

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 22 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**

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**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”<sup>1</sup> in the case of *The Prosecutor v. Callixte Mbarushimana* (hereinafter “appeal”);<sup>2</sup>

**NOTING** that on 15 March 2012 the Presidency decided that, for the purpose of the appeal, the Appeals Chamber was to be composed of Judges Sang-Hyun Song, Akua Kuenyehia, Erkki Kourula, Anita Ušacka and Ekaterina Trendafilova;<sup>3</sup>

**NOTING** the request of Judge Trendafilova of 16 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”);<sup>4</sup>

**NOTING** the decision of the Presidency of 21 March 2012, excusing Judge Trendafilova from the Appeals Chamber;<sup>5</sup>

**CONSIDERING** rule 38 of the Rules providing for the replacement of judges;

**CONSIDERING** regulation 15 of the Regulations of the Court, pursuant to which the Presidency is responsible for the replacement of judges 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;

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<sup>1</sup> ICC-01/04-01/10-465-Conf.

<sup>2</sup> 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.

<sup>3</sup> Decision replacing a judge in the Appeals Chamber, ICC-01/04-01/10-500.

<sup>4</sup> Annex I.

<sup>5</sup> Annex II.

**HEREBY**

**DECIDES**, for the purpose of the appeal, to temporarily attach Judge Silvia Fernández de Gurmendi, currently assigned to the Pre-Trial Division, to the Appeals Chamber which shall be composed as follows:

Judge Sang-Hyun Song

Judge Akua Kuenyehia

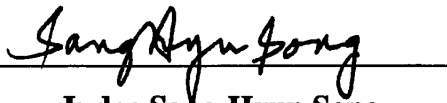
Judge Erkki Kourula

Judge Anita Ušacka

Judge Silvia Fernández de Gurmendi

**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.

  
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**Judge Sang-Hyun Song**  
**President**

Dated this 22 March 2012

At The Hague, The Netherlands

## **ANNEX I**

**Song, Sang-Hyun**

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**From:** Song, Sang-Hyun  
**Sent:** Wednesday, March 21, 2012 9:24 AM  
**To:** Kuenyehia, Akua  
**Cc:** Monageng, Sanji; Tarfusser, Cuno  
**Subject:** Notice of intention to excuse myself from Mbarushimana appeals proceedings

Dear Judge Kuenyehia,

As you are aware, last Thursday you assumed responsibilities in the Presidency in relation to the excusal of Judge Monageng and her replacement in the OA4 appeal in the case of *The Prosecutor v. Callixte Mbarushimana*. It is in this context that I forward you the below email from Judge Trendafilova.

I apologise that I was unable to forward this to you earlier due to my absence from the Court.

I look forward to working with you to address Judge Trendafilova's request.

Kind regards,

Song

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**From:** Trendafilova, Ekaterina  
**Sent:** Friday, March 16, 2012 1:54 PM  
**To:** Song, Sang-Hyun; Monageng, Sanji; Tarfusser, Cuno  
**Subject:** Notice of intention to excuse myself from Mbarushimana appeals proceedings

Dear Members of the Presidency,

On 15 March 2012 the Presidency reached a decision wherein it assigned me to the Appeals Chamber, strictly for the purposes of the Mbarushimana appeal proceedings, thereby replacing Vice President Judge Sanji Monageng.

In readiness of my participation in and whilst reading the documents relating to the said appeal - in particular the Prosecutor's Document in Support of Appeal, dated 12 March 2012 - I realized that the third issue raised in the Prosecutor's application involves an issue with which Pre-Trial Chamber II was seized and has subsequently disposed of. Specifically, this issue was raised in Kenya Case1 (the *Prosecutor v. William Ruto et al.*). Equally, Pre-Trial Chamber II expressed its legal opinion in its confirmation of charges decision, dated and issued on 23 January 2012.

In light of the above, and cognisant of article 41 of the Statute and rules 33 and 35 of the Rules, I find myself compelled to excuse myself from participating in the said appeal. I have always endeavoured to support my colleagues in words and in deeds with respect to their judicial activities. However, mindful of my individual, and our collective duty to preserve and ensure the integrity of proceedings, and specifically the forthcoming said appeal, it would be wholly improper of me not to raise this issue once it became apparent to me.

Best regards,  
Ekaterina

3/22/2012

## **ANNEX II**

**Cour  
Pénale  
Internationale**



La Présidence

**International  
Criminal  
Court**

The Presidency

**Internal memorandum  
Memorandum interne**

<b>To   À</b>	Judge Trendafilova	<b>From   De</b>	The Presidency <i>shs</i>
<b>Date</b>	21 March 2012	<b>Through   Via</b>	
<b>Ref.</b>	2012/PRES/00133-7	<b>Copies</b>	

**Subject | Objet** Decision on the request of Judge Ekaterina Trendafilova of 16 March 2012 to be excused from participating in the appeal "OA4" in the case of *The Prosecutor v. Callixte Mbarushimana*, pursuant to article 41 of the Rome Statute and rules 33 and 35 of the Rules of Procedure and Evidence

The Presidency, composed of the President (Judge Sang-Hyun Song), the Second Vice-President (Judge Cuno Tarfusser) and Judge Akua Kuenyehia, hereby decides the request of Judge Ekaterina Trendafilova (hereinafter "applicant") of 16 March 2012 to be excused from considering the appeal "OA4" (hereinafter "appeal") in the case of *The Prosecutor v. Callixte Mbarushimana* (hereinafter "case").

