

ANNEX II



**Internal memorandum
Memorandum interne**

To / À	Judge Sanji Mmasenono Monageng	From / De	The Presidency <i>ShS</i>
Date	19 March 2010	Through / Via	
Ref.	2010/PRES/155-2	Copies	Judge Sylvia Steiner, President of the Pre-Trial Division
Subject / Objet	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 <i>The Prosecutor v. Omar Hassan Ahmad Al Bashir</i>, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence		

The Presidency, 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 the request of Judge Sanji Mmasenono Monageng (hereinafter "applicant") of 25 February 2010 to be excused from reconsidering, in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (hereinafter "case"), whether a warrant of arrest for the crime of genocide should be issued against Mr Al Bashir.

The request for excusal is denied.

Factual Background

On 4 March 2009, Pre-Trial Chamber I composed of Judges Akua Kuenyehia, Anita Ušacka and Sylvia Steiner issued a warrant for the arrest of Mr Al Bashir for war crimes and crimes against humanity. In the same decision Pre-Trial Chamber I declined the Prosecutor's application for a warrant of arrest in respect of the crime of genocide.¹

¹ Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-3, 4 March 2009.

On 19 March 2009, Pre-Trial Chamber I was reconstituted as follows: Judges Sylvia Steiner, Sanji Monageng and Cuno Tarfusser.²

On 3 February 2010, the Appeals Chamber reversed the decision of Pre-Trial Chamber I not to issue a warrant of arrest in respect of the crime of genocide against Mr Al Bashir, in light of its application of an erroneous standard of proof. The Appeals Chamber remitted the matter to the Pre-Trial Chamber, and directed it to decide anew, on the basis of the correct standard of proof, whether a warrant of arrest in respect of the crime of genocide should be issued.³ The Pre-Trial Chamber's decision to issue an arrest warrant against Mr Al Bashir in respect to crimes against humanity and war crimes remained valid, as it was not subject to appeal.

On 25 February 2010, by memorandum classified as confidential, the applicant submitted a request for excusal to the Presidency pursuant to article 41(1) of the Rome Statute (hereinafter "Statute") and rules 33 and 35 of the Rules of Procedure and Evidence (hereinafter "Rules").

The request for excusal is based upon the involvement of the applicant as a Commissioner to the African Commission on Human and Peoples' Rights (hereinafter "Commission") in the preparation of the report of the fact-finding mission to the Darfur region of the Sudan, undertaken by the Commission between 8 and 18 July 2004. The full mission report of the Commission was annexed to the request for excusal (hereinafter "Report").⁴ Although not part of the fact-finding mission,⁵ the applicant was one of the eleven Commissioners who considered and adopted the draft report.⁶

² Decision on the constitution of Pre-Trial Chambers and on the assignment of the Central African Republic situation, ICC-02/05-01/09-14, 19 March 2009.

³ Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-73, 3 February 2010.

⁴ The African Commission's Report of the Fact-Finding Mission to the Republic of the Sudan Undertaken from 8-18 July 2004, EX.CL/364 (XI) Annex III.

⁵ Request, paragraph 2. Note that the applicant is not named as one of the delegates in paragraph 12 of the Report.

⁶ Request, paragraph 2.

The Report

The objectives of the fact-finding mission included discussing the human rights situation in the Darfur region with the Sudanese authorities and other national and international stakeholders, as well as gathering evidence from all “actors, stakeholders and victims,” to throw light on the human rights situation in Darfur, particularly the allegations of serious and massive human rights violations. Additionally, the mission aimed to consider possible solutions to end the situation.⁷

The Commission expresses no view as to whether genocide had occurred in Darfur.⁸ It concluded, however, that war crimes and crimes against humanity had occurred in Darfur.⁹ With regard to identifying the perpetrators of these crimes, the Report did not make conclusive statements, but rather referred to victims’ statements according to which the perpetrators were “armed forces, using military aircrafts, helicopters and vehicle [sic] of the Sudanese army”, and “militia, identified as the *Janjawid*.”¹⁰

The Commission recommended, *inter alia*, that “the Government should accept the setting up of an International Commission of Enquiry” to, *inter alia*: “investigate the role and involvement of the military, the police, and other security forces in the Darfur conflict, and to establish those responsible for committing war crimes and crimes against humanity, violation [sic] of human rights and international humanitarian law and ensure that they are brought to justice”; and “investigate alleged human rights violations, with a view of further investigating as to whether or not genocide has occurred”.¹¹

⁷ Report, paragraph 11.

⁸ Request, paragraph 5.

⁹ Request, paragraph 6, referring to the Report, paragraphs 120-123.

¹⁰ Report, paragraph 123.

¹¹ Request, paragraph 4, referring to the Report, paragraphs 137-138.

