

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/04-01/06**
Date: **23 September 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. THOMAS LUBANGA DYILO

Public

Decision replacing a judge 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

Ms Catherine Mabilie
Mr Jean-Marie Biju Duval

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 Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Mr Esteban Peralta Losilla

Deputy Registrar

Mr Didier Preira

Detention Section

Mr Anders Backman

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Other

Appeals Chamber
Trial Chamber I

**Victims Participation and Reparations
Section**

Ms Fiona McKay

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

NOTING Trial Chamber I’s “Decision on the prosecution and the defence applications for leave to appeal the ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’” of 3 September 2009¹ in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“case”) granting leave to appeal against a decision of Trial Chamber I of 14 July 2009 (“appeals”);²

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 of the Court and four other judges by virtue of article 39(1) of the Statute;

NOTING that, following the fourteenth³ 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 4 September 2009 by Judge Akua Kuenyehia (“judge”) pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence (“Rules”),⁴ wherein the judge requested to be excused from sitting on the appeals on the basis of her previous involvement in the pre-trial phase of the case, in the course of which the judge issued a warrant of arrest and confirmed the charges against the aforementioned person;

NOTING the decision of the Presidency of 15 September 2009 pursuant to article 41,⁵ granting the request for excusal on the ground of the judge’s previous involvement in the case and treating her as unavailable for the purpose of the appeals;

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.

¹ ICC-01/04-01/06-2107.

² ICC-01/04-01/06-2049.

³ 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.

⁴ Annex I.

⁵ Annex II.

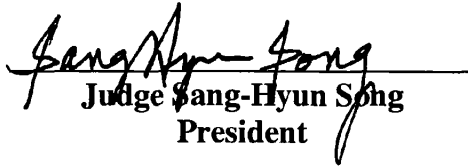
HEREBY DECIDES:

- i. to temporarily attach Judge Christine Van den Wyngaert, currently assigned to the Trial Division, to the Appeals Chamber for the purpose of the appeals;
- ii. that the Appeals Chamber shall, for the purpose of the appeals, be composed as follows:

Judge Sang-Hyun Song;
Judge Erkki Kourula;
Judge Anita Ušacka;
Judge Daniel David Ntanda Nsereko; and
Judge Christine Van den Wyngaert.

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 23 September 2009

At The Hague, The Netherlands

ANNEX I



Internal memorandum
Memorandum interne

To À	Presidency	From De	Judge Kuenyehia <i>AKL</i>
Date	4 September 2009	Through Via	
Ref.	01/04-01/06	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. Yesterday, the Appeals Chamber was notified of Trial Chamber I's "Decision on the prosecution and the defence applications for leave to appeal the 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'"¹ in the case *Prosecutor v. Thomas Lubanga Dyilo*, granting leave to appeal its decision of 14 July 2009.² 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 appeals arising from yesterday's decision.
2. The reason for this request is my previous involvement in the case against Mr. Lubanga Dyilo during the pre-trial phase of the proceedings, in the course of which I *inter alia* issued a warrant of arrest³ and confirmed the charges against the suspects.⁴ I 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).

¹ ICC-01/04-01/06-2107.

² ICC-01/04-01/06-2049.

³ ICC-01/04-01/06-2.

⁴ ICC-01/04-01/06-803.

ANNEX II

**Cour
Pénale
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La Présidence

**International
Criminal
Court**

The Presidency

**Internal memorandum
Memorandum interne**

To À	Judge Akua Kuenyehia	From De	The Presidency <i>shs</i>
Date	15 September 2009	Through Via	
Ref.	2009/PRES/439-2	Copies	Judge Daniel David Ntanda Nsereko
Subject Objet	Decision on the request of 14 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 <i>The Prosecutor v. Thomas Lubanga Dyilo</i> , pursuant to article 41(1) of the Statute and rule 33 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 on the request of Judge Akua Kuenyehia of the Appeals Chamber (hereinafter "applicant") of 4 September 2009 to be excused from sitting on the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*.¹

The request for excusal is granted.

Factual Background

On 4 September 2009, by memorandum classified as confidential,² the applicant requested the Presidency to excuse her from sitting on the appeals, pursuant to article 41(1) 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 applicant in the pre-trial phase of the case in the course of which the applicant *inter alia* issued a warrant of arrest and confirmed the charges against Mr Lubanga Dyilo. The

¹ Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049.

² 2009/PRES/439.

applicant therefore considers herself to have "previously been involved...in that case before the Court" within the meaning of article 41(2)(a) of the Statute.

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...".

Considering the terms of article 41 of the Statute and the previous involvement of the applicant 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 appeals, treat the applicant as unavailable and proceed with her replacement in the Appeals Chamber.

