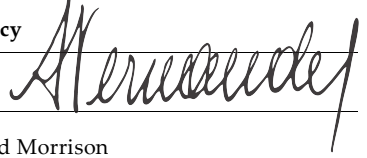


ANNEX I



**Internal memorandum
Memorandum interne**

To À	Judge Christine Van den Wyngaert	From De	The Presidency
Date	26 March 2015	Through Via	
Ref.	2015/PRES/00118-02	Copies	Judge Howard Morrison Judge Piotr Hofmański
Subject Objet	Decision on the request for excusal		

The Presidency, composed of the President (Judge Silvia Fernández de Gurmendi), the Second Vice-President (Judge Kuniko Ozaki) and Judge Sanji Mmsaenono Monageng, hereby decides upon the request for excusal submitted by Judge Christine Van den Wyngaert on 24 March 2015. In the request, Judge Van den Wyngaert requests to be excused, pursuant to article 41(1) of the Rome Statute of the International Criminal Court (“Statute”) and rule 33(1) of the Rules of Procedure and Evidence (“Rules”), from sitting on the appeal filed by the Prosecution on 20 March 2015 against the decision rendered by Trial Chamber V(b) on 3 December 2014 in *The Prosecutor v. Uhuru Muigai Kenyatta* (“Kenyatta”).

The request for excusal is granted.

Factual Background

On 3 December 2014, Trial Chamber V(b) issued its “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute” (“Impugned Decision”).¹

On 20 March 2015, the Prosecution filed its “Prosecution appeal against the ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’” (“appeal”).²

On 13 March 2015, the Presidency assigned Judge Van den Wyngaert to the Appeals Division in accordance with article 39(1) of the Statute and rule 4*bis*(2) of the Rules.³

¹ ICC-01/09-02/11-982.

² ICC-01/09-02/11-1006.

³ Decision assigning judges to divisions, ICC-02/11-01/12/67.

On 24 March 2015, by confidential memorandum, Judge Van den Wyngaert requested the Presidency to excuse her from sitting on the appeal filed by the Prosecution against the Impugned Decision.⁴ The request for excusal is based on Judge Van den Wyngaert's "previous involvement in [*Kenyatta*] during the trial proceedings, in the course of which [she], *inter alia*, expressed views on matters that are potential live issues in the present appeal."⁵ Judge Van den Wyngaert specifically noted

[i]n this regard, . . . the Trial Chamber's statement in the Impugned Decision in this appeal that "[i]n assessing the Prosecution's request, the Chamber has had regard to the full course of proceedings", as well as the fact that this assessment appears to take into account the Prosecutor's conduct on a more general level than only in relation to the cooperation request with Kenya pursuant to article 93 of the Statute. Indeed, . . . the Trial Chamber appears to make, *inter alia*, a link between the conduct of the Prosecutor in this case more generally and the decision that it took in the Impugned Decision in relation to article 87(7) of the Statute, which is the subject of the present appeal.⁶

She observed that

the Impugned Decision therefore contains determinations that are now potentially live issues on appeal that could reasonably be said to relate temporally to the time period during which [she] was involved in this case as a member of the Trial Chamber and upon which [she] ha[s] previously expressed a view.⁷

Judge Van den Wyngaert further noted that

the first sentence of article 41(2)(a) of the Statute states that "[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground"; and that the Presidency has previously clarified that the second sentence of article 41(2)(a) is "concerned with disqualification where a judge has previously been involved in any capacity which gives rise to a reasonable ground to doubt his or her impartiality".⁸

She emphasized that while she "would approach this appeal in a fair and impartial manner", she also "recall[ed] that the question of excusal is one of the objectively reasonable appearance of grounds to doubt the impartiality from the perspective of

⁴ Request for excusal, 2015/PRES/00118.

⁵ *Id.* at para. 3.

⁶ *Id.* (citing ICC-01/09-02/11-982, *supra* note 1, at paras. 84-90).

⁷ *Id.* at para. 4.

⁸ *Id.* at para. 5.

a reasonable observer and does not require actual partiality or bias.”⁹ She stated, in this respect, that she had

carefully reviewed the factors taken into account by the Trial Chamber in the Impugned Decision, the Prosecutor’s arguments in support of the appeal, particularly in relation to the second issue for which leave to appeal was granted, and [her] own prior involvement in the case, in particular the views that [she] ha[s] expressed regarding the Prosecutor’s conduct in relation to its investigative duties, an issue which is now potentially relevant to the merits of this appeal.¹⁰

She concluded that “[t]aken together, . . . there could be the *appearance* to a reasonable observer that [she] already ha[s] a view on issues that are before the Appeals Chamber in the present appeal.”¹¹ In such circumstances, she considered it “appropriate to request excusal from the present appeal.”¹²

