](#), Prosecution response to the Defence “Request for the Disqualification of Judge Miatta Maria Samba,” 29 September 2021 (“OTP Response”).

⁴ [OTP Response](#), para. 3. See [ICC-01/04-01/10-61](#), p. 3 (granting leave to reply where the response “raised new and distinct issues”). See also [ICC-02/05-03/09-261](#), paras. 3, 5 (granting leave to reply where the Defence claimed that the response misinterpreted the applicable law and facts in an unanticipated way)

⁵ *Id.*, para. 31. See [ICC-01/05-01/08-1899-Red](#), para. 4 (granting leave to a reply where the response presented arguments not reasonably foreseeable at the time of the request). See also [ICC-02/05-03/09-261](#), paras. 3, 5.

⁶ *Id.*, para. 31.

⁷ *Id.*, para. 27(e). See [ICC-01/05-01/08-2985](#), para. 6 (granting leave to reply where the response relied of information that was not available to the moving party when making a request).

⁸ See [ICC-01/04-02/06-1994](#), paras. 13-4.

⁹ [OTP Response](#), para. 23, citing [ICC-01/04-01/06-3154-AnxI](#), [ICC-02/05-01/09-76-Anx2](#), [ICC-01/12-01/18-458-AnxI-Red](#).

¹⁰ [ICC-01/04-01/06-3154-AnxI](#), para. 38.

¹¹ [ICC-01/04-01/06-3154-AnxI](#), para. 40.

investigations and its witnesses and will ultimately be deciding on Mr. Gicheru's guilt or innocence.¹²

- b. The Presidency deciding on Judge Monageng's request for recusal from the Pre-Trial Chamber's reconsideration of the warrant of arrest in *Al Bashir* with respect to genocide considered that the Commission in which Judge Monageng participated did not reach any conclusions as to whether genocide was committed in Darfur and was not aimed at establishing criminal responsibility but gathering information to address the humanitarian crisis.¹³ By contrast, Judge Samba participated in the OTP's investigations in the *Kenya* situation and interacted with witnesses who form part of the charges against Mr. Gicheru and may appear before her.¹⁴
- c. The Majority deciding on the request for disqualification of Judge Alapini-Gansou found the request: (a) untimely since the facts could have been accessed through publicly available material and the details of her involvement in the *Al Hassan* case could have been researched prior to seeking relief at the confirmation hearing; and (b) unfounded since her previous work as a Commissioner in Darfur was not aimed at establishing criminal responsibility.¹⁵ By contrast, the request for the disqualification of Judge Samba *is* timely and supported by facts creating a reasonable apprehension of bias: Judge Samba's interactions with witnesses and potential exposure to evidence in the *Kenya* investigations would invariably lead her to form an opinion on evidence forming part of the OTP's case.¹⁶

3. ***The OTP misrepresents Defence arguments.*** The OTP inaccurately claims that "Judge Samba could not reasonably be 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 witnesses ... and/or OTP investigators, the focus of the investigation was the commission of crimes against humanity in the 2007-2008 post-election violence."¹⁷ The OTP's misrepresentations of the Defence's arguments could not have been anticipated prior to the response.

¹² *Prosecutor v. Gicheru*, [ICC-01/09-01/20-173-Conf](#), Request for the Disqualification of Judge Miatta Maria Samba, 17 September 2021, para. 36 ("Request for Disqualification").

¹³ [ICC-02/05-01/09-76-Anx2](#), p. 6.

¹⁴ [Request for Disqualification](#), paras. 33-7.

¹⁵ [ICC-01/12-01/18-458-AnxI-Red](#), paras. 29, 34, 41.

¹⁶ [Request for Disqualification](#), para. 37.

¹⁷ [OTP Response](#), para. 31.

