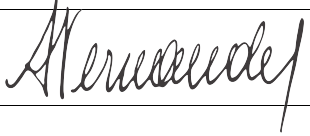


ANNEX I



Internal memorandum
Memorandum interne

To À	Judge Joyce Aluoch Judge Kuniko Ozaki	From De	The Presidency 
Date	19 May 2015	Through Via	
Ref.	2015/PRES/00161-02	Copies	
Subject Objet	Decision on the request for excusal from all pending and future proceedings in <i>The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido</i>		

The Presidency, composed of the President (Judge Silvia Fernández de Gurmendi), Judge Sanji Mmasenono Monageng and Judge Howard Morrison, hereby decides upon the request for excusal submitted by Judge Joyce Aluoch and Judge Kuniko Ozaki on 5 May 2015 (“Request for Excusal”).¹ Judges Aluoch and Ozaki request 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 exercising their functions as judges with respect to all pending and future proceedings in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (“*Bemba et al.*”).

The Request for Excusal is denied.

Factual Background

On 21 April 2015, Mr Jean-Jacques Kabongo Mangenda filed before the Presidency the “Request for Compensation for Unlawful Detention” (“Request for Compensation”) in *Bemba et al.* pursuant to article 81(1) of the Statute.² The Request for Compensation is based on Mr Mangenda’s allegation that he was unlawfully

¹ Request for excusal from all pending and future proceedings in *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 2015/PRES/00161-01.

² ICC-01/05-01/13-921-Conf.

detained for nine days at the ICC Detention Centre following an order for his interim release by Pre-Trial Chamber II.³

Pursuant to rule 173(1) of the Rules, upon receiving such a request for compensation, the Presidency “shall designate a Chamber composed of three judges” to hear the request. This provision further provides that “[t]hese judges shall not have participated in any earlier judgment of the Court regarding the person making the request.”

On 5 May 2015, by confidential memorandum, Judges Aluoch and Ozaki requested the Presidency to excuse them from exercising their functions as judges with respect to all pending and future proceedings in *Bemba et al.* pursuant to article 41(1) of the Statute and rule 33 of the Rules.⁴ In the memorandum, they submitted:

The reason for this request is our previous and ongoing involvement as judges in Trial Chamber III (“Trial Chamber”) which has before it the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (*‘Bemba’*). In *Bemba*, the Trial Chamber found that “[the *Bemba et al.*] proceedings must first be dealt with by a Pre-Trial Chamber rather than [the] Trial Chamber . . . to ensure the impartiality of the Trial Chamber judges may not ‘reasonably be doubted’”. Given our previous and ongoing involvement as judges in *Bemba*, a matter which is “related, though by no means identical” to *Bemba et al.*, we submit this request before any of the parties raise concerns as to our impartiality.⁵

In the same memorandum, Judges Aluoch and Ozaki requested to be excused from the deliberations of the Presidency on the Request for Excusal.⁶ They based their request to be excused from the deliberations of the Presidency on their positions as members of the Presidency, which they noted “may give rise to a possible conflict of interest.”⁷ On 8 May 2015, the remaining member of the Presidency granted this request for excusal from the deliberations of the Presidency. On the same date Judges Monageng and Morrison assumed responsibilities as members of the Presidency in accordance with regulation 11(2) of the Regulations of the Court for the purpose of deliberating on the Request for Excusal.

³ Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, 21 Oct. 2014, ICC-01/05-01/13-703.

⁴ Request for excusal, *supra* note 1, para. 4.

⁵ *Id.* (citing Decision on the prosecution’s request relating to Article 70 investigation, 26 April 2013, ICC-01/05-01/08-2606-Red, para. 19 (“Decision on prosecution’s request”).)

⁶ *Id.* at para. 5.

⁷ *Id.*

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.

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”. 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.”⁸ This clarification arose out of the question as to whether article 41(2)(a) indicates that “the impartiality of a judge would be reasonably doubted . . . where that judge has previously been involved *in any capacity whatsoever* in the relevant case before the Court.”⁹ The Presidency rejected this broad reading in favour of the narrower interpretation above, which is consistent with the objective of ensuring the impartiality of judges while “at the same time . . . ensuring the efficient conduct of proceedings.”¹⁰ This narrower approach is fact-specific and will therefore depend on a case-by-case analysis.

