



Original: **English**

No.: **ICC-02/05-01/09**

Date: **3 July 2009**

**THE PRESIDENCY**

**Before:**                    **Judge Sang-Hyun Song, President**  
                                  **Judge Fatoumata Dembele Diarra, First Vice-President**  
                                  **Judge Hans-Peter Kaul, Second Vice-President**

**SITUATION IN DARFUR, SUDAN**  
**IN THE CASE OF**  
***THE PROSECUTOR v. OMAR HASSAN AHMAD AL-BASHIR***

**Public**

**Decision replacing judges in the Appeals Chamber**

**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, Prosecutor  
 Ms Fatou Bensouda, Deputy-Prosecutor

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
 Participation/Reparation**

**The Office of Public Counsel for Victims**  
 Ms Paolina Massida

**The Office of Public Counsel for the  
 Defence**  
 Mr Xavier-Jean Keïta

**States Representatives**

**Amicus Curiae**

**REGISTRY**

**Registrar**  
 Ms Silvana Arbia

**Defence Support Section**  
 Mr Esteban Peralta Losilla

**Deputy Registrar**  
 Mr Didier Daniel Preira

**Detention Section**  
 Mr Anders Backman

**Victims and Witnesses Unit**  
 Mr Simo Vaatainen

**Victims Participation and Reparations  
 Section**  
 Ms Fiona Mckay

**Other**

**THE PRESIDENCY** of the International Criminal Court;

**NOTING** the intention of the Prosecutor to appeal<sup>1</sup> the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” issued by Pre-Trial Chamber I on 4 March 2009;<sup>2</sup>

**NOTING** the composition of the Appeals Chamber as set out in article 39(2)(b)(i) of the Rome Statute of the International Criminal Court (“Statute”), pursuant to which the Appeals Chamber shall be composed of all the judges of the Appeals Division, which in turn is composed of the President and four other judges by virtue of article 39(1) of the Statute;

**NOTING** that, following the fourteenth plenary session of the judges held on 13 March 2009, the Appeals Division is composed of Judges Sang-Hyun Song, Akua Kuenyehia, Erkki Kourula, Anita Ušacka and Daniel David Ntanda Nsereko;<sup>3</sup>

**NOTING** the requests for excusal filed before the Presidency on 2 July 2009 by Judges Akua Kuenyehia and Anita Ušacka (“judges”) pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence (“Rules”),<sup>4</sup> wherein the judges requested to be excused from sitting on the impending appeal in its entirety on the basis of their previous involvement in the pre-trial phase of the case against Mr Omar Hassan Ahmad Al-Bashir (hereinafter “case”), in the course of which the judges issued a warrant of arrest for Mr Omar Hassan Ahmad Al-Bashir;

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<sup>1</sup> Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’, ICC-02/05-01/09-21; Prosecution Request for an Extension of the Page Limit for its Document in Support of Appeal against the ‘Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir’, ICC-02/05-01/09-22.

<sup>2</sup> ICC-02/05-01/09-3.

<sup>3</sup> See Press Release of 19 March 2009 entitled “New composition of ICC judicial divisions”, ICC-CPI-20091911-PR399, available on the website of the Court.

<sup>4</sup> Annex I.

**NOTING** the decision of the Presidency of 3 July 2009, granting the requests for excusal of the judges on the grounds of their previous involvement in the case in accordance with article 41 and treating them as unavailable for the purpose of the impending appeal;<sup>5</sup>

**CONSIDERING** rule 38 of the Rules, providing for the replacement of judges;

**CONSIDERING** regulation 15 of the Regulations of the Court, pursuant to which the Presidency is responsible for the replacement of judges in accordance with article 39 of the Statute, and regulation 12 of the Regulations of the Court, further to which the Presidency shall, in the event that a member of the Appeals Chamber is disqualified, or unavailable for a substantial reason, attach to the Appeals Chamber on a temporary basis a judge from either the Trial or Pre-Trial Division;

