

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 4 August 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  
 Ms Fatou Bensouda

**Counsel for the Defence of Mr Katanga**  
 Mr David Hooper  
 Mr Andres O'Shea

**Counsel for the Defence of Mr Ngudjolo  
 Chui**  
 Mr Jean-Pierre Kilenda Kakengi Basila  
 Mr Jean-Pierre Fofé Djofia Malewa

**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 Paulina 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

**Deputy Registrar**  
 Mr Didier Daniel Preira

**Defence Support Section**  
 Mr Esteban Peralta Losilla

**Victims and Witnesses Unit**  
 Ms Maria Luisa Martinod-Jacome

**Detention Section**  
 Mr Anders Backman

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

**Other**  
 Appeals Chamber

**THE PRESIDENCY** of the International Criminal Court (“Court”)

**NOTING** the appeal of the Prosecutor filed on 28 July 2009 before the Appeals Chamber against a decision of Trial Chamber II of 24 June 2009 (“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<sup>2</sup> and fifteenth plenary sessions of the judges held on 13 March 2009 and 8 June 2009 respectively, the Appeals Division is composed of Judges Sang-Hyun Song, Akua Kuenyehia, Erkki Kourula, Anita Ušacka and Daniel David Ntanda Nsereko;

**NOTING** the request for excusal filed before the Presidency on 28 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>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 and Mr Mathieu Ngudjolo Chui (hereinafter “case”), in the course of which the judges issued warrants of arrest and confirmed the charges against the aforementioned persons;

**NOTING** the decision of the Presidency of 4 August 2009 pursuant to article 41,<sup>4</sup> granting the request for excusal on the ground of the judges’ previous involvement in the case and treating them as unavailable for the purpose of the appeal;

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

<sup>1</sup> ICC-01/04-01/07-1340-Conf-Exp.

<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** 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;

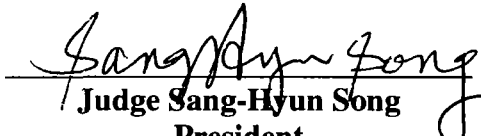
**HEREBY DECIDES:**

- 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; and  
Judge Joyce Aluoch.

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

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

  
Judge Sang-Hyun Song  
President

Dated this 4 August 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	28 July 2009	Through   Via	
Ref.	01/04-01/07 OA 9	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 Appeals Chamber was notified of the Prosecutor's document in support of appeal<sup>1</sup> against a decision that Trial Chamber II had rendered on 24 June 2009 in the case *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.<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 and Mr. Ngudjolo Chui during the pre-trial phase of the proceedings, in the course of which we *inter alia* issued warrants of arrest<sup>3</sup> and confirmed the charges against the suspects.<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 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). We note, however, that the Prosecutor's document in support of the appeal was submitted to the Appeals Chamber confidentially and *ex parte*.

<sup>1</sup> See ICC-01/04-01/07-1340-Conf-Exp.

<sup>2</sup> See ICC-01/04-01/07-1243-Conf-Exp.

<sup>3</sup> See ICC-01/04-01/07-1 and ICC-01/04-02/07-1.

<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	4 August 2009	Through   Via	
Ref.	2009/PRES/00310-4	Copies	Judge Daniel David Ntanda Nsereko
Subject   Objet	Decision on the request to be excused from sitting on the appeal against the decision of Trial Chamber II 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 28 July 2009 to be excused from sitting on the appeal of the Prosecutor of 28 July 2009 against the decision rendered by Trial Chamber II on 24 June 2009 in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (hereinafter “appeal”)¹.

The request for excusal is granted.

#### **Factual Background**

On 28 July 2009, by memoranda 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 and Mr Mathieu Ngudjolo Chui, in the course of which the applicants, *inter alia*, issued warrants of arrest and confirmed the charges against the aforementioned persons. The applicants therefore consider themselves to have “previously been involved ... in that case before the Court” within the meaning of article 41(2)(a) of the Statute.

¹ ICC-01/04-01/07-1340-Conf-Exp.



## 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, in relevant part, provides that “[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 further provides that “[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 applicants have requested to be excused from sitting on the appeal. 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 against Mr Germain Katanga and Mr Mathieu Ngudjolo Chui, 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, shall, 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 in accordance with 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.