

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
ICC-01/09-02/11

Date: 21 May 2013

THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Cuno Tarfusser, Second Vice-President

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASES OF**

**THE PROSECUTOR
V. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG
and
THE PROSECUTOR
V. UHURU MUIGAI KENYATTA**

**Public
With two public annexes**

**Decision constituting Trial Chamber V(a) and Trial Chamber V(b)
and referring to them the cases of
The Prosecutor v. William Samoei Ruto and Joshua Arap Sang
and *The Prosecutor v. Uhuru Muigai Kenyatta***

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for the Defence

For Mr Uhuru Muigai Kenyatta

Mr Steven Kay QC

Ms Gillian Higgins

For Mr William Samoei Ruto

Mr Karim Khan QC

Mr David Hooper QC

For Mr Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Mr Silas Chekera

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber V(a)

Trial Chamber V(b)

THE PRESIDENCY of the International Criminal Court (hereinafter “Court”);

NOTING the Decision of the Presidency of 29 March 2012 attaching Judge Kuniko Ozaki to Trial Chamber V and referring to it the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*;¹ and another Decision of the Presidency of the same date also referring to Trial Chamber V the case of *The Prosecutor v. Uhuru Muigai Kenyatta*;²

NOTING the request of Judge Ozaki of 2 May 2013 to be excused, on the ground of workload, from exercising her functions as a judge in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to article 41 of the Rome Statute (hereinafter “Statute”) and rule 33 of the Rules of Procedure and Evidence (hereinafter “Rules”) and the addendum to that request dated 10 May 2013;³

NOTING today’s decision of the Presidency, excusing Judge Ozaki from the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*;⁴

CONSIDERING that the functions of the Trial Chamber shall normally be carried out by three judges of the Trial Division in accordance with article 39(2)(b)(ii) of the Statute;

CONSIDERING rule 38 of the Rules and regulation 15 of the Regulations of the Court providing for the replacement of judges;

¹ ICC-01/09-01/11-406.

² ICC-01/09-01/11-414.

³ Annex I.

⁴ Annex II.

HEREBY DECIDES the following:

- To dissolve Trial Chamber V;
- To temporarily attach Judge Olga Herrera Carbuccion, currently assigned to the Pre-Trial Division,⁵ to the Trial Division with immediate effect;
- To constitute Trial Chamber V(a) with immediate effect, with the following composition:

Judge Herrera Carbuccion

Judge Fremr

Judge Eboe-Osuji

- To refer the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* to Trial Chamber V(a), as composed above, with immediate effect.
- To constitute Trial Chamber V(b) with immediate effect, with the following composition:

Judge Ozaki

Judge Fremr

Judge Eboe-Osuji

- To refer the case of *The Prosecutor v. Uhuru Muigai Kenyatta* to Trial Chamber V(b), as composed above, with immediate effect, and as such the judicial

⁵ ICC-CPI-20120315-PR778.

bench in that case shall retain its current composition, as set out in the Decision of the Presidency of 26 April 2013;⁶

ORDERS the Registrar to file and notify this decision to the relevant participants in the case.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above a dashed line.

Judge Sanji Monageng

Vice-President

Dated this 21 May 2013

At The Hague, Netherlands

⁶ Decision replacing a judge in Trial Chamber V, ICC-01/09-01/11-706 and ICC-01/09-02/11-729.

Annex I

**Cour
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PRESIDENCY

02 MAY 2013

**International
Criminal
Court**

PRESIDENCY

Ref: _____
CC: _____

02 MAY 2013

Ref: 203/PNS/174 **CONFIDENTIAL**
CC: LP/PA/174

Internal Memorandum

From:	Kuniko Ozaki
To:	Presidency
CC	Judge Robert Fremr, Judge Chile Eboe-Osuji
Date:	2 May 2013
Subject:	Request to be excused from the <i>Ruto and Sang</i> case

1. The purpose of this memorandum is to respectfully request that I, Judge Kuniko Ozaki, be excused, pursuant to Article 41(1) of the Rome Statute ("Statute") and Rule 33 of the Rules of Procedure and Evidence ("Rules"), from my functions in the case of *The Prosecutor v. Ruto and Sang* which is currently before Trial Chamber V.

2. As you are aware, I am currently a member of Trial Chambers III and V. This means that I have to deal with the following cases: *The Prosecutor v. Bemba*, *The Prosecutor v. Ruto and Sang*, and *The Prosecutor v. Muthaura and Kenyatta*. Until now it has been possible for me to combine the workload involved in these three cases because only one case was actually in the trial stage, and the two Kenya cases were still at an early stage in terms of trial preparation. However, according to the current schedule, it is expected that the trial in *Prosecutor v. Ruto and Sang* ("Kenya I") will commence on 28 May 2013 and that the trial in *Prosecutor v. Muthaura and Kenyatta* ("Kenya II") will commence several months thereafter. This implies that I would have to attend trial hearings in three cases. Furthermore, the two Kenya cases have involved an unprecedented volume of filings from the parties, requiring a number of judicial orders and decisions. I have included a sample of the relevant statistics as an annex to this memorandum. Significantly, the volume of filings has continued to increase as the trial commencement dates draw nearer, to the point

where it is no longer possible for me to review and decide on all of the issues raised in both cases.