On 26 March 2015, Second Vice-President Kuniko Ozaki requested to be excused from the deliberations of the Presidency on Judge Van den Wyngaert’s request for excusal.¹³ In her request, Second Vice-President Ozaki submitted that

the Presidency’s decision upon the Request may . . . necessitate consideration of the substantive content of the Impugned Decision and the issues it potentially raises for appeal. As a member of the Trial Chamber which issued the Impugned Decision, I consequently consider that my participation in the Presidency’s deliberations upon the Request could give rise to an objective appearance of conflict or impartiality.¹⁴

On 26 March 2015, the remaining members of the Presidency granted Second Vice-President Ozaki’s request for excusal from the deliberations of the Presidency. On the same date, Judge Monageng assumed responsibilities as a member of the Presidency for the purpose of deliberating on Judge Van den Wyngaert’s request for excusal in accordance with regulations 10 and 11(2) of the Regulations of the Court.

Decision

The present request for excusal is properly before the Presidency in accordance with article 41(1) of the Statute and rule 33(1) of the Rules.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* (emphasis in original).

¹² *Id.*

¹³ 2015/PRES/00124.

¹⁴ *Id.* at pages 1-2.

Article 41(1) of the Statute provides, in relevant part, that “[t]he Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute”.¹⁵ Article 41(2)(a) of the Statute further 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

The Presidency has previously clarified that the second sentence of article 41(2)(a) is “concerned with disqualification where a judge has previously been involved in any capacity which gives rise to a reasonable ground to doubt his or her impartiality.”¹⁶ The Presidency elaborated that this interpretation is “most consistent with the objective of ensuring that the impartiality of judges cannot reasonably be reproached” while “at the same time . . . ensuring the efficient conduct of proceedings.”¹⁷

The Presidency recalls that it has previously emphasized the need to note the “degree of congruence between the legal issues” and whether “the factual determinations” would be “based on the same evidence” in considering requests for excusal on grounds of a judge’s previous involvement in the case.¹⁸ The Presidency further recalls that “it may reasonably appear to an objective observer that” a judge lacks impartiality where he or she is “not free to depart from previous factual findings which [he or she has] made upon consideration of the same issues and evidence”.¹⁹

In her request for excusal, Judge Van den Wyngaert submits that during her previous involvement in the *Kenyatta* trial proceedings, she, “*inter alia*, expressed views on matters that are potential live issues in the present appeal.”²⁰ The Presidency notes that the Prosecution’s appeal of the Impugned Decision concerns

¹⁵ Rule 33(1) of the Rules instructs, in relevant part, that “[a] judge . . . seeking to be excused from his or her functions shall make a request in writing to the Presidency, setting out the grounds upon which he or she should be excused.”

¹⁶ Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, 23 Sept. 2009, ICC-01/04-01/06-2138-AnxIII, p. 5.

¹⁷ *Id.*

¹⁸ Decision on the Request of First Vice President Diarra and Second Vice President Kaul to be excused from the Presidency in relation to the “Defence Application for Review of the Registrar’s Decision of 10 June 2009 entitled *Third Decision of the Registrar on the Monitoring of Non-privileged Telephone Communications and Visits of Mr Mathieu Ngudjolo Chui*”, 17 Dec. 2009, ICC-RoR221-04/09-2-Conf-Exp-Anx2, p. 4.

¹⁹ *Id.*

²⁰ 2015/PRES/00118, *supra* note 4, at para. 3.

Trial Chamber V(b)'s "failure to refer the Government of Kenya ("GoK") to the Assembly of States Parties ("ASP"), pursuant to article 87(7) of the Rome Statute, despite having found that the GoK was in breach of its State Party obligations under the Statute."²¹ The Prosecution raises two grounds of appeal: first, that "[t]he Trial Chamber erred in law by not automatically referring the GoK to the ASP, after having made the requisite factual findings under article 87(7)" and second, that "[i]n the alternative, even if the Trial Chamber had discretion not to refer GoK to the ASP . . . , it erred in the exercise of its discretion by taking into account extraneous or irrelevant considerations and by failing to take into account or give sufficient weight to relevant considerations."²² The Prosecution cited among the irrelevant considerations taken into account by the Trial Chamber "the Prosecution's own conduct when deciding whether to refer the GoK to the ASP".²³

The Presidency notes that Judge Van den Wyngaert sat in Trial Chamber V(b) as a judge in *Kenyatta* from 29 March 2012 to 26 April 2013.²⁴ In her request for excusal, Judge Van den Wyngaert cites in particular to the Trial Chamber's assessment, in the Impugned Decision, of the Prosecution's conduct during the "full course of proceedings".²⁵ As part of this assessment, the Trial Chamber noted that it has had "serious concerns regarding the timeliness and thoroughness of Prosecution investigations in this case".²⁶ In this respect, Judge Van den Wyngaert draws the Presidency's attention to her concurring opinion to the Trial Chamber's 26 April 2013 "Decision on defence application pursuant to Article 64(4) and related requests".²⁷ In its decision, the Trial Chamber, *inter alia*, "reprimand[ed] the Prosecution for its failure to timely disclose" certain materials and "direct[ed] the Prosecution to conduct a review of its case file . . . and certify . . . that it has

²¹ ICC-01/09-02/11-1006, *supra* note 2, at para. 1.

