

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 18 June 2013

**THE PRESIDENCY**

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

***SITUATION IN LIBYA  
IN THE CASE OF  
THE PROSECUTOR v. SAIF AL-ISLAM GADDAFI and  
ABDULLAH AL-SENUSSI***

**Public with four public annexes**

**Notification of a decision on a request for excusal of a Judge**

**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 Saif Al-Islam Gaddafi**

John R.W.D. Jones

**Counsel for Abdullah Al-Senussi**

Benedict Emmerson

**Legal Representatives of Victims****Legal Representatives of 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**

Ahmed El-Gehani

Philippe Sands

Payam Akhavan

Michelle Butler

**Amicus Curiae****REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Deputy Registrar**

Mr Didier Preira

**Other**

Appeals Chamber

**THE PRESIDENCY** of the International Criminal Court;

In the case of *The Prosecutor v. Saif Aif-Islam Gaddafi and Abdullah Al-Senussi* (“case”);

Having before it the request of Judge Sanji Mmasenono Monageng of 11 June 2013 (Annex 1) to be excused from her functions as a judge of the Appeals Chamber in the appeal of the Government of Libya against Pre-Trial Chamber I’s “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”<sup>1</sup>;

Noting its decision of today's date in which it denies the abovementioned request (Annex 4);

Hereby orders the Registrar to transmit this Notification and its annexes to the relevant parties and participants in the case.

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



Judge Sang-Hyun Song

**President**

Dated this 18 June 2013

At The Hague, Netherlands

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<sup>1</sup> ICC-01/11-01/11-344-Red.



Internal memorandum

<b>To   À</b>	<b>The Presidency</b>	<b>From   De</b>	<b>Judge Monageng</b>
<b>Date</b>	11 June 2013	<b>Through   Via</b>	
<b>Ref.</b>	01/11-01/11 (Gaddafi)	<b>Copies</b>	<b>Judge Kuenyehia (President of the Appeals Division); Hiram Abtahi; Volker Nerlich; Natasha Naidoo</b>
<b>Subject   Objet</b>	<b>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</b>		

CONFIDENTIAL

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

1. On 31 May 2013, Pre-Trial Chamber I rendered its “Decision on the admissibility of the case against Saif Al-Islam Gaddafi” (ICC-01/011-01/11-344) (hereinafter: “Decision on Admissibility”) in which the case against Saif Al-Islam Gaddafi (hereinafter: “Mr Gaddafi”) was determined to be admissible before the Court. On 7 June 2013, the Government of Libya lodged its appeal against the Decision on Admissibility (hereinafter: “Appeal”).<sup>1</sup> 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 the Appeal.
2. The reasons for my request, revolve around my involvement in the case during the pre-trial phase of the proceedings and in particular, my participation in the “Decision on the ‘Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and

<sup>1</sup> “The Government of Libya’s Appeal against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, 7 June 2013, ICC-01/11-01/11-350 (OA 4).

Abdullah AL SENUSSI” (hereinafter: “Decision on the Warrant of Arrest”),<sup>2</sup> including the ensuing issuance of the “Warrant of Arrest for Saif Al-Islam Gaddafi” (hereinafter: “Warrant of Arrest”).<sup>3</sup> In this regard, I note that the Decision on Admissibility examines whether Libya is investigating the same case as the ICC against Mr Gaddafi. In doing so, the Pre-Trial Chamber compares the conduct allegedly under investigation by Libya with the conduct attributed to Mr Gaddafi in both the Decision on the Warrant of Arrest and the Warrant of Arrest.<sup>4</sup> In the circumstances, I therefore have “*previously been involved [...] in that case before the Court*” within the meaning of the second sentence of article 41 (2) of the Statute.

