

ANNEX I



**Cour
Pénale
Internationale**
**International
Criminal
Court**

La Présidence
The Presidency

**Internal memorandum
Memorandum interne**

To À	Judge Eboe-Osuji	From De	The Presidency <i>Jhs</i>
Date	30 January 2014	Through Via	
Ref.	2014/PRES/34-2	Copies	Judge Kuniko Ozaki Judge Robert Fremr
Subject Objet	Decision on the Renewed Request for withdrawal from the case of <i>The Prosecutor v Uhuru Muigai Kenyatta</i>		

The Presidency, composed of the President (Judge Sang-Hyun Song), the First Vice-President (Judge Sanji Mmasenono Monageng) and the Second Vice-President (Judge Cuno Tarfusser), hereby decides upon the renewed request of Judge Eboe-Osuji (hereinafter “the Judge”) to be withdrawn from the bench in the case of *The Prosecutor v Uhuru Muigai Kenyatta* (“Kenyatta case”), dated 24 January 2014.

The request for excusal is granted.

Factual Background

By memorandum dated 30 August 2013, the Judge stated:

Further to my previous communications, including a meeting with you on this matter, may I now confirm my request of you (indicated sometime ago), to be relieved from the bench of the *Kenyatta* case.

Foremost among the reasons for the request is the fact that I am the presiding judge in the joint trial of the *Ruto* and *Sang* cases. As you know, in light of the principle clearly expressed in rule 136(2) of the Court’s RPE, that joint trial effectively and legally involves *two* cases. The cases are big and the issues in them are many. It is important that I am left to concentrate my fullest attention to that joint trial.

I expect that you will give this request a similar consideration as you did with Judge Ozaki’s request to be released from the *Ruto* and *Sang* cases, because of her involvement in the *Kenyatta* case and the *Bemba* case.

The foregoing is ample reason for the request, regardless of other personal considerations or of the fact that I am also assigned for now to the *Banda* and *Jerbo* cases.

By memorandum dated 18 September 2013, the Presidency denied the request of the Judge. The Presidency stated in that decision:

In reaching its conclusion, the Presidency recalls the facts in the case of Judge Ozaki, raised by the Judge as a precedential decision. Judge Ozaki submitted that her involvement in three cases, namely the *Bemba* case, the *Ruto* and *Sang* case, and the *Kenyatta* case had previously been workable, as only the *Bemba* case was actually in trial and the two Kenya cases were still in the early stages of trial preparation. The impetus for Judge Ozaki's request was the fact that it was anticipated that the trial in the *Ruto* and *Sang* case would commence on 28 May 2013, and the trial in the *Kenyatta* case "several months" thereafter, implying that the Judge would have had to sit on trial hearings in three cases. In reaching its decision to grant the request in that case, the Presidency drew attention to "the fact that the three trials will overlap when they commence, the substantial size of those three cases, and the availability of other judges".

In the present case, the Presidency notes that the Judge is the presiding judge in the *Ruto* and *Sang* case, which is currently on trial. The opening of the trial in the *Kenyatta* case is scheduled for 12 November 2013. The Presidency notes that the opening of the *Banda* and *Jerbo* trial is not scheduled until 5 May 2014.

The Presidency, having considered the matter before it, finds it is unable to accede to the Judge's request. The Presidency considers that in the immediate future, it is the hearing of evidence in the *Ruto* and *Sang* case and the *Kenyatta* case that will overlap. The Presidency considers that for the time being, the workload of the Judge may be properly balanced if due attention is given to the Judge's commitments by Trial Chambers V(a) and V(b) respectively when arranging the schedule for hearings. In light of future developments, in particular as the opening of the trial in the *Banda* and *Jerbo* case approaches, it is open to the Judge to reapply to the Presidency for excusal in accordance with article 41 of the Statute.

In all particular circumstances, the request for excusal is denied.

By memorandum dated 23 October 2013, the Judge requested that the Presidency reconsider its decision of 18 September 2013. The Judge stated, in relevant part, in that memorandum:

The *Ruto & Sang* trial has two cases in it. Even without the Sang case, the *Ruto* trial will be extremely demanding. Since the commencement of the *Ruto & Sang* trial, it has become increasingly clear to be that I will be unable to sit concurrently in it and the *Kenyatta* trial running in alternating periods in the judicial calendar. I must note that there has not been a precedent in this Court for such an exercise. Members of Trial Chamber I when trying the *Lubanga* case asked to be replaced from the *Bemba* trial. Their request was granted. (Please see attachments as regards the request and decision on that occasion.) Judge Ozaki had also asked to be replaced from the *Ruto & Sang* trial, so that she could focus her attention on the *Kenyatta* trial, as well as complete the *Bemba* trial which would have been nearing its end at the time of commencement of *Kenyatta* trial. Her request was granted.

