

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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No.: ICC-01/04-01/07

Date: 21 November 2008

THE PRESIDENCY

Before: Judge Philippe Kirsch, President
Judge Akua Kuenyehia, First Vice-President
Judge René Blattmann, Second Vice-President

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
v. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI**

**URGENT
Confidential**

**Decision concerning the Request of Mr Germain Katanga of 14 November 2008
for re-composition of the bench of Trial Chamber II**

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

The Office of the Prosecutor

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

Counsel for the Defence for Germain

Katanga

Mr David Hooper

Ms Caroline Buisman

Counsel for the Defence for Mathieu

Ngudjolo Chui

Mr Jean-Pierre Kilenda Kagengi Basila

Ms Maryse Alié

Legal Representatives of the Victims

Ms Carine Bapita Buyangandu

Mr Hervé Diakiese

Mr Jean-Christophe Mulamba Nsokoloni

Mr Joseph Keta

Mr J.L. Gilissen

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Daniel Preira

Other

Trial Chamber II

The Presidency of the International Criminal Court (hereinafter “Court”) has before it the application of Mr Germain Katanga of 14 November 2008 for review of the composition of Trial Chamber II.

The application is dismissed for the reasons set out below.

I. PROCEDURAL HISTORY

1. On 24 October 2008, the Presidency constituted Trial Chamber II (hereinafter “Decision”), composed of Judges Fatoumata Dembele Diarra, Fumiko Saiga and Bruno Cotte, and referred to it the case of *the Prosecutor v. Mr Germain Katanga and Mr Mathieu Ngudjolo Chui* (hereinafter “case”).¹
2. On 14 November 2008, Mr Germain Katanga (hereinafter “applicant”) requested the Presidency to reconsider the composition of Trial Chamber II (hereinafter “Chamber”) “in the interests of justice and, further, to avoid appearance of bias” (hereinafter “Application”);² on the grounds that the Chamber lacks a judge from the common law system;³ Judge Saiga lacks qualifications and experience in the area of criminal practice and international criminal law;⁴ and the statements made by Judge Saiga in her previous capacity as the Ambassador of Japan to the United Nations “give an appearance of bias”.⁵
3. On 19 November 2008, the Presidency ordered the applicant to indicate whether the Application should, if it were to be dismissed, be treated as a request for disqualification, pursuant to article 41 of the Rome Statute, with respect to the third ground on the appearance of bias, and ordered the Registrar to notify the Application to the Chamber.⁶
4. On 20 November 2008, the applicant indicated that he sought to maintain the tenor of his original submissions and that the Presidency was not requested to treat the Application as a request for disqualification pursuant to article 41 (hereinafter all references to articles are to those of the Rome Statute (“Statute”)).⁷

¹ Decision constituting Trial Chamber II and referring to it the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-729.

² Katanga Defence observations on the composition of the bench, ICC-01/04-01/07-749-Conf, page 3.

³ Application, pages 3-4.

⁴ Application, pages 4-7.

⁵ Application, pages 7-9.

⁶ Order concerning the Observations of Mr Germain Katanga on the composition of the bench of 14 November 2008, ICC-01/04-01/07-751-Conf.

⁷ Defence Response to the Presidency’s Order dated 19 November 2008, ICC-01/04-01/07-752-Conf, paragraph 3.

II. MERITS

A. The presence of common law judges in the Chamber

1. Arguments of the applicant

5. The applicant submits that the current composition of the Chamber is too narrowly drawn as it includes no judge with a common law background, contrary to the spirit, objectives and the letter of the Statute which give “high priority to the representation of the principal legal systems of the world in each courtroom”.⁸ It was argued that article 36(8), providing that the States Parties shall, in the selection of judges, take into account the need within the Court for the “representation of the principal legal systems of the world”, would be devoid of meaning if judges from similar legal systems were to be concentrated in the same Chambers. Furthermore, it is noted that, as the case is one of the first to be tried before the Court, the “general principles of jurisprudence” have yet to be determined or given substance. It is argued that for the better understanding of new legal issues and the development of the jurisprudence of the Court, it would be preferable to have for the trial a mix of judges representing the principal legal systems of the world. For those reasons, the applicant argues that it is appropriate to include at least one common law judge amongst the three judges of the Chamber and requests the Presidency to revise its Decision accordingly.⁹