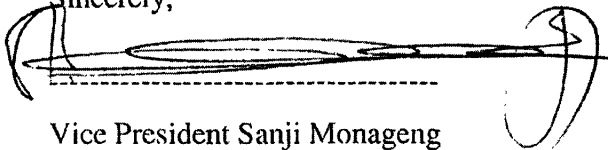
3. Pursuant to rule 33 (2) of the Rules of Procedure and Evidence, I submit this request confidentially. However, I would not object if the Presidency wished to make public this request or the reasons for its eventual decision on this request (second sentence of rule 33 (2) of the Rules of Procedure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

### **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. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, pursuant to Pre-Trial Chamber I’s decision of 31 May 2013.

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

<sup>2</sup> ICC-01/11-01/11-1, dated 27 June 2011 and registered in the case file on 30 June 2011.

<sup>3</sup> ICC-01/011-01/11-3, dated 27 June 2011 and registered in the case file on 30 June 2011.

<sup>4</sup> See Decision on Admissibility, para. 78 *et seq.*



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**Internal memorandum  
Memorandum interne**

<b>To   À</b>	<b>Vice-President Monageng</b>	<b>From   De</b>	<b>President Song Vice-President Tarfusser</b> <i>Sht</i>
<b>Date</b>	18 June 2013	<b>Through   Via</b>	
<b>Ref.</b>	2013/PRES/00215-2	<b>Copies</b>	Judge Kuenyehia
<b>Subject   Objet</b>	<b>Decision on the request of Vice-President Sanji Monageng to be excused from the deliberations of the Presidency</b>		

By memorandum dated 11 June 2013, you requested to be excused from the Appeals Chamber and from the deliberations of the Presidency upon that request.<sup>1</sup>

Noting the terms of article 41 (1) of the Rome Statute and rule 33 of the Rules of Procedure and Evidence, the remaining members of the Presidency hereby grant your request for excusal from the Presidency as a conflict of interest may arise, given your position as both a member of the Presidency and a judge of Appeals Chamber, should you not be excused from the deliberations of the Presidency on your request to be excused from the Appeals Chamber.

Pursuant to regulation 11(2) of the Regulations of the Court, you will be treated as being unavailable for the purpose of the deliberations of the Presidency on your request to be excused from the Appeals Chamber.

<sup>1</sup> 2013/PRES/00215.



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**Internal memorandum  
Memorandum interne**

<b>To   À</b>	Judge Kuenyehia	<b>From   De</b>	President Song, Vice President Tarfusser <i>shs</i>
<b>Date</b>	18 June 2013	<b>Through   Via</b>	
<b>Ref.</b>	2013/PRES/215-3	<b>Copies</b>	
<b>Subject   Objet</b>	Carrying out the responsibilities of First Vice-President Monageng in a matter before the Presidency in accordance with regulation 11(2) of the Regulations of the Court		

By memorandum dated 11 June 2013,<sup>1</sup> Judge Monageng, First Vice-President, requested the Presidency to excuse her as a member of the Appeals Chamber in the appeal of the Government of Libya against Pre-Trial Chamber I's "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" ("appeal") in the case of *The Prosecutor v. Saif Aif-Islam Gaddafi and Abdullah Al-Senussi* ("case"). By the same memorandum, Vice-President Monageng further requested to be excused from the deliberations of the Presidency on her request to be excused from the Appeals Chamber.

On 18 June 2013, noting article 41(1) of the Rome Statute and rule 33 of the Rules of Procedure and Evidence, the remaining members of the Presidency granted the second request of Vice-President Monageng to be excused from the deliberations of the Presidency on her first request, considering that a conflict of interest may arise, given her position as both member of the Presidency and a judge of the Appeals Chamber.<sup>2</sup>

Pursuant to regulation 11(2) of the Regulation of the Court, Vice-President Monageng has therefore been treated as unavailable for the purpose of the deliberations of the Presidency on her request to be excused from the Appeals Chamber. As agreed, the responsibilities of

<sup>1</sup> 2013/PRES/215 (attached).

<sup>2</sup> 2013/PRES/215-2.

Judge Monageng as member of the Presidency in her request to be excused from the Appeals Chamber will be carried out by you as of today, until final determination on the matter.