**HEREBY DECIDES:**

- i. to temporarily attach Judge Ekaterina Trendafilova, currently assigned to the Pre-Trial Division, and Judge Joyce Aluoch, currently assigned to the Trial Division, to the Appeals Chamber for the purpose of the impending appeal;
- ii. that the Appeals Chamber shall, for the purpose of the impending appeal, be composed as follows:

Judge Sang-Hyun Song

Judge Erkki Kourula

Judge Ekaterina Trendafilova

Judge Daniel David Ntanda Nsereko

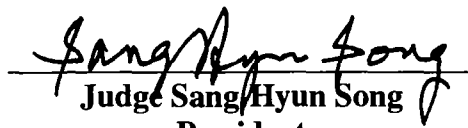
Judge Joyce Aluoch

**ORDERS** the Registrar to file and notify this decision to the relevant parties and participants in the case.

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<sup>5</sup> Annex II.

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

  
Judge Sang Hyun Song  
President

Dated this 3 July 2009

At The Hague, The Netherlands

# **ANNEX I**



Internal memorandum  
Memorandum interne

To   À	Presidency	From   De	Judge Kuenyehia <i>AK</i>
Date	2 July 2009	Through   Via	
Ref.	02/05-01/09 OA 1	Copies	Judge Nsereko, President of the Appeals Division
Subject   Objet	Request for recusal pursuant to article 41 (1) of the Statute and rule 33 of the Rules of Procedure and Evidence		

CONFIDENTIAL

1. Today, the Prosecutor filed a request for an extension of the page limit<sup>1</sup> for the document in support of his appeal against the decision of Pre-Trial Chamber of 4 March 2009<sup>2</sup> on the Prosecutor's application for a warrant of arrest in respect of Mr. Omar Hassan Ahmad Al Bashir. Pursuant to article 41 (1) of the Statute and rule 33 of the Rules of Procedure and Evidence, I hereby request to be excused from sitting on this appeal, including in respect of the Prosecutor's request for an extension of the page limit.
2. I make this request because I was a member of the Pre-Trial Chamber that rendered the decision of 4 March 2009 and therefore have "previously been involved ... in that case before the Court" (second sentence of article 41 (2) (a) of the Statute).
3. Pursuant to rule 33 (2) of the Rules of Procedure and Evidence, I submit this request confidentially. However, I would not object if the Presidency wished to make public this request or the reasons for its eventual decision on this request (second sentence of rule 33 (2) of the Rules of Procedure and Evidence).

<sup>1</sup> See ICC-02/05-01/09-22.

<sup>2</sup> See ICC-02/05-01/09-2-Conf and ICC-02/05-01/09-3.



**Internal memorandum  
Memorandum interne**

<b>To   À</b>	<b>Presidency</b>	<b>From   De</b>	<b>Judge Ušacka</b>
<b>Date</b>	2 July 2009	<b>Through   Via</b>	
<b>Ref.</b>	02/05-01/09 OA 1	<b>Copies</b>	<b>Judge Nsereko, President of the Appeals Division</b>
<b>Subject   Objet</b>	<b>Request for recusal pursuant to article 41 (1) of the Statute and rule 33 of the Rules of Procedure and Evidence</b>		

**CONFIDENTIAL**

1 Today, the Prosecutor filed a request for an extension of the page limit<sup>1</sup> for the document in support of his appeal against the decision of Pre-Trial Chamber of 4 March 2009<sup>2</sup> on the Prosecutor's application for a warrant of arrest in respect of Mr. Omar Hassan Ahmad Al Bashir. Pursuant to article 41 (1) of the Statute and rule 33 of the Rules of Procedure and Evidence, I hereby request to be excused from sitting on this appeal, including in respect of the Prosecutor's request for an extension of the page limit.

2. I make this request because I was a member of the Pre-Trial Chamber that rendered the decision of 4 March 2009 and therefore have "previously been involved ... in that case before the Court" (second sentence of article 41 (2) (a) of the Statute).

