

Annex 1

**Cour
Pénale
Internationale**



Les Chambres

**International
Criminal
Court**

The Chambers

		Internal memorandum	
To / À	The Presidency	From / De	Judge Ušacka <i>[Signature]</i>
Date	14 July 2011	Through / Via	
Ref.	ICC-02/05-03/09 OA	Copies	
Subject / Objet	Request to be Excused		

CONFIDENTIAL

This memorandum provides the reasons for Judge Ušacka's request, pursuant to rule 34 of the Rules, to be excused from the appeal in the case of the *Prosecutor v. Abdallah Banda Abakar Nourain and Salah Mohamed Jerbo Jamus*.¹

BACKGROUND

1. On 20 November 2008, the Office of the Prosecutor filed an application under article 58 of the Statute², requesting that Pre-Trial Chamber I (hereinafter: PTC I), then composed of Judge Kuenyehia, Judge Ušacka, and Judge Steiner, issue warrants of arrest or, alternatively, summonses to appear for three individuals named therein, two of which were Abdallah Banda Abakar Nourain and Salah Mohammed Jerbo Jamus.
2. When the above-mentioned application was filed, PTC I was concurrently seized with another application for a warrant of arrest, also in the Situation in Darfur, Sudan, against Mr Omar Al Bashir, filed on 14 July 2008.³ A corrected version of the application was filed on 21 August 2008, and was 120 pages in length. The application was accompanied by 89 annexes of documentary and other evidence. In addition, when the application for a warrant of arrest for Mr Al Bashir was filed, the Chamber was concurrently seized with the confirmation hearing for the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo*

¹ Trial Chamber IV, "Decision on the Prosecution's Application for Leave to Appeal the 'Decision on the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence'", 13 July 2011, ICC-02-05-03/09-179.

² ICC-02/05-163-Conf-Exp; ICC-02/05-163-Conf-Exp-Anxsl-5.38.

³ ICC-02/05-151-US-Exp; ICC-02/05-151-US-Exp-Anxsl-89; Corrigendum ICC-02/05-151-US-Exp-Corr and Corrigendum ICC-02/05-151-US-Exp-Corr-Anxsl & 2; and Public redacted version ICC-02/05-157 and ICC-02/05-157-AnxA.

Chui, which took place from 27 June to 18 July 2008.⁴ A decision on the confirmation of the charges in that case was issued on 26 September 2008. This decision was 227 pages in length. Thus, at the time the application under article 58 of the Statute naming Mr Abdallah Banda AbakarNourain and Mr. Salah Jerbo Jamus was filed with Pre-Trial Chamber I, the Chamber was obliged to prioritise its workload in order to focus on finalising the decision on the application for an arrest warrant in the *Al Bashir* case, since the Chamber's resources were already fully devoted to this pending matter.⁵

3. A warrant of arrest for Mr Al Bashir was subsequently issued by PTC I on 4 March 2009.⁶ The decision on the warrant of arrest, also issued on 4 March 2009, was 95 pages in length.⁷

4. Nine days later, on 13 March 2009, two of the Judges of PTC I, Judge Kuenyehia and myself, were assigned to the Appeals Division after a unanimous decision of the plenary to that effect.

5. Thus, on 27 August 2009, a recomposed PTC I (Judge Steiner, Judge Monageng and Judge Tarfusser) issued the decision on the Prosecutor's application and a summons to appear for Mr Abdallah Banda Abakar Nourain and Mr Salah Jerbo Jamus (hereinafter: "*Banda and Jerbo Case*").⁸

PROCEDURAL HISTORY

6. I would like to bring to the attention of the Presidency that between 20 November 2008 and 13 March 2009, I was involved in the following proceedings in relation to this case:

- "Decision Requesting Additional Information and Supporting Materials" with a confidential, *ex parte* annex, 9 December 2008, ICC-02/05-166.

⁴ ICC-01/04-01/07-T-38-ENG CT (27 June 2008); ICC-01/04-01/07-T-39-ENG CT (30 June 2008); ICC-01/04-01/07-T-40-ENG ET (2 July 2008); ICC-01/04-01/07-T-41 -ENG ET (2 July 2008); ICC-01/04-01/07-T-42-ENG ET (3 July 2008); ICC-01/04-01/07-T-43-ENG ET (4 July 2008); ICC-01/04-01/07-T-44-ENG ET (7 July 2008); ICC-01/04-01/07-T-45-ENG ET (9 July 2008); ICC-01/04-01/07-T-46-ENG ET (11 July 2008); ICC-01/04-01/07-T-48-ENG CT (14 July 2008); ICC-01/04-01/07-T-49-ENG ET (15 July 2008); ICC-01/04-01/07-T-50-ENG ET (16 July 2008).

⁵ This circumstance is also noted in the "Decision on Prosecution's Request for Expedited Decision on the Prosecution's Application of 20 November 2008", 2 March 2009, ICC-02/05-198 at p. 6.

⁶ ICC-02/05-01/09-1.

⁷ ICC-02/05-01/09-3.

⁸ ICC-02/05-03/09-1. Pursuant to Decision ICC-02/05-03/09-43 dated 15/06/2010, this document is reclassified as public. A summons to appear for the other individual named in the application, Mr. Abu Garda, was issued by the recomposed PTC I on 7 May 2009, ICC-02/05-01/09-1.

