

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-01/10**

Date: **15 March 2012**

THE PRESIDENCY

Before: **Judge Sang-Hyun Song, President**
 Judge Cuno Tarfusser, Second Vice-President
 Judge Akua Kuenyehia, Judge

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. CALLIXTE MBARUSHIMANA

Public

Decision replacing a judge in the Appeals Chamber

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

The Office of the Prosecutor
Mr Luis Moreno-Ocampo
Ms Fatou Bensouda

Counsel for the Defence
Mr Arthur Vercken
Ms Yael Vias-Gvirsman

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims
Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**
Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar
Mr Didier Preira

Victims and Witnesses Unit
Ms Maria Luisa Martinod-Jacome

Defence Support Section
Mr Esteban Peralta Losilla

**Victims Participation and Reparations
Section**
Ms Fiona Mckay

Other
Appeals Chamber

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

NOTING the document in support of appeal filed on 12 March 2012 by the Prosecutor against the “Decision on the Confirmation of charges” (hereinafter “impugned decision”)¹ in the case of *The Prosecutor v. Callixte Mbarushimana* (hereinafter “appeal”);²

NOTING the composition of the Appeals Chamber as set out in article 39(2)(b)(i) of the Rome Statute of the International Criminal Court (“Statute”), pursuant to which the Appeals Chamber shall be composed of all the judges of the Appeals Division, which in turn is composed of the President of the Court and four other judges by virtue of article 39(1) of the Statute;

NOTING that, as of 13 March 2012, the Appeals Division is composed of Judges Sang-Hyun Song, Sanji Mmasenono Monageng, Akua Kuenyehia, Erkki Kourula and Anita Ušacka;

NOTING the request of Judge Monageng of 14 March 2012 to be excused from exercising her functions as a judge of the Appeals Chamber in the appeal (hereinafter “Request”) pursuant to article 41 of the Rome Statute and rule 33 of the Rules of Procedure and Evidence (hereinafter “Rules”) on the basis of her previous involvement in the pre-trial phase of the case, in the course of which she issued the impugned decision and granted leave to appeal that decision (hereinafter “Request”);³

NOTING also that Judge Monageng, requested to be excused from the deliberations of the Presidency on her Request;⁴ Noting further the decision of the Presidency on 15 March 2012 granting the latter request to prevent a conflict of interest from arising and treating Judge Monageng as unavailable for the purposes of deliberations of the Presidency on the Request pursuant to regulation 11(2) of the Regulations of the Court (hereinafter “Regulations”);⁵

¹ ICC-01/04-01/10-465-Conf.

² Corrigendum to the “Prosecution’s Document in Support of Appeal against the ‘Decision on the Confirmation of Charges’ ” (ICC-01/04-01/10-465-Red), ICC-01/04-01/10-499-Corr, 13 March 2012.

³ Annex I.

⁴ 2012/PRES/133-2.

⁵ 2012/PRES/133-3.

NOTING the assumption by Judge Akua Kuenyehia, on 15 March 2012, of the responsibilities of Judge Monageng in the Presidency for the purposes of the Request in accordance with regulation 11(2) of the Regulations;⁶

NOTING the decision of the Presidency of 15 March 2012, excusing Judge Monageng from the Appeals Chamber;⁷

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

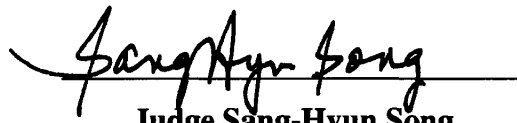
HEREBY

DECIDES that the Appeals Chamber shall henceforth be composed as follows:

Judge Sang-Hyun Song
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka
Judge Ekaterina Trendafilova

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.



Judge Sang-Hyun Song
President

Dated this 15 March 2012

At The Hague, The Netherlands

⁶ 2012/PRES/133-4.

⁷ Annex II.

ANNEX I



		Internal memorandum Memorandum interne	
To / À	The Presidency	From / De	Judge S. M. Monageng
Date	14 March 2012	Through / Via	
Ref.	ICC-01/04-01/10 OA 4	Copies	
Subject / Objet	Request to be Excused		

CONFIDENTIAL

I hereby request, pursuant to article 41 of the Statute and rule 33 of the Rules of Procedure and Evidence, to be excused from being a member of the Chamber seized with the appeal "OA 4" arising from the case *Prosecutor v. Callixte Mbarushimana* (ICC-01/04-01/10).

Under rule 35 of the Rules, a Judge has an affirmative duty to request the Presidency to be excused when the Judge has reason to believe that a ground for disqualification exists. Under this rule, the Judge "shall not wait for a request for disqualification to be made in accordance with article 41." Pursuant to article 41 (2) (a):

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 or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided in the Rules of Procedure and Evidence.