2. Determination of the Presidency

6. On the argument that no common law judges have been included in the Chamber, the Presidency notes that the Statute, the Rules of Procedure and Evidence (hereinafter all references to rules are to those of the Rules of Procedure and Evidence (“Rules”)) and the Regulations of the Court (hereinafter all references to regulations are to those of the Regulations of the Court) do not provide criteria for the constitution of Chambers.
7. The only reference to legal systems is to be found in article 36(8), which provides:
- (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:
 - (i) The representation of the principal legal systems of the world;
 - (ii) Equitable geographical representation; and
 - (iii) A fair representation of female and male judges.

⁸ Application, page 3.

⁹ Application, pages 3-4.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

8. Whilst this provision does not name any legal systems, the common law system is, undoubtedly, amongst the principal legal systems of the world. However, the representation of principal legal systems of the world is a criterion which the only States Parties are required to take into account in the election of judges and not a criterion required in the composition of Chambers.
9. Moreover, the provisions of the Statute and Rules closely related to the composition of Chambers do not require that the Presidency take into account the representation of principal legal systems of the world. Article 39(1) provides that the assignment to Divisions, a matter for the plenary session of the judges in accordance with rule 4, shall be based on an "appropriate combination of expertise in criminal law and procedure and international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience." No mention is made of the legal system to which the judges should belong. Regulation 15 on the replacement of judges, requires the Presidency to take into account, to the extent possible, only gender and equitable geographical representation.
10. Notwithstanding the above, in constituting Chambers, the Presidency endeavours to take into account the criteria set out in articles 36(8) and 39(1) and regulation 15, including the representation of the major legal systems of the world. In the present context it should be noted that of the thirteen judges assigned to the Trial and Pre-Trial Divisions, only three are common law judges, making it impossible to have a common law judge in every Pre-Trial and Trial Chamber. Of these three judges, one is presiding over the case of *the Prosecutor v. Thomas Lubanga Dyilo*, another has replaced Judge Pillay in the Appeals Division, whilst the third presided over the confirmation hearing of the applicant and therefore cannot sit in the Chamber, in accordance with article 39(4).

B. The qualifications and experience of Judge Saiga

1. Arguments of the applicant

11. The applicant raises concern regarding the appointment of Judge Saiga to the Chamber. It is argued that, although of "high moral character, impartiality and integrity", Judge Saiga lacks qualifications and experience in the area of criminal practice and international criminal law. It is noted that Judge Saiga, whilst qualified to sit on the Supreme Court of Japan, would not be qualified to sit as a trial judge in

Japan and has no legal qualifications.¹⁰ It is essential, it is submitted, that all three judges of a Trial Chamber, where issues of guilt and innocence and highly technical legal matters fall to be determined by a majority of two, should have at the very minimum a law degree. It is argued that the designation of Judge Saiga as a trial judge is in violation of the spirit, objectives and letter of the Statute; article 36(3)(a), which only requires that judges possess the qualifications required in their respective States for appointment to the highest judicial offices, does not stand alone but must be read in conjunction with article 36(3)(b), which requires either established competence in criminal procedure or established competence in relevant areas of international law and extensive experience in a professional legal capacity relevant to judicial work. For the above reasons, the applicant requests the Presidency to make a more appropriate appointment so as to better secure the fair trial rights of the applicant.

