

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-02/05-03/09 OA 5**

**Date: 21 January 2015**

**THE APPEALS CHAMBER**

**Before:**

**Judge Sang-Hyun Song  
Judge Akua Kuenyehia  
Judge Erkki Kourula  
Judge Anita Ušacka  
Judge Christine Van den Wyngaert**

**SITUATION IN DARFUR, SUDAN**

**IN THE CASE OF THE PROSECUTOR v. ABDALLAH BANDA ABAKAER  
NOURAIN**

**Public document**

**Dissenting Opinion of Judge Anita Ušacka on the “Decision on the Presiding  
Judge of the Appeals Chamber in the appeal of Mr Abdallah Banda Abakaer  
Nourain against the decision of Trial Chamber IV entitled “Warrant of arrest  
for Abdallah Banda Abakaer Nourain””**



**Annex to decision to be notified in accordance with regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Ms Helen Brady

**Counsel for the Defence**  
Mr Karim Khan  
Mr David Hooper

**REGISTRY**

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**Registrar**  
Mr Herman von Hebel



## **Dissenting Opinion of Judge Anita Ušacka**

1. For the reasons that follow, I respectfully disagree with the procedure adopted by my colleagues for the purposes of issuing the “Decision on the Presiding Judge of the Appeals Chamber in the appeal of Mr Abdallah Banda Abakaer Nourain against the decision of Trial Chamber IV entitled “Warrant of arrest for Abdallah Banda Abakaer Nourain””<sup>1</sup> (hereinafter: “Decision Appointing a Presiding Judge”).

### **I. BACKGROUND**

2. On 19 December 2014, Trial Chamber IV issued the “Decision on defence application for leave to appeal the decision on ‘Warrant of arrest for Abdallah Banda Abakaer Nourain’ and, in the alternative, request for reconsideration”.<sup>2</sup>

3. On 22 December 2014, Mr Abdallah Banda Abakaer Nourain submitted the “Defence Request for extension of time limit to submit Document in Support of Appeal” (hereinafter: “Request for an Extension of Time”).<sup>3</sup> The filing was made during the Court recess when only two Judges of the Appeals Division were present at the seat of the Court: Judge Ušacka, and Judge Monageng, who was, at that time both the President of the Division and, due to the absence of Judge Song, the acting President of the Court.

4. On 23 December 2014, an email was sent on behalf of Judge Song to the other Judges composing the Appeals Chamber for the purposes of this appeal (Judge Kuenyehia, Judge Kourula, Judge Van de Wyngaert and me), indicating that he was willing to preside over the new appeal and appending two draft decisions, one on the Presiding Judge for the appeal and the other “[i]n view of the urgency of the matter” on the Request for an Extension of Time.

5. On the same date, I responded to Judge Song’s email indicating my disagreement with the formulation of the email, which lacked any information about the temporary attachment of Judge Van den Wyngaert to the Appeals Chamber for the purposes of the present appeal, despite the fact that, at that time, no decision by the Presidency to that effect had been notified. In my email, I also disagreed with the

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<sup>1</sup> 24 December 2014, ICC-02/05-03/09-623 (OA 5).

<sup>2</sup> ICC-02/05-03/09-619-Conf; public redacted version (ICC-02/05-03/09-619-Red).

<sup>3</sup> ICC-02/05-03/09-620.

proposed approach and indicated that, if the Judges agreed on the Request for an Extension of Time, I was available to sign the decision granting the requested time extension and the presiding judge could be decided upon after the court recess.

6. Later that same day, the Presidency issued the decision replacing Judge Monageng with Judge Van den Wyngaert for the purposes of the present appeal.<sup>4</sup>

7. On 24 December 2014, with the agreement of the other four Judges of the Appeals Chamber, the Decision Appointing a Presiding Judge was issued. The decision lacked any mention of my objection, although, in contrast to the draft decision circulated on 23 December 2014, the reference to a unanimous decision had been removed.

## II. RELEVANT LEGAL PROVISIONS

8. Article 39 (1) of the Statute provides *inter alia* that “[t]he Appeals Division shall be composed of the President and four other judges [...]”. Article 38 (3) of the Statute provides that “[t]he President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for: (a) The proper administration of the Court [...]”.

9. Regulation 13 (1) of the Regulations of the Court specifies that “[t]he judges of the Appeals Chamber shall decide on a Presiding Judge for each appeal”.<sup>5</sup> Regulation 14 of the Regulations of the Court provides that a President of the Division must be elected by the Judges of each Division in order to oversee its administration.

10. The Rules Governing the Internal Functioning of the Appeals Division were adopted by the Appeals Division on 8 February 2005 in order to regulate the

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<sup>4</sup> “Decision replacing a judge in the Appeals Chamber”, 23 December 2014, ICC-02/05-03/09-621. It is important to note that none of the Judges composing the Presidency for the purposes of this decision were present at the seat of the Court at the time that the decision was issued.

<sup>5</sup> Unlike the Single Judge in the Trial and Pre-Trial Chambers, no aspect of the Appeals Division’s jurisdiction or powers is delegated to the Presiding Judge, whose functions are limited to organisational matters. Appellate jurisdiction and all related powers remain vested in the Appeals Chamber sitting or acting in plenum.

respective appointment and responsibilities of the President of the Division and of the Presiding Judge for each appeal (hereinafter: “Internal Rules”).<sup>6</sup>

11. In relation to the nomination of the Presiding Judge of an Appeal that requires the leave of the Court under article 82 (1) (d) of the Statute, rule 6.2 (B) of the Internal Rules provides that when all Judges are not present at the Court and “a document in support of the appeal is filed, the President of the Division shall, if possible on the same day the document in support of the appeal has been filed, contact all of the Appeals Judges, whether present at the Court or not present at the Court, to ascertain the earliest date a meeting may be held to decide on a Presiding Judge”.