I expect that the Presidency will consider the earlier precedent of the replacement of the *Lubanga* judges in the *Bemba* case – a matter that appeared not to have been considered in the earlier decision of the Presidency in my earlier application.

Additionally, and perhaps more importantly, I stress the fact that since the commencement of the *Ruto & Sang* trial, it has becoming increasingly clear to me that I will be unable to sit concurrently in it and the *Kenyatta* trial running in alternating periods in the judicial calendar.

I therefore, request you to reconsider your earlier decision denying my request to be replaced in the *Kenyatta* case. I request anew that I be replaced in the *Kenyatta* case.

By memorandum dated 29 October 2013, the Presidency denied the request of the Judge. The Presidency stated in that decision:

The Presidency recalls that on 18 September 2013, it denied the request of the Judge for excusal on the grounds that, for the time being, the workload of the Judge may be properly balanced if due attention is given to the Judge's commitments by Trial Chambers V(a) and V(b) when arranging the schedule for hearings in the case of the *Prosecutor v Ruto and Arap Sang* ("*Ruto and Sang* case") and the *Kenyatta* case. The Presidency notes that in a Status Conference on 9 September 2013, the Chamber in the *Ruto and Sang* case noted that, in light of the proceedings in the *Kenyatta* case, its preference would be to sit in alternating periods on the judicial calendar.

Bearing in mind the findings of the Presidency in its decision of 18 September 2013, as well as the current constraints on the Judiciary, the

Presidency is not in a position to grant the request for reconsideration at present.

By memorandum dated 24 January 2014, the Judge renewed his request to be relieved from the bench in the *Kenyatta* case. The Judge stated in that memorandum:

I write to renew my request to be replaced in the *Kenyatta* case. I rely on my previous communications to you in that regard.

In your last decision, responding to my communication to you dated 23 October 2013, you stated that you were not in a position, in the circumstances then prevailing, to grant my request. That, however, was prior to the addition of Judge Henderson to the Bench of the Court.

With the election of Judge Henderson, the circumstances have now changed. I now therefore renew my earlier requests.

Decision

The present request for excusal is properly before the Presidency, in accordance with article 41 of the Rome Statute ("Statute") and rule 33 of the Rules of Procedure and Evidence ("Rules").

The Presidency recalls its decision of 18 September 2013, which denied the Judge's request for excusal on the ground that, for the time being, the workload of the Judge may be properly balanced if Trial Chambers V(a) and V(b) give due attention to the Judge's commitments when arranging their respective hearing calendars. The Presidency noted that the Judge was free to reapply for excusal, in accordance with article 41 of the Statute, in light of future developments, in particular as the opening of the trial in the *Banda* and *Jerbo* case approaches.

The Presidency further recalls its decision of 29 October 2013, which denied the Judge's request that the Presidency reconsider its 18 September 2013 decision. The Presidency relied on the grounds set forth in its earlier decision as well as the current constraints on the Judiciary in denying the request.

With respect to the present request, the Presidency notes recent developments, in particular the election of Judge Geoffrey Henderson to fill a judicial vacancy during the 12th session of the Assembly of States Parties to the Rome Statute in November 2013. Judge Henderson took the oath of office on 12 December 2013.¹

¹ New ICC judge Geoffrey A. Henderson sworn in today at the seat of the International Criminal Court, 12 December 2013, ICC-CPI-20131212-PR973.

In light of this change in circumstances, the Presidency is in a position to reconsider its decisions of 18 September 2013 and 29 October 2013. The Presidency, having reviewed anew the grounds for excusal set forth in the present request as well as in the prior requests of 30 August 2013 and 23 October 2013, accedes to the Judge's request for excusal. The Presidency takes further note of the fact that the Judge is the presiding judge in the joint *Ruto* and *Sang* trial, which involves two cases of considerable complexity, as well as the fact that the trial in the *Banda* case will open on 5 May 2014.

In all the particular circumstances, the request for excusal is granted.

Noting that the Judge has indicated that the requests for excusal are not confidential, pursuant to rule 33(2) of the Rules, this decision will be annexed to the subsequent decision of the Presidency replacing the judge in this case.