The appeal OA 4 was filed on 12 March 2012 by the Prosecutor.¹ The appeal is directed against the "Decision on the Confirmation of charges" (hereinafter: the "Impugned Decision").² As Presiding Judge of the Pre-Trial Chamber assigned with the Situation in the Democratic Republic of the Congo, I was a member of the bench rendering the Impugned Decision. Further, I was a member of the Chamber granting leave to appeal the Impugned Decision according to article 82 (1) (d) of the Statute.

¹ ICC-01/04-01/10-499.

² ICC-01/04-01/10-465-Conf.

Considering the facts and the law, I cannot but request to be excused from this appeal.

Sincerely,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above the typed name.

Vice President Sanji Monageng



**Internal memorandum
Memorandum interne**

To À	President Sang-Hyun Song Vice-President Cuno Tarfusser	From De	Vice-President Sanji Monageng
Date	15 March 2012	Through Via	
Ref.	2012/PRES/133-2	Copies	
Subject Objet	Request to be excused from the Presidency		

I hereby request to be excused from the deliberations of the Presidency upon my request to be excused from being a member of the Appeals Chamber seized with the appeal "OA 4" arising from the case of *The Prosecutor v. Callixte Mbarushimana*,¹ as the impression could be given of a possible conflict of interest given my position as a member of the Presidency.

I have no objection to making public this request, as well as my request to be excused from the Appeals Chamber and the decision thereon, pursuant to rule 33 of the Rules, should the Presidency decide to do so.

¹ 2012/PRES/133.

ANNEX 2



**Internal memorandum
Memorandum interne**

To À	Judge Sanji Monageng	From De	The Presidency <i>sh</i>
Date	15 March 2012	Through Via	
Ref.	2012/PRES/133-5	Copies	
Subject Objet	Decision on the request to be excused from the exercise of judicial functions in the Appeals Chamber pursuant to article 41 of the Rome Statute		

The Presidency, composed of the President (Judge Sang-Hyun Song), the Second Vice President (Judge Cuno Tarfusser) and Judge Akua Kuenyehia, hereby decides upon the request of Judge Sanji Monageng (“applicant”) of 14 March 2012 to be excused from her functions as a judge of the Appeals Chamber in the “OA 4” appeal in the case of *The Prosecutor v. Callixte Mbarushimana* (“request for excusal”).

The request for excusal is granted.

Factual background

By memorandum dated 14 March 2012, the applicant requested the Presidency to be excused from her functions as a judge of the Appeals Chamber in the Prosecutor’s appeal “OA 4” in the case of *The Prosecutor v. Callixte Mbarushimana* against the “Decision on the Confirmation of charges”,¹ pursuant to article 41(1) of the Rome Statute (“the Statute”) and rule 33 of the Rules of Procedure and Evidence (“the Rules”).² By memorandum of 15 March 2012, the applicant also requested the Presidency to excuse her, in her capacity as First Vice-President, from the deliberations of the Presidency on the request for excusal.³ That same date, noting article 41(1) of the Statute and rule 33 of the Rules, the remaining members of the Presidency granted the latter request in order to prevent a conflict of interest from

¹ ICC-01/04-01/10-499.

² 2012/PRES/133.

³ 2012/PRES/133-2.

arising, bearing in mind the position of the applicant as both a member of the Presidency and a judge of the Appeals Chamber. Pursuant to regulation 11(2) of the Regulations of the Court ("Regulations"), the applicant was treated as unavailable for the purpose of the deliberations of the Presidency on the request for excusal.⁴ On 15 March 2012, Judge Akua Kuenyehia assumed the responsibilities of the applicant as a member of the Presidency in the request for excusal, in accordance with regulation 11(2) of the Regulations.⁵

The request for excusal is based upon the previous involvement of the applicant in the pre-trial phase of the case, during which she sat on the bench that: a) rendered the "Decision on the confirmation of charges" that is impugned before the Appeals Chamber in the "OA 4" appeal and b) granted leave to appeal that decision.

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 finds the request for excusal to be well founded. Article 41(1) of the Statute, in relevant part, provides 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 that "[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, having considered the matter before it, finds the request for excusal to be well founded. Noting the terms of article 41(1) and 41(2)(a) of the Statute, the Presidency finds that the impartiality of the applicant might reasonably be doubted considering her previous involvement in the pre-trial phase of the case and, as such, the request for excusal in the present appeal is granted. The Presidency, pursuant to rule 38 of the Rules and regulations 12 and 15 of the Regulations of the Court, shall, for the purpose of the present appeal, treat the applicant as unavailable and proceed with her replacement in the Appeals Chamber

⁴ 2012/PRES/133-3.

⁵ 2012/PRES/133-4.

The Presidency notes that the applicant has consented to the Presidency making public the request for excusal and the reasons for its decision upon that request pursuant to rule 33(2) of the Rules. A copy of this decision and the requests for excusal from the Appeals Chamber and Presidency shall be annexed to the decision of the Presidency replacing the applicant in the Appeals Chamber for the purpose of the appeal.