



To À	All the Judges of the Court	From De	Judge Miatta Maria Samba
Date	5 October 2021	Through Via	
Ref.		Copies	
Subject Objet	Observations of Judge Miatta Maria Samba on the “Request for the Disqualification of Judge Miatta Maria Samba”		

I. INTRODUCTION

1. The Defence for Mr Gicheru has requested my disqualification from Trial Chamber III in the *Gicheru* case before the Plenary of Judges, pursuant to Article 41(2)(a) of the Rome Statute (‘Statute’) and Rule 34(1)(c) of the Rules of Procedure and Evidence (‘Rules’).¹

2. In its Request the Defence argues that there is an appearance of bias ‘resulting from [my] prior involvement in the *Kenya* situation as an Office of the Prosecutor of the International Criminal Court [(‘OTP’)] Field Operations Officer (‘FOO’) and performance of functions in the *Kenya* situation, which would invariably cause [me] to form an opinion in the *Gicheru* case, objectively and adversely affecting [my] impartiality.’²

3. These are my observations on the Request, in accordance with Article 41(2)(c) of the Statute and Rule 34(2) of the Rules.³ I believe that this matter should be conducted as publicly and transparently as possible and would therefore appreciate if the Presidency disseminate my observations publicly, if it deems it fit.

¹ Request for the Disqualification of Judge Miatta Maria Samba, ICC-01/09-01/20-173-Conf, with confidential Annexes A and B, ICC-01/09-01/20-173-Conf-AnxA & ICC-01/09-01/20-173-Conf-AnxB. A public redacted version was filed on 22 September 2021, [ICC-01/09-01/20-173-Red](#) (the ‘Request’).

² [Request](#), Preamble.

³ Filed within the timeline set out in the Presidency’s Order – Order concerning the ‘Request for the Disqualification of Judge Miatta Maria Samba’ dated 17 September 2021 (ICC-01/09-01/20-173-Conf), ICC-01/09-01/20-178-Conf.

II. OBSERVATIONS

A. Preliminary Observations

4. As a preliminary matter, I wish to note that the Defence is entitled to raise concerns over such matters as it sees fits. The principles of judicial independence and impartiality are enshrined in Articles 40 and 41 of the Statute, Rule 34 of the Rules and Articles 3 and 4 of the Code of Judicial Ethics of the Court, and are fundamental for ensuring the legitimacy and effectiveness of the international judicial process.⁴

5. I take my responsibilities as a Judge of the Court with the utmost seriousness. As noted in my responses to the Advisory Committee on Nominations of Judges prior to my election to the Court, as Judges we must be seen to be impartial and uphold the credibility of the Court and avoid any perception of bias.⁵

6. It was for precisely this reason that I provided information to the parties in the *Gicheru* case on my prior employment with the OTP so as to ensure that they had all the information necessary in order to form their own opinion about my impartiality.⁶ As stated in the Decision on Provision of Information, I strongly believe in the impartiality of the judges as a cornerstone of fair proceedings.⁷

7. I have carefully considered my participation in the *Gicheru* case and continue to believe that there is no need for my recusal therefrom. I stand firm in my view that I am able to retain an independent and open mind and adjudicate matters before me impartially and in accordance with the applicable law and procedure set out in the Court's legal framework. Accordingly, for the reasons that follow, I respectfully invite my learned colleagues to dismiss the Request as unfounded.

⁴ [Code of Judicial Ethics](#), Preamble, para. 3.

⁵ [Judge Miatta Maria Samba, Advisory Committee on the Nomination of Judges Questionnaire, 3 July 2020](#), p. 6.

⁶ See [Decision on Defence Request for Information concerning Judge Samba's Prior Employment](#), 27 August 2021, ICC-01/09-01/20-168 ('Decision on Provision of Information').

⁷ [Decision on Provision of Information](#), ICC-01/09-01/20-168, para. 3.