- "Decision on the 'Notification to the Chamber Pursuant to Article 58'", 24 December 2008, ICC-02/05-169.
- "Decision scheduling an *Ex Parte* Hearing and Providing an Agenda", 30 January 2009, ICC-02/05-176.
- "Decision modifying the agenda of the scheduled *Ex Parte* Hearing of 3 February 2009", 2 February 2009, ICC-02/05-178.
- Hearing, Tuesday, 3 February 2009 (ICC-02/05-T-4-Conf-Exp-Eng).⁹
- "Decision on Prosecution's Request for Expedited Decision on the Prosecution's Application of 20 November 2008", 2 March 2009, ICC-02/05-198.
- "Decision on the Prosecution's request for reclassification of the Prosecution's application of 20 November 2008", 2 March 2009, ICC-02/05-200.
- "Decision on the Prosecution's Requests of 5 and 6 March 2009", 10 March 2009, ICC-02/05-204.

REQUEST

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.

Article 41 (2) (a) of the Statute, second sentence, is phrased broadly. By itself, it appears to indicate that a judge shall be disqualified if that judge has previously been involved in any capacity in that case before the Court. However, the Presidency has clarified that this provision should be read in context with its nature and purpose, as follows:

[T]he relevant part of article 41(2)(a) is concerned with disqualification where a judge has previously been involved in any capacity which gives

⁹ This hearing took place in the context of the Situation in Darfur, Sudan, and primarily related to witness protection in advance of Pre-Trial Chamber I issuing a decision on the prosecution application for a warrant of arrest in the *Al Bashir* case. Therefore, of the 42 pages of the transcript, only pages 36 – 40 concern the *Banda & Jerbo* case, which at that time, was joined with the *Abu Garda* case.

rise to a reasonable ground to doubt his or her impartiality. The Presidency finds this interpretation most consistent with the objective of ensuring that the impartiality of judges cannot reasonably be reproached, at the same time; as ensuring the efficient conduct of proceedings. The Presidency thus accepts the view of the applicant that article 41(2)(a) functions "to certify the integrity and impartiality of the judicial proceedings by ensuring that Judges who have previously participated in the case do not participate as Judges in the present proceedings, if their impartiality might reasonably be doubted".¹⁰ The language of "previously involved in any capacity in that case before the Court" cannot be considered in isolation but must be understood as closely connected to the first sentence of article 41(2)(a).¹⁰

In order to certify the integrity and impartiality of the proceedings, a Judge must not only be certain that she can exercise her functions impartially, but also must ensure that as a result of her participation in the case, her impartiality could not be reasonably doubted on any ground. Thus, a request to be excused from participation in a case is meant to avoid not only actual bias, but also any perception of bias, in order to ensure public confidence in the courts.

The Pre-Trial Chamber issued several decisions related to the *Banda and Jerbo Case* prior to my assignment to the Appeals Division on 13 March 2010, which certainly constitutes involvement "in any capacity." I do not believe, however, that if I participate in appellate proceedings related to the *Banda and Jerbo Case*, my impartiality could reasonably be doubted on any ground. As the European Court of Human Rights has repeatedly held, "[t]he mere fact that a judge has also made pre-trial decisions cannot in itself be taken as justifying doubts regarding his or her impartiality. What matters is the extent and nature of the pre-trial measures taken by the judge."¹¹ Upon reviewing the pre-trial record, it would be clear to the reasonable observer that, notwithstanding my limited involvement during the pre-trial proceedings, my ability to perform my duty as a judge impartially and conscientiously remains in tact: the seven decisions rendered and one hearing convened while I was assigned to the Pre-Trial Chamber I, in relation to the *Banda and Jerbo Case*, concerned procedural issues such as requests from the Prosecutor to expedite the proceedings or to reclassify documents, and requests to the Prosecutor for further information. It is also clear from the complete record that I have neither made a legal assessment of the factual allegations nor any determination of guilt or innocence in the

¹⁰ ICC-01/04-01/06-2138-AnxIII, pp. 6-7.

¹¹ *Case of D.P. v. France*, Application no. 53971/00, ECHR, 10 February 2004, para. 35. See also, *Case of Hauschildt v. Denmark*, Application no. 10486/83, ECHR, 24 May 1989; *Case of Saraiva de Carvalho v. Portugal*, Application no. 15651/89, ECHR, 22 April 1994; and *Case of Morel v. France*, (Application no. 34130/96), ECHR, 6 June 2000.

case.¹² For these reasons, I am ready, willing and able to commence my judicial duties as they arise in the *Banda and Jerbo Case*.

Nevertheless, I firmly believe that in all matters pertaining to judicial ethics, a cautious approach should be followed, especially in situations such as this one in which the wording of article 41 (2) (a) of the Statute and rule 34 of the Rules is phrased broadly enough to create the potential for ambiguity. For these reasons, and because there is no formal mechanism provided in the Statute, Rules, Regulations or Code of Judicial Ethics in which a Judge may ask for advice when faced with such an issue, I feel that it is my ethical duty to request to be excused from this appeal and any others arising from this case, so that the Presidency may decide on this matter pursuant to article 41 (1) of the Statute.

¹² See e.g., *Case of Hernandez Cairos v. Spain*, (Application no. 41785/02), ECHR, 11 November 2002; distinguishing from *Case of Castillo Algar v. Spain*, Case No. 79/1997/863/1074, ECHR, 28 October 1998 (application no. 28194/95).



Internal memorandum

Memorandum interne

To À	The Presidency	From De	Judge Kuenyehia
Date	14 July 2011	Through Via	
Ref.	ICC-02/05-03/09 OA	Copies	
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