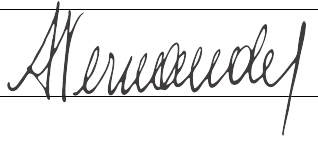




**Cour
Pénale
Internationale**
**International
Criminal
Court**

La Présidence
The Presidency

**Internal memorandum
Memorandum interne**

To À	Judge Sanji Monageng	From De	The Presidency 
Date	18 September 2015	Through Via	
Ref.	2015/PRES/00331-02	Copies	Judge Christine Van den Wyngaert Judge Howard Morrison Judge Piotr Hofmański
Subject Objet	Decision on the "Request for excusal" dated 16 September 2015		

The Presidency, composed of the President (Judge Silvia Fernández de Gurmendi), the First Vice-President (Judge Joyce Aluoch) and the Second Vice-President (Judge Kuniko Ozaki), hereby decides upon the request of Judge Sanji Mmasenono Monageng ("Request for Excusal"), pursuant to article 41(1) of the Rome Statute ("Statute") and rule 33(1) of the Rules of Procedure and Evidence ("Rules"), to be excused from her function as a judge in the Appeal Chamber in relation to an appeal in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ("case").

The Request for Excusal is granted.

Factual Background

On 10 September 2015, Trial Chamber V(a) granted leave to appeal its "Decision on Prosecution Request for Admission of Prior Recorded Testimony"¹ ("Impugned Decision") to the defence of both Mr. William Samoei Ruto and Mr. Joshua Arap Sang, pursuant to article 82(1)(d) of the Rome Statute ("appeal").²

On 16 September 2015, Judge Monageng made a Request for Excusal from the appeal, citing the following reasons:

"The reason for this request centres on allegations reported in various news articles about assurances given by Court officials, prior to the adoption of the proposed

¹ 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2.

² Public Redacted Version of Decision on the Defence's Applications for Leave to Appeal the "Decision on Prosecution Request for Admission of Prior Recorded Testimony", ICC-01/09-01/11-1953-Red-Corr.

amendment to rule 68 of the Rules of Procedure and Evidence, by the Assembly of States Parties (ASP) at its Twelfth Session held in November 2013. The alleged assurances concern the non-retroactive application of the rule change to the Kenyan cases. While I consider these allegations to be entirely without foundation or merit, it is my considered opinion that my discussions with various states parties on the proposed amendment in the process leading up to its adoption may be construed as having a bearing on this appeal. This is because one of the issues on appeal relate to the Trial Chamber's finding that the principle of non-retroactivity does not apply to this particular rule change. Accordingly, I request to be excused from the present appeal ahead of any concerns being raised as to my impartiality."

Decision

The Request for Excusal is properly before the Presidency in accordance with article 41(1) of the Statute and rule 33(1) of the Rules.

Article 41(1) of the Statute provides, in relevant part, that "[t]he Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute". Article 41(2)(a) of the Statute further provides that a "judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground".

The Presidency notes that one aspect of this provision is that a judge should be excused when the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias. Noting that Judge Monageng considers that the allegations reported in various news articles are "entirely without foundation or merit", the Presidency emphasises that its current assessment is concerned not with any actual bias on the part of Judge Monageng but with the *appearance* of grounds to doubt her impartiality.³

³ See "Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v. Thomas Lubanga Dyilo*", 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 28; "Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*", 23 June 2014, paras. 16-17; "Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*", 11 June 2013, ICC-01/04-01/06-3040-Anx, paras. 9-10, 34; "Decision of the plenary of judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012", 5 June 2012, ICC-02/05-03/09-344-Anx, para. 11; Presidency, "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 Presidency notes that Judge Monageng has drawn attention to media reports which contain allegations that Court officials gave assurances concerning the non-retroactive application of amended rule 68 to the case. Judge Monageng then notes that, in her professional capacity, she participated in “discussions with various states parties on the proposed amendment in the process leading up to its adoption”.

The Presidency notes that one of the issues on which leave to appeal has been granted is “[w]hether Rule 68 of the Rules can be applied in this case without offending Articles 24(2) and 51(4) of the Statute”.⁴ This issue raises the potential retroactive application of the amended rule 68. Since any alleged assurances by Court officials may be of relevance to this issue and Judge Monageng performed professional responsibilities requiring her to make statements concerning the amendment of rule 68, the Presidency considers it prudent to grant the Request for Excusal in order to ensure that there can be no appearance of grounds to doubt her impartiality.

The Presidency shall make public this decision, noting that Judge Monageng has expressed her consent in accordance with rule 33(2) of the Rules.

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”, 19 March 2010, ICC-02/05-01/09-76-Anx2, pp. 5-7.

⁴ Public Redacted Version of Decision on the Defence's Applications for Leave to Appeal the “Decision on Prosecution Request for Admission of Prior Recorded Testimony”, ICC-01/09-01/11-1953-Red-Corr, para. 20(i).