²² *Id.* at para. 4.

²³ *Id.* at para. 18.

²⁴ See *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang and The Prosecutor v. Uhuru Muigai Kenyatta*, Presidency, Decision replacing a judge in Trial Chamber V, 26 April 2013, ICC-01/09-01/11, ICC-01/09-02/11; *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Presidency, Decision referring the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V, 29 Mar. 2012, ICC-01/09-02/11-414.

²⁵ 2015/PRES/00118, *supra* note 4, at para. 3 (citing ICC-01/09-02/11-982, *supra* note 1, at para. 84).

²⁶ *Id.* (citing ICC-01/09-02/11-982, *supra* note 1, at para. 86).

²⁷ 2015/PRES/00118, *supra* note 4, at para. 4 (citing *The Prosecutor v. Uhuru Muigai Kenyatta*, Judge Christine Van den Wyngaert, Concurring Opinion to Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728-Anx2). The defence application challenged, *inter alia*, "the Prosecution's conduct with respect to the non-disclosure, prior to the Confirmation hearing" of certain materials, "the validity of the Confirmation Decision as a result of 'deficiencies' in the Prosecution's evidence" and the Prosecution's "reliance on a substantial body of new evidence collected after the Confirmation Hearing". *The Prosecutor v. Uhuru Muigai Kenyatta*, TC V, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, para. 21.

reviewed all materials in its possession.”²⁸ In her concurring opinion, Judge Van den Wyngaert emphasized her belief that there were “serious questions as to whether the Prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation” as well as “concerns . . . about the overwhelming number of post-confirmation witnesses and the quantity of post-confirmation documentary evidence”.²⁹ The concurring opinion further reprimanded the Prosecution for its “negligent attitude towards verifying the trustworthiness of its evidence” and observed “grave problems in the Prosecution’s system of evidence review”.³⁰

At the outset, the Presidency identifies the relevant legal issue raised by the Prosecution before the Appeals Chamber to be its second ground of appeal – *i.e.*, whether the Chamber took into account “extraneous or irrelevant considerations” in not referring GoK to the ASP. The Presidency further pinpoints that it is whether the Chamber erroneously took into account “the Prosecution’s own conduct when deciding whether to refer the GoK to the ASP” that is of concern in evaluating Judge Van den Wyngaert’s request for excusal.

The Presidency observes that the specific legal issue of whether the Trial Chamber erroneously took into account “the Prosecution’s own conduct when deciding whether to refer the GoK to the ASP” does not, by itself, raise a question of whether Judge Van den Wyngaert’s impartiality might reasonably be doubted with respect to the appeal. This issue requires the Appeals Chamber to determine whether the Trial Chamber should have even considered the Prosecution’s conduct at all and not the actual substance or quality of that conduct.

The Presidency recognizes, however, the potential for the Appeals Chamber, in deliberating on the present appeal, to consider the actual substance or quality of the Prosecution’s conduct in investigating and prosecuting the case.³¹ It is distinctly possible, for example, that the Appeals Chamber might determine that the Trial Chamber did appropriately consider the Prosecution’s conduct as a factor in its decision but further proceed to evaluate the Trial Chamber’s assessment of that conduct. That evaluation would necessarily re-open the question of the substance and quality of the Prosecution’s conduct in investigating and prosecuting the case, an issue on which Judge Van den Wyngaert has previously expressed an unequivocal view.³²

²⁸ *Id.* at p. 56.

²⁹ ICC-01/09-02/11-728-Anx2, *supra* note 27, at para. 1.

³⁰ *Id.* at para. 4.

³¹ Indeed, the Presidency notes, in this respect, that Judge Van den Wyngaert herself submits in her request for excusal that she has “expressed views on matters that are *potential* live issues in the present appeal.” 2015/PRES/00118, *supra* note 4, at para. 3 (emphasis added).

³² See ICC-01/09-02/11-728-Anx2, *supra* note 27.

In these circumstances, the Presidency finds there to be enough of a potential degree of congruence between the factual determinations that Judge Van den Wyngaert has previously made and those that may arise in the Prosecution's appeal. Noting the terms of articles 41(1) and 41(2)(a) of the Statute, the Presidency accordingly grants Judge Van den Wyngaert's request for excusal from the appeal.

The Presidency shall make public this decision, noting that Judge Van den Wyngaert has expressed her consent in accordance with rule 33(2) of the Rules.