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 an applicant’s previous involvement in the case.¹¹ 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

⁸ 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.

⁹ *Id.* (emphasis added).

¹⁰ *Id.*

¹¹ 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.

factual findings which [he or she has] made upon consideration of the same issues and evidence".¹²

The Request for Excusal

The Presidency, having thoroughly examined the matter before it, finds the Request for Excusal to be without merit.

The Request for Excusal is based on Judges Aluoch and Ozaki's "previous and ongoing involvement" as judges in *Bemba*, which they submit is "related, though by no means identical" to *Bemba et al.*¹³ In particular, the Request for Excusal cites to a previous decision of the Trial Chamber seised with *Bemba*.¹⁴ Judges Aluoch and Ozaki observe that, in that decision, the Trial Chamber found that the *Bemba et al.* proceedings must be dealt with by a Pre-Trial Chamber, rather than the Trial Chamber, "to ensure that the impartiality of the Trial Chamber judges, which include Judges Aluoch and Ozaki, may not 'reasonably be doubted'".¹⁵

The Presidency observes that the Request for Compensation is based on Mr Mangenda's allegation that he was unlawfully detained for nine days at the ICC Detention Centre following an order for his interim release by the Pre-Trial Chamber in the *Bemba et al.* proceedings.¹⁶ The Request for Compensation alleges three bases on which Mr Mangenda's detention was unlawful: (i) the United Kingdom's revocation of Mr Mangenda's 5-year entry visa, (ii) the Registry's failure to ensure Mr Mangenda's release to an alternative State, and (iii) the Host State's "failure to facilitate prompt relief."¹⁷ These issues neither refer to facts underlying the *Bemba* or *Bemba et al.* proceedings nor pertain to legal issues relevant to either proceeding. Accordingly, the Presidency fails to see how the involvement of Judges Aluoch and Ozaki in the *Bemba* proceedings would give rise to a question of impartiality with respect to the Request for Compensation.

The Presidency further observes that the Trial Chamber decision referred to by Judges Aluoch and Ozaki does not support the Request for Excusal. That decision held that the Trial Chamber in *Bemba* lacked competence "to make determinations on any investigative measures requested by the prosecution in relation to an Article 70 investigation" in *Bemba et al.*¹⁸ This decision was based primarily on the

¹² *Id.*

¹³ Request for excusal, *supra* note 1, at para. 4.

¹⁴ *Id.* (citing to Decision on prosecution's request, *supra* note 6)

¹⁵ *Id.* (citing to Decision on prosecution's request, *supra* note 6, at para. 19).

¹⁶ Request for Compensation, *supra* note 2.

¹⁷ *Id.* at para. 2.

¹⁸ Decision on prosecution's request, *supra* note 4, paras. 21-22.

separation of responsibilities between the Pre-Trial and Trial Chambers and cited to the article 39(4) prohibition that “under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case”.¹⁹ The question of impartiality raised in that decision concerned the possibility, should the Article 70 charges in *Bemba et al.* be confirmed, that the Trial Chamber in *Bemba* might have to “decide whether to direct . . . joinder of charges”.²⁰ The Trial Chamber observed that, in order to render such a decision, it ought not to have “been previously involved in [the] Article 70 investigation and prosecution” in *Bemba et al.*²¹ These issues lack any factual or legal congruence with those raised in the Request for Excusal. Accordingly, the Presidency finds that the reasoning underlying the Trial Chamber decision is of no relevance to the Request for excusal.

For the reasons set forth above, the Presidency concludes that the involvement of Judges Aluoch and Ozaki in the proceedings on the Request for Compensation would not lead a reasonable observer to apprehend bias or doubt their impartiality. The Request for Excusal is therefore denied.

The Presidency shall make public this decision, noting that Judges Aluoch and Ozaki have expressed their consent in accordance with rule 33(2) of the Rules.

¹⁹ *Id.* at para. 19 (emphasis in original).

²⁰ *Id.* at para. 20.

²¹ *Id.*