The request for excusal is granted.

#### **Factual background**

On 14 March 2012, Judge Sanji Mmasenono Monageng sought excusal from the Appeals Chamber in relation to the appeal, on the grounds that she had previously, *inter alia*, issued a warrant of arrest in the case.<sup>1</sup> On 15 March 2012, Judge Monageng further requested that she be excused from the Presidency for the purpose of its deliberations on her request for excusal.<sup>2</sup> Following the granting of the latter request that same day,<sup>3</sup> Judge Monageng was replaced by Judge Akua Kuenyehia who was entrusted to perform all functions related to the request for excusal until its final determination.<sup>4</sup> That same day, the Presidency, consisting of the President, the Second Vice-President and Judge Akua Keunyehia granted Judge Monageng's request for excusal, replacing her with the applicant for the purpose of the appeal.<sup>5</sup>

<sup>1</sup> ICC-01/04-01/10-500-Anx1.

<sup>2</sup> 2012/PRES/00133-2.

<sup>3</sup> 2012/PRES/00133-3.

<sup>4</sup> 2012/PRES/00133-4.

<sup>5</sup> Decision replacing a judge in the Appeals Chamber. ICC-01/04-01/10-500, 15 March 2012.



On 16 March 2012, the applicant addressed the members of the Presidency, informing them that in the course of assuming her duties in the appeal she became aware that the appeal involved an issue which she had already determined while performing her functions as a judge of Pre-Trial Chamber II. Accordingly, noting article 41 of the Rome Statute (hereinafter “Statute”) and rules 33 and 35 of the Rules of Procedure and Evidence (hereinafter “Rules”), the applicant felt compelled to excuse herself from participating in the appeal (hereinafter “request for excusal”).

### 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 notes that the relevant issue arising in the appeal is whether the mode of liability established by article 25(3)(d) of the Statute requires that a person make a “significant” contribution to the commission or attempted commission of the crime.<sup>6</sup> The Presidency notes that this legal question is similar to that which the applicant has recently considered in the confirmation of charges decision in the case of *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*.<sup>7</sup> Accordingly, the question for consideration raised by the applicant is whether the fact that she has considered a legal question in the context of one case before a Pre-Trial Chamber gives reason to doubt her impartiality if considering the same or similar legal question before the Appeals Chamber in a different case.

The Presidency notes article 41(2)(a) of the Statute which provides, *inter alia*, 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 language of article 41(2)(a), in particular the words “in that case” in the second sentence, is clearly concerned with situations in which a judge has previously been involved in a specific case before the Court. The applicant has not been previously

<sup>6</sup> 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, 12 March 2012, paragraph 3.

<sup>7</sup> See Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute. ICC-01/09-01/11-373, 23 January 2012, paragraph 354.

involved in the case of *The Prosecutor v. Callixte Mbarushimana*, but rather, has decided a similar legal issue in the context of a different case.

Nonetheless, the second sentence of article 41(2)(a) cannot be read in isolation from the first.<sup>8</sup> Thus, the Presidency must consider whether the more general prescription that “[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground” provides any basis for excusal.

The Presidency has had reference to the practice of the International Criminal Tribunal for the former Yugoslavia which has emphasised that the relevant issue in considering requests for disqualification is not merely whether a judge would decide issues in the same way that he or she decided them in a previous case, but whether a reasonable observer would consider that the judge in question would not bring an impartial and unprejudiced mind to the issues in the present case. The ICTY has supported the following dictum:

“There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case other than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable base for inferring that there is a reasonable apprehension that he will approach the issues in this way”.<sup>9</sup>

Accordingly, the Presidency considers that the applicant’s request discloses no ground for excusal from hearing the appeal in the case of *The Prosecutor v. Callixte Mbarushimana*.

Nonetheless, noting that the Presidency decision of 15 March 2012 re-constituted the Pre-Trial Chambers and re-assigned the situations between them so that the situation in the Democratic Republic of the Congo, which had been previously assigned to Pre-Trial

<sup>8</sup> Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, ICC-01/04-01/06-2138-AnxIII, 13 November 2009, pages 6-7.

<sup>9</sup> *Re JRL: Ex parte CJL* (1986) 161 CLR 345 at 352 (per McHugh CJ) (High Court of Australia) as quoted and applied in *Prosecutor v. Brđanin and Talić*, IT-99-36-PT, Decision on Application by Momir Talić for the disqualification and withdrawal of a judge, 18 May 2000, paragraphs 18-19; *Prosecutor v. Šešelj*, IT-03-67-R77.3, Decision on motion by Professor Vojislav Šešelj for the disqualification of Judges O-Gon Kwon and Kevin Parker, 19 November 2010, paragraph 28.

Chamber I, was assigned to Pre-Trial Chamber II,<sup>10</sup> the Presidency is aware that one possible outcome of the appeal is that the decision under appeal could potentially be remitted by the Appeals Chamber to the Pre-Trial Chamber in which the applicant is a member. For this reason, the Presidency excuses the applicant from the appeal and will proceed with her replacement.

As per usual practice in requests for judicial excusal, it is desirable to make public this decision and the request for excusal, considering that they are of general relevance, particularly to the parties and participants. The applicant is hereby requested to inform the Presidency by 22 March 2012 whether she consents to such publication, in accordance with rule 33(2) of the Rules.

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<sup>10</sup> Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situations ICC-01/04-01/10-501.