The Presidency notes that the applicant has consented to the Presidency making public the request for excusal and the reasons for its decision upon that request 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 applicant in the Appeals Chamber for the purpose of the appeals.



ANNEX III

**Cour
Pénale
Internationale**



La Présidence

**International
Criminal
Court**

The Presidency

**Internal memorandum
Memorandum interne**

To / À	Judge Anita Ušacka	From / De	The Presidency <i>shs</i>
Date	23 September 2009	Through / Via	
Ref.	2009/PRES/460-02	Copies	
Subject / Objet	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 <i>The Prosecutor v. Thomas Lubanga Dyilo</i> , pursuant to article 41(1) of the Statute and rule 33 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 on the request of Judge Anita Ušacka of the Appeals Chamber (hereinafter "applicant") dated 16 September 2009 wherein she requested to be excused from sitting on the appeals arising from Trial Chamber I's decision of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (hereinafter "case").

The request for excusal is denied.

Factual Background

On 3 September 2009, Trial Chamber I granted leave to appeal in respect of its decision of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (hereinafter "appellate proceedings").¹ On 7 September 2009, by memorandum classified as confidential,² the applicant brought to the attention of the Presidency her previous involvement in a decision of Pre-Trial Chamber I (hereinafter "Chamber") in that case.³ Having described her involvement in that decision and her understanding of the scope of article 41(2)(a) of the Statute, which addresses the excusal and disqualification of judges, the applicant noted that

¹ Decision on the prosecution and the defence applications for leave to appeal the "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06-2107.

² 2009/PRES/450.

³ Decision on the Motion by Former Counsel for Leave to File Written Corrigenda to Oral Arguments, ICC-01/04-01/06-1028.

she "... [did] not feel that a ground for [her] disqualification exist[ed] in relation to these appellate proceedings, and therefore [did] not feel that a request to be excused, pursuant to article 41(1) of the Rules[sic], [was] warranted".⁴ Nonetheless, the applicant considered that it was possible to understand article 41(2)(a) so that "a judge sh[ould] be disqualified if that judge ha[d] previously been involved in *any* capacity in that case before the Court" (emphasis in original).⁵ Although not requesting excusal, the applicant noted that "in all matters pertaining to judicial ethics, a Judge should proceed cautiously". Thus, noting the lack of clarity as to the meaning of article 41(2) and considering that "there [was] no formal mechanism provided in the Statute, Rules, Regulations or Code of Judicial Ethics in which a Judge may ask advice when faced with such an issue", she sought possible further instruction.⁶

By memorandum of 15 September 2009, the Presidency provided such instruction.⁷ The Presidency indicated that it could not take further action in respect of the applicant's memorandum dated 7 September 2009. The Presidency indicated that where a judge did not feel that a request for excusal was warranted "[t]hat would normally be the end of the matter".⁸ The Presidency acknowledged, however, that a judge may feel uncertain as to whether a ground deemed reasonable for disqualification exists, noting that "[w]here in doubt, a cautious approach should be followed".⁹ Although the Presidency was "not prepared to act in an advisory capacity in the present matter where the opinion as to whether a reasonable ground for disqualification exists [was] vested in an individual judge and where an avenue for adjudication [was] foreseen on such matters in accordance with article 41 of the Statute and rules 33 and 35 of the Rules",¹⁰ the Presidency indicated to the applicant that the procedure by which it could further consider the merits of any ground for disqualification would be if the matter was presented as a request for excusal.¹¹

On 16 September 2009, by memorandum classified as confidential,¹² the applicant requested the Presidency to excuse her from sitting in the appellate proceedings (hereinafter "request for excusal"), pursuant to article 41(1) of the Rome Statute (hereinafter "Statute") and rule 33 of the Rules of Procedure and Evidence (hereinafter "Rules").

⁴ Page 3.

⁵ Page 2.

⁶ Page 3.

⁷ 2009/PRES/450-2.

⁸ Page 3.

⁹ Page 3.

¹⁰ Page 3.

¹¹ Page 3.

¹² 2009/PRES/00460.

The request for excusal is based on the facts set out below. On 29 January 2007, the Chamber, then composed of Judge Claude Jorda, Judge Akua Kuenyehia and Judge Sylvia Steiner issued the "Decision on the confirmation of charges" in the case.¹³ On 5 June 2007, the Chamber, still composed of Judge Claude Jorda, Judge Akua Kuenyehia and Judge Sylvia Steiner, determined that it was no longer seised of the case.¹⁴ Following the announcement of the resignation of Judge Jorda, the Presidency decided, on 22 June 2007, to temporarily attach the applicant to the Pre-Trial Division and to assign her to the Chamber with effect from 25 June 2007.¹⁵ The applicant sat in that Chamber until she was assigned to the Appeals Division, following the fourteenth¹⁶ and fifteenth plenary sessions of the judges held on 13 March 2009 and 8 June 2009 respectively.

