

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/05-03/09  
Date: 20 December 2012

**THE PRESIDENCY**

**Before:** Judge Sang-Hyun Song, President  
Judge Cuno Tarfusser, Second Vice-President  
Judge Erkki Kourula, Judge

**SITUATION IN THE DEMOCRATIC IN DARFUR SUDAN**

**IN THE CASE OF  
THE PROSECUTOR *v.* ABDALLAH BANDA ABAKAER NOURAIN *and* SALEH  
MOHAMMED JERBO JAMUS**

**Public Document  
with Annex**

**Decision replacing a judge in the Appeals Chamber**

**Decision/Order/Judgment 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**

Mr Karim A.A. Khan QC

Mr Nicholas Koumjian

**Legal Representatives of the Victims**

Ms Hélène Cissé

Mr Jens Dieckmann

**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**

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**Registrar**

Ms Silvana Arbia

**Counsel Support Section**

**Deputy Registrar**

Mr Didier Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

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

**NOTING** the Decision on the “Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’” in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*;<sup>1</sup>

**NOTING** the composition of the Appeals Chamber as set out in article 39(2)(b)(i) of the Rome Statute of the Court Statute (“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 Chamber 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 December 2012 to be excused from exercising her functions as a judge of the Appeals Chamber in the appeal pursuant to article 41 of the Statute and rule 33 of the Rules of Procedure and Evidence (“Rules”) on the basis of her previous involvement in the pre-trial phase of the case, in the course of which she sat on the bench that: a) issued summons to appear<sup>2</sup> and b) rendered the “Decision on the confirmation of charges” (“Request”);<sup>3</sup>

**NOTING** also that, on 17 December 2012, Judge Monageng requested to be excused from the deliberation of the Presidency;<sup>4</sup> Nothing further the decision of the Presidency on 20 December 2012 granting the latter request to prevent a conflict of interest from arising and treating Judge Monageng as unavailable for the purposes

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<sup>1</sup> ICC-02/05-03/09-428.

<sup>2</sup> ICC-02/05-03-09-1.

<sup>3</sup> ICC-02/05-03/09-121-Corr.

<sup>4</sup> 02/05-03/09, 17 December 2012.

of deliberations of the Presidency on the Request pursuant regulation 11(2) of the Regulations of the Court (“Regulations”);<sup>5</sup>

**NOTING** the assumption by Judge Kourula, on 20 December 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;<sup>6</sup>

**NOTING** the decision of the Presidency of 20 December 2012, excusing Judge Monageng from the Appeals Chambers;<sup>7</sup>

**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; and

Judge Ekaterina Trendafilova.

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

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<sup>5</sup> 2012/PRES/00585-2.

<sup>6</sup> 2012/PRES/00585-3.

<sup>7</sup> 2012/PRES/00582-2.

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

A handwritten signature in black ink, appearing to read 'Cuno Tarfusser', with a long, sweeping flourish extending to the right.

**Judge Cuno Tarfusser**  
**Second Vice-President**

Dated this 20 December 2012

At The Hague, Netherlands



**Cour  
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**International  
Criminal  
Court**

La Présidence  
The Presidency

**Internal memorandum  
Memorandum interne**

<b>To   À</b>	Judge Sanji Monageng	<b>From   De</b>	The Presidency	<i>Wolofu</i>
<b>Date</b>	20 December 2012	<b>Through   Via</b>	[type name]	
<b>Ref.</b>	2012/PRES/00582-2	<b>Copies</b>	[type names]	
<b>Subject   Objet</b>	<b>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</b>			

The Presidency, composed of the President (Judge Sang-Huyn Song), the Second-Vice-President (Judge Cuno Tarfusser) and Judge Erkki Kourula, hereby decides upon the request of Judge Sanji Monageng (“applicant”) of 14 December 2012 to be excused from her functions as a judge of the Appeals Chamber in the appeal of the “Decision on the defence request for a temporary stay of the proceedings” in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (“request for excusal”).<sup>1</sup>

The request for excusal is granted.

#### **Factual background**

By memorandum dated 14 December 2012, the applicant requested the Presidency to be excused from her functions as a judge of the Appeals Chamber in the Defence’s appeal in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* against the “Decision on the defence request for a temporary stay of the proceedings”, pursuant to article 41(1) of the Rome Statute (“Statute”) and rule 33 of the rules of Procedure and Evidence (“Rules”).<sup>2</sup> By memorandum of 17 December 2012, the applicant also requested the Presidency to excuse her, in her capacity as the First Vice-President,

<sup>1</sup> 02/05-03/09, 14 December 2012.

