

Annex 2

**Cour
Pénale
Internationale**



La Présidence

**International
Criminal
Court**

The Presidency

**Internal memorandum
Memorandum interne**

To À	Judges Kuenyehia and Ušacka	From De	The Presidency <i>Shs</i>
Date	1 August 2011	Through Via	
Ref.	2011/PRES/360-2 2011/PRES/361-2	Copies	
Subject Objet	Decision on the requests of Judge Akua Kuenyehia and Judge Anita Ušacka of 14 July 2011 to be excused from the appeal in the case of the <i>Prosecutor v. Abdallah Banda Abakaer Nourain and Salah Mohammed Jerbo Jamus</i>		

The Presidency of the International Criminal Court (hereinafter "Court"), composed of the President (Judge Sang-Hyun Song), the First Vice-President (Judge Fatoumata Dembele Diarra) and the Second Vice-President (Judge Hans-Peter Kaul), hereby decides on the requests of Judges Akua Kuenyehia and Anita Ušacka of the Appeals Chamber (hereinafter "applicants") dated 14 July 2011 wherein they requested to be excused from sitting in an appeal in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Salah Mohammed Jerbo Jamus* (hereinafter "case").

The request for excusal is denied.

Factual Background

On 13 July 2011, Trial Chamber IV granted leave to appeal in respect of its decision of 6 July 2011 (hereinafter "appellate proceedings").¹ On 14 July 2011, by memoranda classified as confidential,² the applicants requested the Presidency to excuse them from the appellate proceedings, pursuant to article 41(1) of the Rome Statute (hereinafter "Statute") and rule 33 of the Rules of Procedure and Evidence (hereinafter "Rules").

The requests for excusal are based on the applicants' previous involvement in the case as members of Pre-Trial Chamber I, in the course of which the applicants participated in seven

¹ 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", ICC-02/05-03/09-179, 13 July 2011.

² 2011/PRES/00360; 2011/PRES/00361.

procedural decisions and one hearing related to the case.³ Although they make their request for excusal on the basis that a cautious approach should be followed in all matters pertaining to judicial ethics, the applicants consider that their impartiality cannot be reasonably doubted on any grounds if they were to participate in the appellate proceedings.

Decision

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

The Presidency, having thoroughly examined the matter before it, finds the request to be without merit.

The applicants request to be excused on the grounds that they have had previous limited involvement in the pre-trial phase of the proceedings, having issued seven decisions and sat in one hearing related to procedural matters.

The Presidency recalls that, pursuant to rule 35 of the Rules, there is a duty upon a judge to request to be excused in the absence of a request for disqualification, should he or she believe that a ground for disqualification exists. The Presidency further recalls that article 41(2)(a) of the Statute provides, in relevant part:

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 has previously found that the capacities with which the second sentence of article 41(2)(a) is concerned are those by virtue of which the impartiality of a judge might

³ Decision Requesting Additional Information and Supporting Materials, ICC-02/05-166, 9 December 2008; Decision scheduling an *Ex Parte* Hearing and Providing an Agenda, ICC-02/05-176, 30 January 2009; Decision modifying the agenda of the scheduled *Ex Parte* Hearing of 3 February 2009, ICC-02/05-178, 2 February 2009; Decision on Prosecution's Request for Expedited Decision on the Prosecution's Application of 20 November 2009, ICC-02/05-198-Conf-Exp, 2 March 2009; Decision on the Prosecution's Requests of 5 and 6 March 2009, ICC-02/05-204-Conf-Exp, 10 March 2009; Decision on the "Notification to the Chamber Pursuant to Article 58", ICC-02/05-169-Conf-Exp, 24 December 2008; Decision on the Prosecution's request for reclassification of the Prosecution's application of 20 November 2008, ICC-02/05-200-Conf-Exp, 3 March 2009; ICC-02/05-T-4-CONF-EXP-ENG, pages 36-40.

reasonably be doubted.⁴ The Presidency found 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.⁵

The Presidency has previously determined that, even in circumstances where a judge has issued a warrant of arrest in a case, this does not necessarily give rise to reasonable grounds to doubt the impartiality of that judge in appellate proceedings in general.⁶ In addition, the Presidency has also previously determined that limited involvement by a judge in a discrete procedural motion does not constitute a ground on which the impartiality of a judge might be reasonably doubted.⁷

The Presidency considers that the applicants' involvement in the case at pre-trial level related only to the determination of limited procedural issues. In view of these circumstances, the Presidency accepts the identical submission made by each applicant that "[u]pon reviewing the pre-trial record, it would be clear to the reasonable observer that, notwithstanding my limited involvement during 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 case. For these reasons, I am ready, willing and able to commence my judicial duties as they arise in the *Banda and Jerbo Case*".⁸

⁴ 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, 23 September 2009, as contained in ICC-01/04-01/06-2138-AnxIII, 13 November 2009, page 6 (hereinafter "Decision of 23 September 2009").

⁵ Decision of 23 September 2009, page 6; See also Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, ICC-02/05-01/09-76-Anx2, 19 March 2010.

⁶ Decision on the request of Judge Akua Kuenyehia of 18 February 2010 to be excused from participating in the exercise to reclassify documents in the appeals proceedings related to the case of *The Prosecutor v. Bosco Ntaganda* and in all appeals in the case, 24 September 2010, as contained in ICC-01/04-584-Anx4, 11 November 2010, page 5.

⁷ Decision of 23 September 2009.

⁸ 2011/PRES/00360, pages 4-5; 2011/PRES/00361, pages 4-5.

Considering the above and in view of its previous jurisprudence, the Presidency finds that such limited involvement does not constitute a ground on which the impartiality of the applicants might reasonably be doubted.

The Presidency notes that the applicants have marked their respective applications as confidential. Thus, pursuant to rule 33(2) of the Rules, the Presidency shall not publicise this decision. Considering, however, that this decision elucidates the Presidency's understanding of article 41(2) of the Statute and noting the applicants' observation that this is a matter "pertaining to judicial ethics", the Presidency sees no reason for this decision or the applications to remain confidential and requests the applicants to provide their views on this matter by 15 August 2011.