4. Should leave to reply be granted, the Defence would submit that the OTP misrepresented the Defence arguments that Judge Samba could have formed an opinion on the *Gicheru* case because: (a) during the period of Judge Samba’s employment with the OTP, it received reports of witness interference against witnesses with whom Judge Samba interacted; (b) the OTP intends to present the testimony of [REDACTED], whose narratives concern the witnesses with whom Judge Samba interacted; and thus (c) there is a real possibility that the witnesses with whom Judge Samba interacted could appear before her.¹⁸
5. ***The OTP misdirects by raising irrelevant factors.*** The OTP misdirects in claiming that: (a) “there is no temporal or substantive overlap between the *Gicheru* case and the main Kenya investigation” since “witnesses for [the] article 70 offences case were contacted and questioned only *after* Judge Samba had left the OTP’s employment;” and (b) Provisional Rule 165 does not magnify the reasonable observer’s apprehension of bias since the parties can appeal the trial judgment and Judge Samba as a Single Judge enjoys a presumption of impartiality.¹⁹ The OTP’s invocation of these irrelevant factors could not have been anticipated prior to the response.
6. Should leave to reply be granted, the Defence would submit that:
- a. The timing of the OTP’s investigation into Article 70 offences is irrelevant because: (i) the OTP received reports of witness interference in the *Ruto and Sang* case as early as January 2010; (ii) Judge Samba interacted with witnesses who were interfered with; and thus (iii) it is plausible that Judge Samba was exposed to information concerning witness interference in the *Kenya* situation that now forms part of the *Gicheru* case;²⁰ and
 - b. The fact that Judge Samba is presumed impartial even as a Single Judge is irrelevant because under Provisional Rule 165, there is no possibility that a panel of Judges could neutralize any appearance of bias on the part of Judge Samba, nor is there a possibility of seeking appellate review of her decisions prior to a trial judgment.²¹
7. ***The OTP relies on information that was not available to the Defence at the time of its request.*** The OTP claims that Judge Samba, for approximately six months until her departure in October 2010, “provided logistical support to a discrete number of OTP activities” including “[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

¹⁸ [Request for Disqualification](#), paras. 33-7.

¹⁹ [OTP Response](#), para. 31 (emphasis in original).

²⁰ [Request for Disqualification](#), paras. 33-7.

²¹ *Id.*, paras. 47-8.

possible OTP field operations, including by coordinating with relevant international agencies and entities, and fiscal management in relation to operational funds.”²² The OTP injects this information that it declined to provide to the Defence before making its request.²³

8. Should leave to reply be granted, the Defence would submit that the insufficient information provided by the OTP concerning Judge Samba’s participation in this mission and interactions with witnesses and investigators during her employment with the OTP²⁴ must not enure to Mr. Gicheru’s detriment under the principle of *in dubio pro reo*.²⁵

WHEREFORE, considering the OTP’s misrepresentation of ICC jurisprudence, its misrepresentation of the Defence arguments, its attempt to misdirect by raising irrelevant factors, and its reliance on information not available to the Defence, the Presidency is respectfully requested to **GRANT** this leave to reply; it is not only in the interest of justice for it would assist the Presidency, but comes at no appreciably delay to the resolution of the disqualification request before the Presidency.

Respectfully submitted, 29 November 2022,

In The Hague, the Netherlands.



Michael G. Karnavas
Counsel for Mr. Paul Gicheru

²² [OTP Response](#), para. 27(e).

²³ Email from the Defence to OTP entitled “Judge Samba’s prior employment with the ICC OTP,” 26 July 2021 at 10:41 (Annex B to Request for Disqualification, p. 1); Letter from OTP to Defence entitled “Re: Appointment of Judge Miatta Maria Samba,” 29 July 2021 at 14:56 (Annex B to Request for Disqualification, pp. 6-8); Email from the Defence entitled “Further request for information concerning Judge Samba,” 30 August 2021 at 11:04 (Annex B to Request for Disqualification, p. 21); Email from the OTP entitled “RE: Further request for information concerning Judge Samba,” 1 September 2021 at 12:03 (Annex B to Request for Disqualification, p. 22); Letter from the Defence to OTP entitled: “Further request for information concerning Judge Samba,” 7 September 2021 at 16:23 (Annex B to Request for Disqualification, pp. 25-8); Letter from the OTP to Defence entitled: “RE: Your letter dated 07 September 2021,” 9 September 2021 at 14:29 (Annex B to Request for Disqualification, pp. 31-2).

²⁴ See [OTP Response](#), para. 30 (claiming that it must be presumed that when Judge Samba interacted with witnesses, she did so within the framework of her assigned functions and duties as FOO.)

²⁵ [ICC-01/09-02/11-382-Red](#), para. 53; [ICC-01/09-01/11-373](#), para. 41; [ICC-01/05-01/08-424](#), para. 31.