On 30 October 2007, former defence counsel in the case filed a motion before the Chamber (hereinafter "Motion"),¹⁷ by then composed of Judge Akua Kuenyehia, Judge Sylvia Steiner and the applicant, requesting the correction of a transcript of a hearing in the confirmation of charges proceedings. On 14 November 2007, the Chamber declined the Motion (hereinafter "Decision").¹⁸

The applicant states that she does not believe that her impartiality might reasonably be doubted were she to participate in the appellate proceedings. The applicant makes this assertion on the grounds that the Chamber was no longer seised of the case on the date of the Decision¹⁹ and, further, that the Decision "did not require an assessment of the facts of the case, a determination of guilt or innocence, or substantive legal arguments".²⁰

In her memorandum, the applicant notes that, pursuant to rule 35 of the Rules, a judge has a duty to request to be excused where he or she has reason to believe that a ground for disqualification exists and shall not wait for a request for disqualification to be brought in accordance with article 41 of the Statute.²¹ The applicant notes that article 41(2)(a) of the

¹³ ICC-01/04-01/06-803-tEN.

¹⁴ Decision on the application for additional means under regulation 83(3) of the *Regulations of the Court* and on the applications to intervene as *amici curiae* under rule 103 of the *Rules of Procedure and Evidence*, ICC-01/04-01/06-919-tENG.

¹⁵ Decision replacing a judge in Pre-Trial Chamber I, ICC-01/04-01/06-930.

¹⁶ 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.

¹⁷ Motion by former counsel to file written corrigenda to oral arguments, ICC-01/04-01/06-1009.

¹⁸ Decision on the Motion by Former Counsel for Leave to File Written Corrigenda to Oral Arguments, ICC-01/04-01/06-1028.

¹⁹ Trial Chamber I declining to deal with the motion but making no express referral to the Chamber pursuant to article 64(4) of the Statute.

²⁰ Page 3.

²¹ Page 2.

Statute "appears to indicate that a judge shall be disqualified if that judge has previously been involved in *any* capacity in that case before the Court. Read this way, signing one decision in a case could be considered involvement in that case" (emphasis in original).²²

The applicant states that in her view, however, applying article 41(2)(a) of the Statute in that way " ... lead[s] to unreasonable and unintended results".²³ The applicant submits that the second sentence of article 41(2)(a) of the Statute, should be read in the context of the provision as a whole; the purpose of the provision, in line with the first sentence, being to "certify the integrity and impartiality of the judicial proceedings" by ensuring that judges who have previously participated in a case do not participate in proceedings if their impartiality might reasonably be doubted.²⁴

As an auxiliary matter, the applicant refers to regulation 12(1) of the Regulations of the Court, providing that "[u]nder no circumstances shall a judge who has participated in the pre-trial or trial phase of a case be eligible to sit on the Appeals Chamber hearing that case". The applicant re-iterates that the Chamber was not seised of the case at the time of the Decision, thus she does not believe that she "participated in the pre-trial phase" of the case in the manner envisaged by this provision.²⁵

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 and having fully appraised itself of the relevant materials, 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 article 41(2)(a) of the Statute which provides, in relevant part, 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

²² Page 2.

²³ Page 2.

²⁴ Page 2.

²⁵ Page 3.

accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court ...

The Presidency notes the ambiguity therein. The second sentence above could be understood as a proscriptive example of the general principle espoused in the first sentence. Accordingly, an example of a situation in which the impartiality of a judge would be reasonably doubted is where that judge has previously been involved in any capacity whatsoever in the relevant case before the Court. Alternatively, the two sentences could be understood to interact in a more wholistic manner so that the second sentence is read in conjunction with the general principle of impartiality contained within the first. The capacities with which the second sentence is concerned are those by virtue of which the impartiality of the judge might reasonably be doubted. Thus, this part of article 41(2)(a) would be concerned with disqualification where a judge has previously been involved in any capacity which gives rise to a reasonable ground to doubt his or her impartiality.

