

Annex I

**Cour
Pénale
Internationale**



PRESIDENCY

02 MAY 2013

**International
Criminal
Court**

PRESIDENCY

Ref: _____
CC: _____

02 MAY 2013

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

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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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.