3. Even setting aside the unique demands of the Kenya cases, it requires no explanation to understand that it is not humanly possible to sit in three simultaneous trials. Irrespective of the question whether there are actual hearings in all three cases on the same day, it is not realistic to expect anyone to prepare for hearings, process all procedural issues that arise, as well as assimilate all the evidence that is being presented, in three different cases. In this regard, I refer to the request of Judge Fulford, on behalf of himself and Judge Odio Benito, to be excused from the *Bemba* trial on the basis of their workloads in the *Lubanga* case. In that instance, Judge Fulford noted that “it would be inimical to the interests of justice in both cases if I and Judge Odio Benito attempted to preside over two substantial, concurrent trials”.¹ The Presidency found the request to be “well-founded”, in particular because of the “potential lengthy overlap” between the two trials as well as the availability of other judges.² These same factors are present with regard to the two Kenya cases, with the additional consideration that I am currently sitting in three cases rather than two. The task of adjudication is a serious one, which requires adequate time to reflect upon complex legal and factual questions. I fear that if I am required to continue sitting in three active trials, I will no longer be able to carry out my functions as a judge in the conscientious manner that is required of me in accordance with the solemn undertaking I made on 20 January 2010. My concern is shared by the parties of the two Kenya cases. In December of last year, a defence team in one of the Kenya cases requested that, in the interests of justice and in order to respect the right of the accused to be tried without undue delay, the judges of Trial Chamber V excuse themselves from their functions in one of the Kenya cases.³ The prosecution, in its response to the defence’s request, specifically referred to my workload—the fact that I am sitting on both Trial Chambers III and V.⁴

¹ ICC-01/05-01/08-837-Anx1.

² Presidency, Decision replacing judges in Trial Chamber III, 20 July 2012, ICC-01/05-01/08-837-Anx2.

³ Defence Request to the Judges of the Chamber to consider acting pursuant to Rule 33(1) of the Rules, 11 December 2012, ICC-01/09-02/11-565, reclassified as public on 8 February 2013.

⁴ Prosecution’s observations on the Muthaura Defence’s “Request to the Judges of the Chamber to consider acting pursuant to Rule 33(1) of the Rules”, 18 December 2012, ICC-01/09-02/11-576.

4. For these reasons, and given that the *Ruto and Sang* case is scheduled to begin shortly, I ask the Presidency, in order to guarantee the good administration of justice, that I be excused from my functions in that case. The Chamber hearing the *Ruto and Sang* case urgently needs to resolve a number of issues crucial to the conduct of trial: it must issue a decision on the number of hours to be allotted to the prosecution for its case, determine the order and manner of the presentation of the evidence, including the procedure for admission of evidence and the permissible scope of questioning of witnesses, decide on the extent to which it will allow admission of prior-recorded statements, and set out the scope and modalities of victim participation at trial, to name only several pending matters. It is therefore critical that I am excused from the *Ruto and Sang* case without delay so that the Chamber which will actually sit during the trial is the same Chamber to decide on these crucial – and controversial – issues which will have a significant impact on the conduct of the trial proceedings.

5. Accordingly, I request to be excused, pursuant to Article 41(1) of the Rome Statute (“Statute”) and Rule 33 of the Rules of Procedure and Evidence (“Rules”), from my functions in the *Ruto and Sang* case, and to be replaced in accordance with Rule 38 of the Rules.

6. Finally, I consent to this request being made public if the Presidency wishes to do so in accordance with rule 33(2) of the Rules.

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CONFIDENTIAL

Internal Memorandum

From:	Kuniko Ozaki
To:	Presidency
CC	Judge Robert Fremr, Judge Chile Eboe-Osuji
Date:	10 May 2013
Subject:	Addendum to request to be excused from the <i>Ruto and Sang</i> case

1. On 2 May 2013 I sent a memorandum to the Presidency requesting to be excused from the *Ruto and Sang* case. Several days thereafter, on 6 May 2013, Trial Chamber V issued an order vacating the trial date in that case and stating that a new date would be set in a future decision by the Chamber.¹ I write to notify you that my request to be excused from this case as soon as possible is not altered by this latest development, as the change in trial date does not alter the fact that there remains a significant volume of work to be completed in this case before a trial can start. In fact, the trial was delayed in part due to the high number of unresolved procedural issues related to the conduct of the proceedings. It is neither fair nor realistic to expect me to resolve these issues along with other crucial decisions that are pending in the *Ruto and Sang* case while simultaneously sitting on two other active cases.
2. Accordingly, I re-affirm my request to be excused, pursuant to Article 41(1) of the Rome Statute ("Statute") and Rule 33 of the Rules of Procedure and Evidence ("Rules"), from my functions in the *Ruto and Sang* case, and to be replaced in accordance with Rule 38 of the Rules.