12. Rule 3.5 of the Internal Rules provides that “[w]henver the President of the Division is for any reason unable to be present, his or her functions as chair shall be carried out by the next available Judge of the Division having precedence in accordance with regulation 10 of the Regulations of the Court”.

13. Rule 23 provides that “[i]f the Presiding Judge is unavailable to sign a judgment, decision or order, the Judge of the Appeals Chamber taking precedence over the other Judges pursuant to regulation 10 of the Regulations of the Court shall sign and initial instead of the Presiding Judge”.

### III. ANALYSIS

14. In the present appeal, as Judge Monageng, the President of the Division, was excused from the Appeals Chamber for all appeals in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain*, she was unavailable for the purposes of convening the judges to decide on the presiding judge for the present appeal pursuant to rule 6.2 (B) of the Internal Rules.<sup>7</sup> In such circumstances, rule 3.5 of the Internal Rules specifies that her functions shall be carried out “by the next available Judge of the

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<sup>6</sup> The First Revision of the Rules took place on 21 June 2006 and the Second Revision of the Rules took place on 9 October 2009.

<sup>7</sup> “Decision replacing a judge in the Appeals Chamber”, dated 28 March 2013 and registered on 2 April 2013, ICC-02/05-03/09-458, p. 4 and ICC-02/05-03/09-458-Anx2, p.2; Presidency, “Decision replacing a judge in the Appeals Chamber”, 23 December 2014, ICC-02/05-03/09-621.

Division having precedence in accordance with regulation 10 of the Regulations of the Court”.<sup>8</sup> In this instance, the only available Judge was Judge Ušacka.

15. Nevertheless and in violation of the legal provisions set out above, the President of the Court proposed himself as Presiding Judge in the appeal and, with the agreement of the other Judges of the Appeals Chamber signed the decision appointing himself Presiding Judge on behalf of the President of the Division, although he was, at the time, absent from the seat of the Court.<sup>9</sup>

16. In my view, judges are guardians of the law and, if they themselves violate the very legal provisions that they are bound to uphold and apply, they jeopardise respect for the rule of law and call into question the legitimacy and authority of the judiciary. Moreover, the intervention of the President of the Court in this manner resulted, in my opinion, in a regrettable blurring of the distinction between the functions of the President of the Court, the Vice-President of the Court and the President of the Division. Given the need to reconcile the judicial and administrative functions of the judges comprising the Presidency, a strict separation of their administrative and judicial duties in this regard must be observed.<sup>10</sup> To this end and in order to safeguard against arbitrariness in the exercise of the functions of the Presidency in such instances and to ensure “[t]ransparency in the management of work”, I agree with the recommendation of a recent expert report that the Appeals Chamber “should make its working methods public so that their adequacy and efficiency may be evaluated and so that improvement can occur in that context”.<sup>11</sup>

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<sup>8</sup> Regulation 10 of the Regulations of the Court sets out the following order of precedence: After the President, the First Vice-President and the Second Vice-President, judges take precedence according to the date of commencement of their terms of office, and, where their terms begin on the same day, according to seniority of age.

<sup>9</sup> Equally, it may be noted that the “Decision replacing a judge in the Appeals Chamber”, issued on 23 December 2014 (ICC-02/05-03/09-621), and the “Decision on Mr Banda’s request for extension of time for the filing of a document in support of the appeal”, filed on 24 December 2014 (ICC-02/05-03/09-624), were signed by Judge Song at a time when he was absent from the seat of the Court.

<sup>10</sup> G.M. Pikis, *The Rome Statute for the International Criminal Court, Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, (Martinus Nijhoff Publishers, 2010), p. 38, para. 100. As the Appeals Chamber and the Appeals Division generally are composed of the same judges, the Presidency’s role in its composition is limited to “the temporary designation of replacement judges of the Appeals Chamber where a member is unable to sit”. (See W.A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute* (Oxford University Press, 2010), p. 544).

<sup>11</sup> Expert Initiative on Promoting Effectiveness at the International Criminal Court, December 2014, pp. 163-164.

17. In my view, the initiative to contact all Judges in relation to the appointment of the Presiding Judge should, pursuant to rule 6.2 (B) of the Internal Rules, have come from the President of the Appeals Chamber and, in her absence, the next available Judge of the Division.

18. Furthermore, it was, as I suggested in my email of 23 December 2014, unnecessary to urgently issue a decision appointing a Presiding Judge during the recess and in the absence of the majority of the Judges of the Appeals Chamber solely for the purposes of deciding on a request for an extension of time. Rule 6.2 (B) of the Internal Rules specifies that a decision on the Presiding Judge must be taken only following the filing of the document in support of the appeal.<sup>12</sup> Rule 23 of the Internal Rules specifies that the next Judge of the Appeals Chamber taking precedence shall sign and initial any decision in the event of the unavailability of the Presiding Judge.

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



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**Judge Anita Ušacka**

Dated this 21st day of January 2015

At The Hague, The Netherlands

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<sup>12</sup> In the present case, the document in support of the appeal was filed on 12 January 2015.