<sup>2</sup> 02/05-03/09, 14 December 2012.

from the deliberations of the Presidency on the request for excusal.<sup>3</sup> On 20 December 2012, 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 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.<sup>4</sup> On the same date, Judge Erkki Kourula 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.<sup>5</sup>

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) issued summons to appear; and b) rendered the "Decision on the confirmation of charges".

### **Decision**

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

Article 41(1) of the Statute, in relevant parts, 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, shall, for the purpose of the present appeal, treat the applicant as unavailable and proceed with her replacement in the Appeals Chamber.

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<sup>3</sup> 02/05-03/09, 17 December 2012.

<sup>4</sup> 2012/PRES/00589-2.

<sup>5</sup> 2012/PRES/00589-3.

The Presidency notes that the applicant has consented to the Presidency making public the request for excusal and the reason 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 the Presidency shall be annexed to the decision of the Presidency replacing the applicant in the Appeals Chamber for the purpose of the appeal.





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Les Chambres  
The Chambers

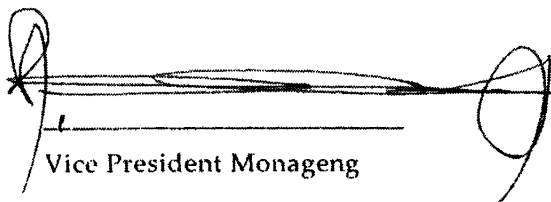
**Internal memorandum**  
**Memorandum interne**

<b>To   À</b>	<b>President Song Vice President Tarfusser</b>	<b>From   De</b>	<b>Vice President Monageng</b>
<b>Date</b>	17/12/2012	<b>Through   Via</b>	
<b>Ref.</b>	02/05-03/09	<b>Copies</b>	Natasha Naidoo Hirad Abtahi
<b>Subject   Objet</b>	<b>Request to be excused from the Presidency</b>		

I hereby request to be excused from the deliberations of the Presidency on my request to be excused from being a member of the Appeals Chamber, in the appeal to be brought in the case of *Prosecutor vs. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, against Trial Chamber IV 's decision entitled "Decision on the defence request for a temporary stay of proceedings", and all future appeals arising in this case.

My reason for this request is the possible conflict of interest given my position as a member of the Presidency.

Sincerely,



\_\_\_\_\_  
Vice President Monageng

**Cour  
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**Internal memorandum  
Memorandum interne**

To   À	Presidency	From   De	Judge Monageng
Date	14 December 2012	Through   Via	
Ref.	02/05-03/09	Copies	Judge Kourula (President of Appeals Division)
Subject   Objet	Request for recusal pursuant to article 41 (1) of the Statute and rule 33 of the Rules of Procedure and Evidence		

**CONFIDENTIAL**

1. On 26 October 2012, Trial Chamber IV rendered the “Decision on the defence request for a temporary stay of proceedings”, rejecting the Defence request to temporarily stay the proceedings.<sup>1</sup> On 5 November 2012, the Defence for Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus filed a request for leave to appeal Trial Chamber IV’s decision.<sup>2</sup> On 13 December 2012, Trial Chamber IV granted the Defence request for leave to appeal its decision of 26 October 2012. Pursuant to article 41 (1) of the Statute and rule 33 of the Rules of Procedure and Evidence, I hereby request to be recused from this appeal and all future appeals in this case.

2. The reason for this request is my previous involvement in the case against Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus during the pre-trial phase of the proceedings, in the course of which I, *inter alia*, issued summonses to appear<sup>3</sup> and later confirmed the charges against the suspects.<sup>4</sup> I therefore have “previously been involved ... in that case before the Court” (second sentence of article 41 (2) (a) of the Statute).

<sup>1</sup> *Prosecutor v. Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-410.

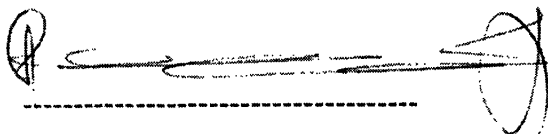
<sup>2</sup> “Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’”, 5 November 2012, ICC-02/05-03/09-412.

<sup>3</sup> ICC-02/05-03-09-1.

<sup>4</sup> ICC-02/05-03/09-121-Corr.

3. Pursuant to rule 33 (2) of the Rules of Procedure and Evidence, I submit this request confidentially. However, I would not object if the Presidency wished to make public this request or the reasons for its eventual decision on this request (second sentence of rule 33 (2) of the Rules of Procedure and Evidence).

Sincerely,

A handwritten signature in black ink, consisting of a stylized initial 'S' followed by a long horizontal stroke and a circular flourish at the end.

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Vice President Sanji Monageng