2. Determination of the Presidency

12. The Presidency has noted the arguments of the applicant, in particular with regard to article 36(3), which provides:

(a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

13. In essence, the issue goes to the election of judges by the Assembly of States Parties, which takes place in accordance with article 36. The election of judges and, therefore, the evaluation of the qualifications of the candidates for the position of judge of the Court are left to the discretion of the Assembly of States Parties. Absent violation of objective criteria specified for the election of judges, the Court must respect this discretion. In the present case, the Assembly of States Parties has determined that Judge Saiga meets the qualifications set out in article 36(3)(b)(ii).

¹⁰ Application, pages 4-5.

14. As with the representation of legal systems referred to above, no provisions govern the actual composition of Chambers with respect to competency. However, as indicated above, the Presidency always endeavours to take into account the relevant criteria. Specifically, article 39(1) requires that:

The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.

15. The Presidency therefore seeks to ensure, where possible, an appropriate combination of expertise in criminal law and procedure and in international law within Chambers, even though this is a condition set for the assignment of judges to the Divisions by the plenary session of the judges, in accordance with article 39(1), and not strictly the constitution of Chambers.
16. The different types of experience of judges mentioned in article 39(1) clearly refer to the criteria set out in article 36(3)(b). In the instant case, the Chamber comprises two judges elected on the basis of their meeting the qualifications in article 36(3)(b)(i) (also known as "List A" judges, in accordance with article 36(5)) and one judge elected on the basis of her meeting the qualifications in article 36(3)(b)(ii) (also known as a "List B" judge, in accordance with article 36(5)). Therefore, the Chamber is predominantly comprised of judges whom the Assembly of States Parties have determined have the necessary relevant experience in criminal proceedings.

C. The appearance of bias

1. Arguments of the applicant

17. The applicant raises concerns with respect to Judge Saiga's prior involvement in matters directly relevant to the case. It is argued that in her capacity as Ambassador of Japan to the United Nations, Judge Saiga made statements on the gravity of using child soldiers in conflict and, with reference to a report by the United Nations Secretary General, submitted that Lendu militia recruited or used child soldiers in 2003. Given that both accused persons in the case allegedly belonged to the Lendu / Nigiti militia groups and are charged with the use of child soldiers in 2003, it is argued that the afore-mentioned submission of Judge Saiga necessarily gives the

impression of legal bias;¹¹ with reference to the jurisprudence of, *inter alia*, the European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia it is noted that it is sufficient to establish an appearance of bias, as is argued in the instant case, not actual bias.¹² Furthermore, it is argued that the determination of the Secretary General, General Assembly and Security Council, explicitly supported by Judge Saiga, that the recruitment and use of child soldiers are crimes under international law undermines any challenge raised by the applicant on jurisdiction in respect of those crimes.¹³

2. Determination of the Presidency

18. With respect to the argument that the presence of Judge Saiga in the Chamber creates an appearance of bias against the applicant, the Presidency notes the terms of rule 35, which provides that “where a judge...has reason to believe that a ground for disqualification exists in relation to him or her, he or she shall make a request [to the Presidency] to be excused and shall not wait for a request for disqualification to be made in accordance with article 41, paragraph 2, or article 42, paragraph 7 and rule 34 [...]”. By order of the Presidency of 19 November 2008, the judges of the Chamber were notified of the Application and no request for excusal has since been forthcoming. In so far as the applicant is not, at this stage, raising a question of disqualification, the Presidency recalls its decision of 26 January 2006 that “[n]either the Statute nor the Rules make provision for the pre-emptive control by the Presidency of the impartiality of the judges”.

The application is dismissed.

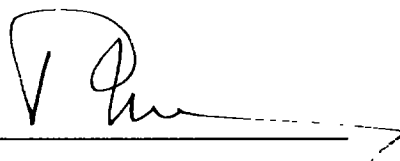
The Registrar is ordered to notify the submissions of the applicant of 20 November 2008 to the Chamber (ICC-01/04-01/07-752-Conf).

¹¹ Application, pages 7-8.

¹² Application, page 9.

¹³ Application, page 8.

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



Judge Philippe Kirsch
President

Dated this 21 November 2008
At The Hague, the Netherlands