

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **8 March 2010**

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 of Mr Katanga
Mr David Hooper
Mr Andres O'Shea

Counsel for the Defence of Mr Ngudjolo Chui
Mr Jean-Pierre Kilenda Kakengi Basila
Prof 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 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

Victims Participation and Reparations Section
Ms Fiona McKay

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

NOTING the “Decision on the ‘Defence Application for Leave to Appeal the Trial Chamber’s *Décision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure*’”;¹

NOTING the “Document in support of the Defence Appeal of the *Décision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure*” filed on 25 February 2010 before the Appeals Chamber (“appeal”);²

NOTING the request for excusal filed before the Presidency on 16 February 2010 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”), wherein the judges requested to be excused from sitting in the appeal and in all future appeals in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (hereinafter “case”) on the basis of their previous involvement in the pre-trial phase of the case, in the course of which they issued warrants of arrest for, and confirmed the charges against, Mr Germain Katanga and Mr Mathieu Ngudjolo Chui;³

NOTING the decision of the Presidency of 8 March 2010 pursuant to article 41 of the Rome Statute of the International Criminal Court (“Statute”), granting the judges’ request for excusal in the appeal and in all future appeals in the case on the ground of the judges’ previous involvement in the case and treating them as unavailable for the purpose of the appeal;⁴

NOTING the composition of the Appeals Chamber as set out in article 39(2)(b)(i) of, the 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;⁵

¹ ICC-01/04-01/07-1859, 11 February 2010.

² ICC-01/04-01/07-1916-Corr, 25 February 2010.

³ Annex I.

⁴ Annex II.

⁵ Following the fourteenth and fifteenth plenary sessions of the judges held on 13 March 2009 and 8 June 2009 respectively, the Appeals Division and Chamber is composed of Judges Sang-Hyun Song, Akua Kuenyehia, Erkki Kourula, Anita Ušacka and Daniel David Ntanda Nsereko.

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:

For the purpose of the appeal, 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, which shall be composed as follows:

Judge Sang-Hyun Song;

Judge Erkki Kourula;

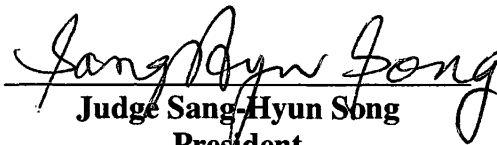
Judge Ekaterina Trendafilova;

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 8 March 2010

At The Hague, The Netherlands

ANNEX I



Internal memorandum
Memorandum interne

To À	Presidency	From De	Judge Kuenyehia, Judge Ušacka
Date	16 February 2010	Through Via	
Ref.	01/04-01/07	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

- On 12 February 2010, Trial Chamber II filed a decision in the case of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo*, entitled "Decision on the 'Defence Application for Leave to Appeal the Trial Chamber's Decision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure'",¹ granting Mr. Katanga leave to appeal its "Décision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure" of 20 November 2009.² 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 and all future appeals in this case.
- 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 arrest³ and confirmed the charges against the suspects.⁴ We therefore have "previously been involved ... in that case before the Court" (second sentence of article 41 (2) (a) of the Statute).
- 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).

¹ ICC-01/04-01/07.

² ICC-01/04-01/07-1666-Conf-Exp), 20 November 2009. A public redacted version, ICC-01/04-01/07-1666-Red was filed on 3 December 2009.

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

⁴ See ICC-01/04-01/07-717.

ANNEX II

**Cour
Pénale
Internationale**



La Présidence

**International
Criminal
Court**

The Presidency

**Internal memorandum
Memorandum interne**

To À	Judge Akua Kuenyehia Judge Anita Ušacka	From De	The Presidency <i>shb</i>
Date	8 March 2010	Through Via	
Ref.	2010/PRES/00127-2	Copies	Judge Daniel Nsereko, President of the Appeals Division

Subject | Objet Decision on the request of 16 February 2010 to be excused from sitting in the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 20 November 2009 and from sitting in all future appeals arising in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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 upon the request of Judge Akua Kuenyehia and Judge Anita Ušacka of the Appeals Chamber (hereinafter "applicants") of 16 February 2010 to be excused from sitting in the appeal of Mr Germain Katanga of 25 February 2010 against the decision rendered by Trial Chamber II on 20 November 2009 in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (hereinafter "appeal") and from sitting in all future appeals arising in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (hereinafter "case").

The request for excusal is granted.

Factual Background

On 16 February 2010, by memorandum classified as confidential, the applicants requested the Presidency to excuse them from sitting in the appeal anticipated from Mr Germain Katanga, following the decision of Trial Chamber II granting him leave to appeal² its « Décision relative à la requête de la Défense de Germain Katanga en illégalité de la

¹ 2010/PRES/00127.

² Decision on the 'Defence Application for Leave to Appeal the Trial Chamber's Décision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure', ICC-01/04-01/07-1859, 11 February 2010.

détention et en suspension de la procédure » of 20 November 2009, and from all future appeals in the case, pursuant to article 41(1) of the Rome Statute (hereinafter “Statute”) and rule 33 of the Rules of Procedure and Evidence (hereinafter “Rules”). Mr Germain Katanga appealed that decision on 25 February 2010.³ 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 for,⁴ and confirmed the charges against,⁵ 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.

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 applicants have requested to be excused from sitting in the appeal and in all future appeals arising in the case. 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 Presidency has previously found the capacity referred to in the second sentence of article 41(2)(a) to be one which might lead the impartiality of a judge to be reasonably called into doubt.⁶

Noting the terms of article 41(1) and 41(2)(a) of the Statute, the Presidency finds that the impartiality of the applicants might reasonably be doubted considering their previous involvement in the pre-trial phase of the case and, as such, the request for excusal in the present appeal and all future appeals in the case is granted. The Presidency, pursuant to

³ Document in support of the Defence Appeal of the *Décision relative à la requête de la Défense de Germain Katanga en illégalité de la détention et en suspension de la procédure*, ICC-01/04-01/07-1916-Corr, 25 February 2010.

⁴ Warrant of arrest for Germain Katanga, ICC-01/04-01/07-1-tENG, 2 July 2007. Warrant of arrest for Mathieu Ngudjolo Chui, ICC-01/04-02/07-1-tENG, 6 July 2007.

⁵ Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008.

⁶ 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 *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, ICC-01/04-01/06-2138-AnxIII, 23 September 2009.

rule 38 of the Rules and regulation 12 and 15 of the Regulations of the Court, shall, for the purpose of the present appeal and all future appeals arising in the case, treat the applicants as unavailable and proceed with their replacement in the Appeals Chamber.

From henceforth, the President of the Appeals Division shall promptly inform the Presidency of the advent of any appeal in the case, in order for it to proceed with the replacement of the applicants in a timely fashion in accordance with this decision.

Noting that the applicants have consented to the Presidency making public the request for excusal and the reasons for its decision thereon in accordance with rule 33(2) of the Rules, 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.