

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/05-03/09

Date: 28 March 2013

THE PRESIDENCY

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

SITUATION IN DARFUR, SUDAN

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

**Public Document
with 2 Annexes**

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 H el ene Ciss e
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

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 that the “Decision on the Defence Application for Leave to Appeal the ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’”¹ in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (“Case”) has given rise to an appeal before the Appeals Chamber (“Appeal”);

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 27 March 2013 (“Request”)² to be excused from exercising her functions as a judge of the Appeals Chamber in the Appeal and in all future appeals in the Case 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 summonses to appear³ and b) rendered the “Decision on the confirmation of charges”;⁴

¹ ICC-02/05-03/09-457.

² Annex I.

³ ICC-02/05-03-09-1.

⁴ ICC-02/05-03/09-121-Corr.

NOTING also that within the same Request, Judge Monageng asked to be excused from the deliberation of the Presidency regarding the Request;

NOTING further the decision of the Presidency on 28 March 2013 granting this latter request 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 ("Regulations") in order to prevent a conflict of interest from arising;⁵

NOTING the assumption by Judge Kuenyehia on 28 March 2013, 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 28 March 2013, granting the Request of Judge Monageng for excusal from the Appeals Chambers for the purposes of this Appeal and all future appeals in the Case;⁷

CONSIDERING rule 38 of the Rules and regulation 15 of the Regulations providing for the replacement of judges by the Presidency in accordance with article 39 of the Statute and regulation 12 of the Regulations of the Court, further to which the Presidency shall, in the event that a member of the Appeals Chamber is disqualified, or unavailable for a substantial reason, attach to the Appeals Chamber on a temporary basis a judge from either the Trial or Pre-Trial Division;

⁵ 2013/PRES/00147-2.

⁶ 2013/PRES/00147-3.

⁷ Annex 2.

HEREBY DECIDES:

For the purpose of this Appeal, to temporarily attach Judge Ekaterina Trendafilova, currently assigned to the Pre-Trial Division, to the Appeals Division, which shall 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.

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



Judge Sang-Hyun Song
President

Dated this 28 March 2013

At The Hague, Netherlands



Internal memorandum
Memorandum interne

To À	The Presidency	From De	Judge Monageng
Date	27 March 2013	Through Via	
Ref.	02/05-03/09 (Banda & Jerbo)	Copies	Judge Kuenyehia (President of the Appeals Division); Hiram Abtahi; Volker Nerlich; Natasha Naidoo
Subject Objet	Request for excusal pursuant to article 41 (1) of the Statute and rule 33 of the Rules of Procedure and Evidence and Request to be excused from the Presidency		

CONFIDENTIAL

A. Request for excusal pursuant to article 41 (1) of the Statute and rule 33 of the Rules of Procedure and Evidence

1. On 21 March 2013, Trial Chamber IV rendered the “Decision on the Defence Application for Leave to Appeal the ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’”, granting leave to appeal. Pursuant to article 41 (1) of the Statute and rule 33 of the Rules of Procedure and Evidence, I hereby request to be excused from exercising my functions as an Appeals Chamber Judge in this appeal and all future appeals arising in the case against Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo.

2. The reasons for my request, as documented in my previous request for excusal dated 14 December 2012¹, revolves around my involvement in the case during the pre-trial phase of the proceedings. I respectfully emphasise that this request should be considered in respect of all future appeals that may arise in this case.

¹ ICC-02/05-03/09-433-Anx.

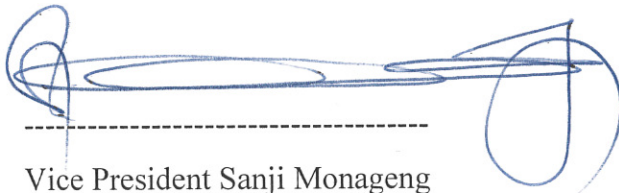
3. Pursuant to rule 33 (2) of the Rules of Procedure and Evidence, I submit this request confidentially. However, I would not object if the Presidency wished to make public this request or the reasons for its eventual decision on this request (second sentence of rule 33 (2) of the Rules of Procedure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

B. Request to be excused from the Presidency

4. In addition, 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. Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo*, pursuant to Trial Chamber IV's decision of 21 March 2013 and all future appeals arising in this case.

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

Sincerely,



Vice President Sanji Monageng



**Cour
Pénale
Internationale**
**International
Criminal
Court**

La Présidence
The Presidency

**Internal memorandum
Memorandum interne**

To À	Judge Sanji Monageng	From De	The Presidency <i>Sang-Hyun Song</i>
Date	28 March 2013	Through Via	
Ref.	2013/PRES/00147-4	Copies	Hirad Abtahi; Volker Nerlich; Natasha Naidoo
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 ("Request")¹ of Judge Sanji Monageng ("Applicant") of 27 March 2013 to be excused from her functions as a judge of the Appeals Chamber in the appeal of the "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor" ("Appeal") in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* ("Case") and all future appeals arising in the Case.

The Request for excusal from the Appeal and all future appeals arising in the Case is granted, for the following reasons.

Factual background

By memorandum dated 27 March 2013, the Applicant made the Request, pursuant to article 41(1) of the Rome Statute ("Statute") and rule 33 of the rules of Procedure and Evidence ("Rules"). In the same memorandum, the Applicant also requested the Presidency to excuse her, in her capacity as the First Vice-President, from the deliberations of the Presidency on the Request ("Second Request"). On 28 March 2013, noting article 41(1) of the Statute and

¹ 2013/PRES/00147.

rule 33 of the Rules, the remaining members of the Presidency granted the Second Request.² 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. On the same date, Judge Akua Kuenyehia assumed the responsibilities of the Applicant as a member of the Presidency for the purposes of the deliberations on the Request, in accordance with regulation 11(2) of the Regulations.³

The Request 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 summonses to appear⁴ and b) rendered the “Decision on the confirmation of charges”.⁵ A similar request, made on the same basis, was made by Judge Monageng for the previous appeal in the Case (“Previous Request”), the appeal of the “Decision on the defence request for a temporary stay of proceedings” and this request was granted by the Presidency.⁶

Decision

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

The Presidency notes that for so long as the relevant circumstances remain the same as they were when the Previous Request was made, the impartiality of the Applicant as a judge in any appeal arising in the Case might reasonably be doubted considering her previous involvement in the pre-trial phase of the Case. Thus, the Presidency, having considered the matter before it, finds the Request to be well founded, for the same reasons as in the Previous Request.

As such, the Applicant’s Request for excusal in the present Appeal, as well as from all future appeals arising in the Case, 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.

² 2013/PRES/00147-2.

³ 2013/PRES/00147-3.

⁴ ICC-02/05-03/09-1.

⁵ ICC-02/05-03/09-121-Corr.

⁶ ICC-02/05-03/09-433-Anx.

From henceforth, the President of the Appeals Division shall promptly inform the Presidency of the advent of any appeal in the case, in order for it to proceed with the replacement of the Applicant in a timely fashion in accordance with this decision.

The Presidency notes that the Applicant has consented to the Presidency making public the Request and the Second Request and the reason for its decision upon those requests pursuant to rule 33(2) of the Rules. A copy of this decision and the requests shall be annexed to the decision of the Presidency replacing the applicant in the Appeals Chamber for the purpose of the Appeal.