¹ Order scheduling status conferences and provisionally vacating the trial start date, ICC-01/09-01/11-722.

3. Finally, I consent to this request being made public if the Presidency wishes to do so in accordance with rule 33(2) of the Rules.

Annex II



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La Présidence
The Presidency

**Internal memorandum
Memorandum interne**

To À	Judge Kuniko Ozaki	From De	The Presidency
Date	21 May 2013	Through Via	
Ref.	2013/PRES/000174 - 4	Copies	Judge Robert Fremr, Judge Chile Eboe-Osuji
Subject Objet	Decision on the request to be excused from the exercise of judicial functions in the case of <i>The Prosecutor v. William Samoei Ruto and Joshua Arap Sang</i>, pursuant to article 41 of the Rome Statute		

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 request of Judge Kuniko Ozaki (hereinafter "Judge") of 2 May 2013 to be excused from her functions as a judge of Trial Chamber V in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to article 41(1) of the Rome Statute (hereinafter "Statute") and rule 33 of the Rules of Procedure and Evidence (hereinafter "Rules"), and to be replaced as a judge in that case pursuant to rule 38 of the Rules (hereinafter "request for excusal")

The request for excusal is granted.

Factual background

The request is made on the ground of workload. As a member of Trial Chambers III and V the Judge sits in the following cases: *The Prosecutor v. Bemba*, *The Prosecutor v. Ruto and Sang* ("Kenya I") and *The Prosecutor v. Kenyatta* ("Kenya II"). The Judge submits that whereas this was workable until recently, as only the *Bemba* case was actually in trial and

the two Kenya cases were still in the early stages of trial preparation, according to the current schedule, it is expected that trial in *Kenya I* will commence on 28 May 2013 and that trial in *Kenya II* will commence “several months” thereafter; implying that the Judge would have to attend trial hearings in three cases. Further, the Judge submits that the case files in *Kenya I* and *Kenya II* are of such volume that it is no longer possible to review and decide on all of the issues raised therein.¹ It is argued that it is unrealistic “...to expect anyone to prepare for hearings, process all procedural issues that arise, as well as assimilate all the evidence that is being presented, in three different cases”.² In this regard, the Judge refers to the decision of the Presidency excusing Judges Fulford and Odio Benito from the *Bemba* trial on the basis of their workload in the *Lubanga* case.³ The Judge argues that the same factors which led to the excusal of those judges from the *Bemba* case – sitting in two substantial concurrent trials and the availability of other judges – are applicable to the instant case, with the additional consideration that the Judge is sitting in three cases rather than two.⁴

The Judge submits that “[t]he task of adjudication is a serious one, which requires adequate time to reflect upon complex legal and factual questions. I fear that if I am required to continue sitting in three active trials, I will no longer be able to carry out my functions as a judge in the conscientious manner that is required of me in accordance with the solemn undertaking I made on 20 January 2010”, adding that her concerns are shared by the parties in the two Kenya cases.⁵

The Judge requests to be excused from *Kenya I* without delay so that the Chamber which eventually tries the case has the same composition as the Chamber that will decide on the pending “crucial – and controversial issues” in the advance trial preparation stage, which will have a significant impact on the conduct of the trial proceedings.⁶

¹ Request for excusal, page 1.

² Request for excusal, page 2.

³ Citing Presidency Decision replacing judges in Trial Chamber III, 20 July 2010, ICC-01/05-01/08-837-Anx2.

⁴ Request for excusal, page 2.

⁵ Request for excusal, page 2.

⁶ Request for excusal, page 2.

On 10 May the Judge submitted an addendum to the request for excusal. Whilst giving notice of the fact that the trial date in *Kenya I* had been vacated, the Judge reiterated her request for excusal, maintaining that it had not been altered by that procedural development and still stood on the basis of significant workload.⁷

Decision

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

The Presidency, having considered the matter before it, finds the request to be well founded. In coming to this conclusion the Presidency took particular note of its previous decision in the *Bemba* case, as cited above,⁸ and the current and anticipated workload of the Judge as also described above; i.e. the fact that the three trials will overlap when they commence, the substantial size of those three cases and the availability of other judges.⁹

In all the particular circumstances, the request for excusal is granted. The Presidency, pursuant to rule 38 of the Rules and regulation 15 of the Regulations, will proceed with the replacement of the Judge in *Kenya I*.

Nothing that the Judge has consented to the request for excusal and its addendum being made public, pursuant to rule 33(2) of the Rules, those documents will, in addition to this decision, be annexed to the subsequent decision of the Presidency replacing the Judge in *Kenya I*.

⁷ Addendum, page 1.

⁸ Decision replacing judges in Trial Chamber III, 20 July 2010, ICC-01/05-01/08-837.

⁹ See also Decision replacing a judge in Trial Chamber II, 30 September 2009, ICC-01/04-01/07-1503.