B. Applicable Law

8. I recall that the relevant law, as developed by the Court, is whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.⁸ Such fair-minded and informed observer is not to be confused with the applicant⁹ and the fair-minded and informed observer's consideration of facts and circumstances includes the nature of a judge's profession.¹⁰

9. Furthermore, I note that a high threshold must be satisfied in order to rebut the strong presumption of impartiality which attaches to judicial office.¹¹ In this regard, the Court has previously found that:

The [...] disqualification of a judge [is] not a step to be undertaken lightly, and a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice. When assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case.¹²

10. Moreover, in the context of requests for disqualification on the grounds of previous involvement in a case at this Court, attention has been paid to the 'degree of

⁸ [Decision of the plenary of the 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 ('*Banda and Jerbo* Disqualification Decision'), para. 11; [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 ('*Lubanga* 2013 Disqualification Decision'), paras 9, 34; [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 ('*Ntaganda* 2021 Disqualification Decision'), para. 21.

⁹ [Lubanga 2013 Disqualification Decision](#), para. 35; [Ntaganda 2021 Disqualification Decision](#), para. 21.

¹⁰ [Lubanga 2013 Disqualification Decision](#), para. 36; [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 ('*Ntaganda* 2019 Disqualification Decision'),

para. 32; [Ntaganda 2021 Disqualification Decision](#), para. 21.

¹¹ [Banda and Jerbo Disqualification Decision](#), para. 14; [Lubanga 2013 Disqualification Decision](#), para. 10 (see also para. 37); [Ntaganda 2019 Disqualification Decision](#), para. 31.

¹² [Banda and Jerbo Disqualification Decision](#), para. 14; [Lubanga 2013 Disqualification Decision](#), para. 10. See also [Ntaganda 2019 Disqualification Decision](#), para. 31; [Ntaganda 2021 Disqualification Decision](#), para. 24.

congruence’ between the legal issues in question and to whether factual determinations would be ‘based on the same evidence’.¹³ Thus, the capacity leading to disqualification or recusal with which Article 41(2)(a) of the Statute is concerned is not *every* capacity of previous involvement in the case, but one which gives rise to a reasonable ground to doubt the impartiality of a judge.¹⁴

C. Observations on the Defence Request

11. In respect of the present Request, it has not been argued by the Defence that the mere fact of my previous employment with the OTP should, in and of itself, lead to my disqualification. The State Parties elected me in full knowledge of my employment with the OTP. Nor does the Defence seek to establish actual bias. Rather, it argues that there is an appearance of bias as a result of: (i) my apparent previous involvement in the *Kenya* situation before the Court;¹⁵ (ii) my functions as an FOO in the OTP which would have ‘invariably cause[d] [me] to form an opinion on the *Gicheru* case’;¹⁶ (iii) my ‘[inability] to provide further information to dispel the appearance of bias’;¹⁷ (iv) that once ‘[I] had reason to believe that grounds for disqualification exist, [I] should have requested recusal’;¹⁸ and (v) I am the Single Judge in Trial Chamber III pursuant to Provisional Rule 165 of the Rules.¹⁹

12. I have reviewed the Defence’s Request with due care and consideration and it appears that the overarching question at issue in these proceedings is whether my past service as an FOO in the OTP affects my independence and impartiality as a judge in the *Gicheru* case. As noted above, on 27 August 2021, I issued the Decision on Provision of Information where I comprehensively laid out my duties and functions in my previous role as an FOO with the OTP.²⁰ I invite my learned colleagues to have regard to that decision in considering the Defence’s Request. Similarly, because I have

¹³ [Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v. Thomas Lubanga Dyilo*](#), 3 August 2015 (notified on 4 August 2015), ICC-01/04-01/06-3154-AnxI (‘*Lubanga* 2015 Disqualification Decision’), para. 31; [Ntaganda 2021 Disqualification Decision](#), para. 29.

¹⁴ See [Lubanga 2015 Disqualification Decision](#), para. 30.

¹⁵ [Request](#), para. 27(a).