The Request

The applicant requests excusal “[i]n view of the fact that the Appeals Chamber has recently remitted the...case to [Pre-Trial Chamber I], of which [she is] a member, for reconsideration”.¹² The Presidency hereby understands the request to be a request for excusal from the Pre-Trial Chamber’s reconsideration of whether to issue a warrant of arrest against Mr Al Bashir for the crime of genocide, rather than as a broader request for excusal from the entire case, noting the timing of the request, which was made on 25 February 2010, shortly after the decision of the Appeals Chamber remitting the matter to the Pre-Trial Chamber for reconsideration, and the fact that the applicant has been a member of the relevant Chamber since 19 March 2009.

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, having thoroughly examined the matter before it, finds the request for excusal to be without merit.

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.

As the Presidency has found in previous decisions, the overriding purpose of article 41(2)(a) is to safeguard the integrity of proceedings of the Court by ensuring that no judge participates in a case in which his or her impartiality might reasonably be doubted on any ground.¹³ The Presidency notes that the assessment of judicial impartiality requires not only

¹² Request, paragraph 7.

¹³ 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*,

that a judge be impartial in the sense of being subjectively free from bias, but also that there is no objective appearance of bias.¹⁴

Given that there is no subjective bias or conflict of interest that would disqualify the applicant from sitting in the present case,¹⁵ the Presidency will turn to consider whether an appearance of bias could objectively be perceived in the present circumstances.

The Presidency notes that following a survey of the jurisprudence of the European Court, the United Kingdom, Australia, Canada, South Africa, the United States of America, Germany, France, Italy, the Netherlands and Sweden, the Appeals Chamber of the *ad hoc* tribunals has concluded that the assessment of the appearance of bias requires consideration of whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.¹⁶ Examples of such circumstances are set out in rule 34(1)(c) and 34(1)(d) of the Rules which concern an objective appearance of impartiality due, *inter alia*, to extra-judicial activities and the Presidency has found that an objective appearance of impartiality may be denied when a judge previously made determinations of fact based upon consideration of the same issues and evidence, from which it would appear that he or she is not free to depart.¹⁷

The question that is now pending decision before the Pre-Trial Chamber is whether “[t]here are reasonable grounds to believe”¹⁸ that Mr Al Bashir has committed the crime of genocide.¹⁹

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, 23 September 2009, page 6; Decision of the Presidency of 10 December 2009, ICC-RoR221-04/09-2-Conf-Exp-Anx2, 10 December 2009, page 5.

¹⁴ Decision of the Presidency of 10 December 2009, page 5.

¹⁵ Cf. Decision of the Presidency of 30 September 2009 entitled “Decision on the request to be excused from the exercise of judicial functions in Trial Chamber II, pursuant to article 41 of the Rome Statute”, ICC-01/04-01/07-1503-Anx2, 30 September 2009, page 2.

¹⁶ *Prosecutor v. Anto Furundzija*, IT-95-17/1-A, Appeals Chamber Judgment of 21 July 2000, paragraph 189; *Prosecutor v. Stanislav Galic*, IT-98-29-A, Appeals Chamber Judgment of 30 November 2006, paragraph 39; *Prosecutor v. Brdanin & Talic*, IT-99-36, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, 18 May 2000, paragraphs 15, 19; *Prosecutor v. Vojislav Seselj*, IT-03-67-T, Order on the Prosecution Motion for the Disqualification of Judge Frederik Harhoff, Order of the President of 14 January 2008, paragraph 9.

¹⁷ Decision of the Presidency of 10 December 2009, page 5.

¹⁸ See article 58(1) of the Statute.

¹⁹ Judgment on the Appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC-02/05-01/09-73, 3 February 2010.

As noted above, the Commission did not reach any conclusions with regard to whether the crime of genocide was committed in Darfur. It merely recommended that further investigation, in the form of an International Commission of Enquiry, be conducted as to whether genocide had occurred.

More significantly, the Commission was not aimed at establishing or assessing the individual criminal responsibility of Mr Al Bashir, or of any other individual. As the Report indicates, it was aimed at gathering information about the situation in Darfur in order to address the humanitarian crisis.

The Presidency is of the view that, when assessing the appearance of bias in the eyes of the reasonable observer, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, are capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case,²⁰ whilst excluding any information that was available to them in other capacity.

For these reasons, the Presidency finds that the present circumstances do not raise a question of partiality on the part of the applicant due to her previous extra judicial activities.

The Presidency shall make public the request for excusal and this decision, noting that the applicant has expressed her consent in accordance with rule 33(2) of the Rules.

²⁰ See *Prosecutor v. Brdanin & Talic*, IT-99-36, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge, 18 May 2000, paragraph 17; *Prosecutor v. Stanislav Galić*, IT-98-29-A, Appeals Chamber Judgment of 30 November 2006, paragraphs 41 and 44; *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4, Appeals Chamber Judgment of 1 June 2001, paragraph 269.