Noting this ambiguity, the Presidency has considered the meaning to be given to the second sentence of this article in its context and in light of its object and purpose.²⁶ The Presidency considers the overriding purpose of article 41(2)(a) to be the safeguarding of 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. Such purpose is manifest in the first sentence of article 41(2)(a) itself, but is also confirmed by the interrelationship between articles 40 and 41, with the broader objective of these provisions being the safeguarding of judicial functions and ensuring confidence in the judiciary. Noting also the placement of article 41 in Part IV of the Statute dealing with the composition and administration of the Court, the Presidency considers that a further objective of article 41 is ensuring the overall efficiency of the conduct of proceedings before the Court. As such, the Presidency prefers the latter understanding expressed in the preceding paragraph; namely that the relevant part of article 41(2)(a) is concerned with disqualification where a judge has previously been involved in any capacity which gives rise to a reasonable ground to doubt his or her impartiality. The Presidency finds this interpretation most consistent with the objective of ensuring that the impartiality of judges cannot reasonably be reproached, at the same time as ensuring the efficient conduct of proceedings. The Presidency thus accepts the view of the applicant that article 41(2)(a) functions "to certify the integrity and impartiality of the judicial proceedings by ensuring that Judges who have previously participated in the case do not participate as Judges in the present proceedings, if their impartiality might

²⁶ Vienna Convention on the Law of Treaties, article 31(1).

reasonably be doubted”.²⁷ The language of “previously involved in any capacity in that case before the Court” cannot be considered in isolation but must be understood as closely connected to the first sentence of article 41(2)(a).

The applicant puts forward two grounds to suggest that her impartiality may not reasonably be doubted were she to participate in the appellate proceedings notwithstanding the fact that she issued a Decision in the case. The first being that, at the time of the Decision, the Chamber was no longer seised of the case, and the second being that the Decision “did not require an assessment of the facts of the case, a determination of guilt or innocence, or substantive legal arguments”.²⁸

The Presidency considers the first ground in the preceding paragraph to be wholly without merit. The Presidency does not consider the Chamber’s decision of 5 June 2007, in which it determined that it was “no longer seised of any matter in the case”,²⁹ to be determinative of the applicant’s request for excusal. By his Motion, former defence counsel clearly seised the Chamber and, in taking the Decision, the Chamber accepted jurisdiction thereof. For this reason, the Presidency finds that the Chamber was seised of at least an aspect of the case at the time in question, namely the Motion.

The Presidency turns now to consider the second ground, namely the nature of the Decision taken by the Chamber. The Chamber considered a discrete procedural motion by former defence counsel in the case to correct a transcript of a hearing in the confirmation of charges proceedings in accordance with his responsibility under article 24(3) of the Code of Professional Conduct for Counsel to take steps to correct any erroneous statement he may have made.³⁰ In his Motion, former defence counsel noted that “during the confirmation hearing before [the Chamber] on 9 November 2006, he inadvertently misspoke and as a result, the record inaccurately reflects the argument intended”.³¹ The proposed amendment concerned statements relating to the composition of the Prosecutor’s team. Specifically, former counsel sought to insert the following underlined words into the original text (original shown in italics): “*I said that he [the Prosecutor] accepted in his team somebody who was a member of a government that attempted – that made an attempt on the life of my client”*”.³² The Chamber considered the accuracy of the record of counsel’s statements in the transcript. Finding that it “properly reflect[ed] what was actually said by the former

²⁷ Page 2.

²⁸ Page 3.

²⁹ ICC-01/04-01/06-919-tENG, page 4.

³⁰ Motion, paragraphs 3-4.

³¹ Motion, paragraph 2.

³² Motion, paragraph 4.

counsel", the Chamber determined "that no corrigenda sh[ould] be made to the transcript of the hearing ...".³³ The Decision does not address any further matters.

Considering the above, the Presidency finds that such limited involvement does not constitute a ground on which the impartiality of the applicant might reasonably be doubted.³⁴

For the aforementioned reasons, the request for excusal is dismissed.

The Presidency notes that the applicant desires her request to remain confidential until otherwise indicated. Thus, pursuant to rule 33(2) of the Rules, the Presidency shall not publicise this decision. Considering, however, that this decision elucidates the Presidency's understanding of article 41(2) of the Statute and noting the applicant's observation that this is a matter "pertaining to judicial ethics", the Presidency sees no reason for this decision to remain confidential and requests the applicant to provide her views on this matter by 2 October 2009.

³³ Decision, pages 3 - 4.

³⁴ The Presidency notes that this determination is consistent with practice of the European Court of Human Rights, in which the assessment of impartiality depends on the scope and nature of measures taken by a judge during any prior involvement; See *Depiets v. France*, no. 53971/00, Judgment of 10 February 2004, paragraphs 40-41; *Morel v. France*, no. 34130/96, Judgment of 6 June 2000, paragraphs 48-49.