¹⁶ [Request](#), para. 27(b).

¹⁷ [Request](#), para. 27(c).

¹⁸ [Request](#), para. 27(d).

¹⁹ [Request](#), para. 27(e).

²⁰ See [Decision on Provision of Information](#).

already set out the relevant information in that decision, I will limit myself to the following additional observations.

13. Fundamentally, the Defence's arguments appear to be premised on a misunderstanding of my role as an FOO. As also explained in the Decision on Provision of Information, as an FOO in the OTP my duties were exclusively limited to logistical activities only. I never participated in the gathering of evidence or any other investigative activities. Nor did I have any discussions with members of the OTP about the content of any investigations in any situation before the Court.

14. In respect of the *Kenya* situation specifically, for the avoidance of doubt, as an FOO, I undertook no substantive role in it regarding aspects of the investigation or prosecution phase.²¹ I played no part in the investigation or gathering of evidence in the *Kenya* situation, nor did I have access to any evidence in the *Kenya* situation. Any contact with witnesses or potential witnesses arising out of the *Kenya* situation was strictly restricted to my duties providing logistical or other support and at no point did I have access to any databases containing evidentiary material. Similarly, during my employment as an FOO, I was not personally aware of any suspected problems of potential witness interference in the *Kenya* situation, nor had I ever heard the name of Mr. Gicheru or any other alleged co-conspirators connected with this case. I was also not aware of any case which concerned Mr. Gicheru as referenced by the Defence.

15. Furthermore, I wish to re-emphasise that my employment as an FOO was over a decade ago.²² I have no recollection of specific details of witnesses with whom I may or may not have had contact with. Nor do I recall the names of investigators who went to the field from headquarters. That being said, I stress that any contact I may have had never went outside the scope of my duties which, as noted above, was strictly restricted

²¹ In this regard, the Defence's reference to Judge Fernández de Gurmendi's request for recusal in the *Bemba* case is inapposite. Unlike Judge Fernández de Gurmendi, who played a substantive role in the OTP in respect of the *Central African Republic* situation as Head of the Jurisdiction, Complementary, and Cooperation Division, I had an administrative role as an FOO which was confined to logistical support.

²² I note that there is a minor discrepancy as to the date I left my role with the OTP. In the Decision on the Provision of Information I noted that I left in September 2010 whilst the OTP notes I left in October 2010. This is a clerical error on my part and indeed I left in October 2010.

to administrative and logistical tasks. Indeed, I would have acted *ultra vires* if I had discussed the content of any witness' testimony either with him or her personally or with the OTP staff who conducted the interviews.

16. In connection with the foregoing, the Defence's submission that my 'interactions with witnesses and potential exposure to evidence would invariably lead [me] to form an opinion on the oral and documentary evidence forming part of the OTP's case'²³ is baseless. As an FOO I did not have an opportunity to form such an opinion given the restricted and limited nature of my responsibilities. Any opinion I form on the evidence in this case will be exclusively through my functions as a judge in Trial Chamber III, guided by the applicable parameters of the Court's legal framework and the relevant standards set out therein.


17. Last, in respect of the Defence's submission to the effect that my being the sole judge in Trial Chamber III 'magnifies the reasonable observer's apprehension of bias',²⁴ I note that, regardless of whether a judge sits alone or as part of a panel, he or she is bound by the same standards of independence and impartiality. Indeed, to follow the Defence's logic would lead to the untenable situation where the appearance of bias of one judge could be alleviated by the fact that he or she sat as part of a panel.

III. CONCLUSION

18. I consider myself fully capable of acting in an impartial and unbiased manner in these proceedings. However, I would be equally unperturbed should my learned colleagues consider it wiser for me to be disqualified in this case. I trust that they will make the right decision in the best interests of the parties and the Court as a whole.

²³ [Request](#), para. 37.

²⁴ [Request](#), para. 48.



Judge Miatta Maria Samba

Dated 5 October 2021

At The Hague, The Netherlands