

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

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

**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**

Mr David Hooper  
Mr Andres O'Shea

**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**

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**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 “Appeal of the Defence for Germain Katanga against the Decision of the Trial Chamber ‘*Motifs de la décision orale relative à l’exception d’irrecevabilité de l’affaire*’”, filed on 22 June 2009 before the Appeals Chamber (“appeal”);<sup>1</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>2</sup>

**NOTING** the request for excusal filed before the Presidency on 24 June 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>3</sup> wherein the judges requested to be excused from sitting on the appeal on the basis of their previous involvement in the pre-trial phase of the case against Mr Germain Katanga (hereinafter “case”), in the course of which the judges *inter alia* issued a warrant of arrest for Mr Germain Katanga and confirmed the charges against him;

**NOTING** the decision of the Presidency of 3 July 2009, granting the request for excusal of the judges on the grounds of their previous involvement in the case in accordance with article 41 and treating the judges as unavailable for the purpose of the appeal;<sup>4</sup>

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<sup>1</sup> ICC-01/04-01/07-1234.

<sup>2</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>3</sup> Annex I.

<sup>4</sup> Annex II

**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 appeal;
- ii. that the Appeals Chamber shall, for the purpose of the appeal, be composed as follows:

Judge Sang-Hyun Song

Judge Erkki Kourula

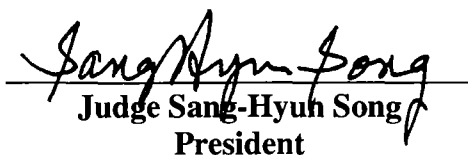
Judge Ekaterina Trendafilova

Judge Daniel David Ntanda Nsereko

Judge Joyce Aluoch

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

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**

**Cour  
Pénale  
Internationale**



Les Chambres

**International  
Criminal  
Court**

The Chambers

Internal memorandum  
Memorandum interne

To   À	Presidency	From   De	Judge Kuenyehia, Judge Ušacka
Date	24 June 2009	Through   Via	
Ref.	01/04-01/07 OA 8	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. On 22 June 2009, Mr. Katanga filed an appeal<sup>1</sup> against the decision of Trial Chamber II of 12 June 2009 on the admissibility of his case.<sup>2</sup> Pursuant to article 41 (1) of the Statute and rule 33 of the Rules of Procedure and Evidence, we hereby request to be excused from sitting on this appeal.
2. The reason for this request is our previous involvement in the case against Mr. Katanga during the pre-trial phase of the proceedings, in the course of which we *inter alia* issued a warrant of arrest for Mr. Katanga<sup>3</sup> and confirmed the charges against him.<sup>4</sup> We 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, we submit this request confidentially. However, we would not object if the Presidency wished to make public 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-01/04-01/07-1234.

<sup>2</sup> See ICC-01/04-01/07-T-67; ICC-01/04-01/07-1213.

<sup>3</sup> See ICC-01/04-01/07-1.

<sup>4</sup> See ICC-01/04-01/07-717.

## **ANNEX II**



**Internal memorandum  
Memorandum interne**

To   À	Judge Akua Kuenyehia Judge Anita Ušacka	From   De	The Presidency <i>shs</i>
Date	3 July 2009	Through   Via	
Ref.	2009/PRES/00310-2	Copies	Judge Daniel David Ntanda Nsereko
Subject   Objet	Decision on the request to be excused from sitting on the appeal against the decision on admissibility in the case of <i>The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui</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 request of Judge Akua Kuenyehia and Judge Anita Ušacka of the Appeals Chamber (hereinafter “applicants”) of 24 June 2009 to be excused from sitting on the appeal against the decision of Trial Chamber II of 12 June 2009 on the admissibility of the case against Mr Germain Katanga (hereinafter “appeal”).<sup>1</sup>

The request for excusal is granted.

### **Factual Background**

On 24 June 2009, by memorandum classified as confidential, the applicants requested the Presidency to excuse them from sitting on the appeal, pursuant to article 41 of the Rome Statute (hereinafter “Statute”) and rule 33 of the Rules of Procedure and Evidence (hereinafter “Rules”). The request for excusal is based upon the previous involvement of the applicants in the pre-trial phase of the case against Mr Germain Katanga (hereinafter “case”), in the course of which the applicants *inter alia* issued a warrant of arrest for Mr Germain Katanga and confirmed the charges against him. As such, the

<sup>1</sup> ICC-01/04-01/07-1234.



applicants consider that they 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 request for excusal is properly before the Presidency in accordance with article 41 of the Statute and rule 33 of the Rules.

The Presidency finds the request 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...”

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 is granted.

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 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 request for excusal will be annexed to the decision of the Presidency replacing the applicants in the Appeals Chamber for the purpose of the appeal.

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<sup>2</sup> Request for excusal, paragraph 2.