3. Pursuant to rule 33 (2) of the Rules of Procedure and Evidence, I submit this request confidentially. However, I would not object if the Presidency wished to make public this request or the reasons for its eventual decision on this request (second sentence of rule 33 (2) of the Rules of Procedure and Evidence).

<sup>1</sup> See ICC-02/05-01/09-22

<sup>2</sup> See ICC-02/05-01/09-2-Conf and ICC-02/05-01/09-3



## **ANNEX II**



**Internal memorandum  
Memorandum interne**

<b>To   À</b>	Judge Akua Kuenyehia Judge Anita Ušacka	<b>From   De</b>	The Presidency <i>Shs</i>
<b>Date</b>	3 July 2009	<b>Through   Via</b>	
<b>Ref.</b>	2009/PRES/00312-3	<b>Copies</b>	Judge Daniel David Ntanda Nsereko
<b>Subject   Objet</b>	Decision on the request to be excused from sitting on the appeal against the decision of Pre-Trial Chamber I on the Prosecutor's application for an arrest warrant in the case of <i>The Prosecutor v. Omar Hassan Ahmad Al-Bashir</i> , pursuant to article 41 of the Rome Statute		

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 requests of Judge Akua Kuenyehia and Judge Anita Ušacka of the Appeals Chamber (hereinafter "applicants") of 2 July 2009 to be excused from sitting on the impending appeal against the decision of Pre-Trial Chamber I of 4 March 2009 on the application of the Prosecutor for a warrant of arrest in respect of Mr Omar Hassan Ahmad Al-Bashir (hereinafter "impending appeal"), including in respect of the request of the Prosecutor for an extension of the page limit for filing the document in support of the impending appeal.<sup>1</sup>

The request for excusal is granted.

### **Factual Background**

On 2 July 2009, by memoranda classified as confidential, the applicants requested the Presidency to excuse them from sitting on the impending appeal, pursuant to article 41 of the Rome Statute (hereinafter "Statute") and rule 33 of the Rules of Procedure and Evidence (hereinafter "Rules"). The requests for excusal are based upon the previous involvement of the applicants in the pre-trial phase of the case against Mr Omar Hassan Ahmad Al-Bashir (hereinafter "case"). Given that the applicants were members of the Pre-Trial Chamber that rendered the decision of 4 March 2009, they consider that they

<sup>1</sup> ICC-02/05-01/09-22.

have “previously been involved ... in that case before the Court” within the meaning of article 41(2)(a) of the Statute.<sup>2</sup>

### **Decision**

The requests for excusal are properly before the Presidency in accordance with article 41 of the Statute and rule 33 of the Rules.

The Presidency finds the requests for excusal to be well founded. Article 41(1) of the Statute provides: “[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 provides: “[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 requests for excusal were triggered by the request of the Prosecutor for an extension of the page limit for filing his document in support of the impending appeal. The applicants have requested to be excused from the impending appeal in its entirety. Considering the terms of articles 41(1) and 41(2)(a) of the Statute and the previous involvement of the applicants in the pre-trial phase of the case, the request for excusal from the impending appeal in its entirety is granted. This necessarily includes involvement in the decision upon the request of the Prosecutor for an extension of the page limit for filing his document in support of the impending appeal.

The Presidency, pursuant to rule 38 of the Rules and regulations 12 and 15 of the Regulations of the Court, will, for the purpose of the impending appeal, treat the applicants as unavailable and proceed with their replacement in the Appeals Chamber.

The Presidency notes that the applicants have consented to the Presidency making public the request for excusal and the reasons for its decision on the request for excusal, pursuant to rule 33(2) of the Rules. A copy of this decision and the requests for excusal will be annexed to the decision of the Presidency replacing the applicants in the Appeals Chamber for the purpose of the impending appeal.

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<sup>2</sup> Judge Akua Kuenyehia’s request for excusal, paragraph 2; Judge Anita Ušacka’s request for excusal, paragraph 2.