




Internal memorandum  
Memorandum interne

To   À	Vice-Presidents Joyce Aluoch and Kuniko Ozaki	From   De	The Presidency 
Date	7 April 2016	Through   Via	
Ref.	2016/PRES/00097-2	Copies	
Subject   Objet	Decision on the request for excusal from certain Presidency functions in relation to the case of <i>The Prosecutor v. Jean-Pierre Bemba Gombo</i>		

The Presidency, composed of Judge Sanji Monageng, Judge Christine Van den Wyngaert and Judge Howard Morrison, hereby decides upon the request for excusal submitted by Vice-President Joyce Aluoch and Vice-President Kuniko Ozaki on 5 April 2016 (“request”). Vice-Presidents 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 certain functions of the Presidency in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“case”).

The request for excusal is granted.

### Factual Background

On 20 March 2015, President Silvia Fernández was excused by the Presidency from sitting in all appeals in the case.<sup>1</sup> As a result, every time an appeal arises in the case, she must be replaced in the Appeals Chamber.

On 21 March 2016, Vice-Presidents Aluoch and Ozaki rendered the “Judgment pursuant to Article 74 of the Statute” in the case (“Trial Judgment”).<sup>2</sup> On 4 April 2016, the defence for Mr. Bemba filed a notice of appeal before the Appeals Chamber.<sup>3</sup>

<sup>1</sup> Decision on the request for excusal from Appeals Chamber in all pending and future appeals in *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-3245-AnxI.

<sup>2</sup> ICC-01/05-01/08-3343.

<sup>3</sup> “Defence Notice of Appeal against the Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343”, ICC-01/05-01/08-3348.

On 5 April 2016, Vice-Presidents Aluoch and Ozaki requested to be excused from the Presidency for the purpose of determining which judge will replace Judge Fernández de Gurmendi in the Appeals Chamber for the abovementioned appeal.<sup>4</sup> They also sought to be excused from the Presidency's determination of who will replace Judge Fernández in any future appeals in the case made under article 81 of the Rome Statute.

The Vice-Presidents founded their request on the following basis:

The replacement of President Fernández in the article 81 appeal must be carried out by the Presidency. Although we consider ourselves entirely capable of impartially performing our functions in this respect, we note the need to ensure the appearance of impartiality and that there can be no reasonable perception of a conflict of interest. Therefore, we consider that it is prudent that we seek to be excused from our functions in the Presidency in relation to the replacement of President Fernández in the article 81 appeal, in order to avoid any potential appearance of impropriety if we are involved in the selection of the judge whose role it will be to examine the article 81 appeal against our own Trial Judgment.<sup>5</sup>

The Vice-Presidents also made the following specification, by way of footnote:

We note that we have previously participated as members of the Presidency to replace President Fernández in the Appeals Chamber in the case where such replacement was conducted by drawing of lot. However, the policy of replacing judges in the Appeals Chamber by drawing of lot applies only to appeals pursuant to article 82 of the Rome Statute and not to article 81 appeals, see e.g. Decision replacing a judge in the Appeals Chamber, 20 March 2015, ICC-01/05-01/08-3245, p. 4.

In the same memorandum, Vice-Presidents Aluoch and Ozaki requested to be excused from the deliberations of the Presidency on their request for excusal.

On 6 April 2016, Judges Monageng, Van den Wyngaert and Morrison assumed responsibilities as members of the Presidency for the purpose of deliberating on the request of Vice-Presidents Aluoch and Ozaki.

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<sup>4</sup> 2016/PRES/00097-1.

<sup>5</sup> *Ibid.*

## 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.

The Presidency first grants the request of Vice-Presidents Aluoch and Ozaki to be excused from the deliberations of the Presidency on their request for excusal as there would be an actual conflict of interest if they were to be involved in deliberating on their own request.

Turning to their request to be excused from the Presidency for the purpose of determining who will replace Judge Fernández for the abovementioned appeal, 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”. The language of “function” thus includes excusal from Presidency functions. Article 41(2)(a) of the Statute further provides that “[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground”.

The Presidency notes that Vice-Presidents Aluoch and Ozaki express concern that if they were to participate in the Presidency’s decision to determine which judge would hear the appeal against their own Trial Judgment, there is a risk that the appearance of impartiality could be undermined or that a conflict of interest could be perceived.

The Presidency notes that article 4 of the Code of Judicial Ethics emphasises the importance of such appearances and perceptions in the following terms:

1. Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.
2. Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest.

The Presidency considers that the concern expressed by Vice-Presidents Aluoch and Ozaki is well-founded. It is evident that, if they participated in deciding who should hear the appeal from their own Trial Judgment, this could give rise to both a risk of the appearance of an absence of impartiality and a perception of a conflict interest. Accordingly, the request is granted. For the same reason, the request is granted in respect of any future appeals in the case made under article 81 of the Rome Statute.

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