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**Internal memorandum  
Memorandum interne**

<b>To   À</b>	<b>Judge Sanji Monageng</b>	<b>From   De</b>	<b>The Presidency</b> <i>Shs</i>
<b>Date</b>	18 June 2013	<b>Through   Via</b>	
<b>Ref.</b>	2013/PRES/00215-4	<b>Copies</b>	
<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 Judge Sang-Hyun Song, Judge Cuno Tarfusser and Judge Akua Kuenyehia, hereby decides upon the request<sup>1</sup> of Judge Sanji Monageng (“judge”) of 11 June 2013 to be excused from her functions as a judge of the Appeals Chamber in the appeal of the Government of Libya against Pre-Trial Chamber I’s “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”<sup>2</sup> (“appeal”) in the case of *The Prosecutor v. Saif Aif-Islam Gaddafi and Abdullah Al-Senussi* (“case”).

The Request for excusal is rejected, for the following reasons.

### **Factual background**

By memorandum dated 11 June 2013, the judge requested to be excused from the appeal (“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 judge 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

<sup>1</sup> 2013/PRES/00147.

<sup>2</sup> ICC-01/11-01/11-344-Red.

Request”). On 28 March 2013, noting article 41(1) of the Statute and rule 33 of the Rules, the remaining members of the Presidency granted the Second Request.<sup>3</sup> Pursuant to regulation 11(2) of the Regulations of the Court (“Regulations”), the judge was treated as being 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 judge as a member of the Presidency for the purposes of the deliberations on the Request, in accordance with regulation 11(2) of the Regulations.<sup>4</sup>

The Request is based upon the previous involvement of the judge in the pre-trial phase of the case, during which she sat on the bench of the Pre-Trial Chamber that: a) issued the Decision on the Prosecutor’s Application for a warrant of arrest against Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al Senussi<sup>5</sup> (“Decision on the Warrant of Arrest”) and b) issued the Warrant of Arrest for Saif Al-Islam Gaddafi<sup>6</sup> (“Warrant of Arrest”).

In considering the admissibility of the case before the Court, the Impugned Decision of Pre-Trial Chamber I examined whether Libya was investigating the same case against Mr Gaddafi as that being investigated by the Court against Mr Gaddafi. In coming to that decision, Pre-Trial Chamber I compared the conduct allegedly under investigation in Libya with the conduct attributed to Mr Gaddafi in both the Decision on the Warrant of Arrest and in the Warrant of Arrest itself.

As a result, the judge argues that she has “previously been involved [...] in that case before the Court” within the meaning of the second sentence of article 41(2) of the Statute.

## **Decision**

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

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<sup>3</sup> 2013/PRES/00147-2.

<sup>4</sup> 2013/PRES/00147-3.

<sup>5</sup> ICC-01/11-01/11-1, 30 June 2011.

<sup>6</sup> ICC-01/11-01/11-3, 30 June 2011.

The Application is dismissed. The Presidency notes that the notice of appeal is not directly contesting the Decision on the Warrant of Arrest or the Warrant of Arrest which the judge issued as a former member of the pre-trial bench. Rather it is challenging the decision of the Pre-Trial Chamber, as currently composed, on the admissibility of the case before the Court, which, in considering whether Libya was investigating the same case as the Court, inter alia, compared the alleged crimes in the Decision on the Warrant of Arrest and the Warrant of Arrest with conduct allegedly under investigation by the Libyan authorities. As such, the excusal is not warranted at present. However, should the situation change, directly or indirectly, and in this vein the Presidency notes that the Document in Support of the Appeal setting out the grounds for the appeal has yet to be filed and the Appeals Chamber has yet to determine the scope of the appeal, the judge may decide to seek a request for excusal.

The Presidency notes that the judge has consented to the Presidency making public the Request and the reasons for its decision thereupon, pursuant to rule 33(2) of the Rules. A copy of this decision and the Request shall be annexed to the decision of the Presidency notifying the parties and participants of the request in the case.