

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

**No.: ICC-01/04-02/06
Date: 4 December 2013**

THE PRESIDENCY

**Before: Judge Sang-Hyun Song, President
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Cuno Tarfusser, Second Vice-President**

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

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
 Ms Fatou Bensouda
 Mr Eric MacDonald

Counsel for the Defence of Mr Ntaganda
 Mr Marc Desalliers

Legal Representatives of the Victims**Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants for
Participation/Reparation****The Office of Public Counsel
For Victims****The Office of Public Counsel for the Defence****States Representatives***Amicus Curiae***REGISTRY****Registrar**

Mr Herman von Hebel

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations
Section****Other
Appeals Chamber**

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

NOTING the “Acte d'appel de la Défense de M. Bosco Ntaganda à l'encontre de la ‘Decision on the Defence's application for interim release’ rendue par la Chambre préliminaire II le 18 novembre 2013” (“appeal”) in the case of *The Prosecutor v Bosco Ntaganda* (“case”);¹

NOTING the request for excusal filed before the Presidency on 26 November 2013 by Judge Akua Kuenyehia (“judge”) pursuant to article 41(1) of the Rome Statute of the International Criminal Court (“Statute”) and rule 33 of the Rules of Procedure and Evidence (“Rules”), wherein the judge requested to be excused from the appeal (Annex I);

NOTING the decision of the Presidency of 4 December 2013, granting the judge’s request for excusal from the appeal due to the likelihood of it addressing issues directly related to the warrant of arrest issued by the judge for Mr Ntaganda in the course of her previous involvement in the pre-trial phase of the case (Annex II);

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;²

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 25 November 2013, ICC-01/04-02/06-155.

² Following the decision of the Presidency of 13 March 2012 assigning judges to judicial divisions, the Appeals Division is composed of Judges Sang-Hyun Song, Sanji Monageng, Akua Kuenyehia, Erkki Kourula and Anita Ušacka, Press Release dated 14 March 2012, ICC-CPI-20120315-PR778.

HEREBY DECIDES:

For the purpose of the appeal, to temporarily attach Judge Christine Van den Wyngaert, currently assigned to the Pre-Trial Division,³ to the Appeals Chamber which shall be composed as follows:

Judge Sang-Hyun Song;
Judge Sanji Mmasenono Monageng;
Judge Erkki Kourula;
Judge Anita Ušacka; and
Judge Christine Van den Wyngaert.

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

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



Sanji Mmasenono Monageng
First Vice-President

Dated this 4 December 2013
At The Hague, The Netherlands

³ See decision of the Presidency of 13 March 2012 assigning judges to judicial divisions, Press Release dated 14 March 2012, ICC-CPI-20120315-PR778.



Internal memorandum
Memorandum interne

To À	Presidency	From De	Judge Akua Kuenyehia 
Date	26 November 2013	Through Via	
Ref.	ICC-01/04-02/06 (Ntaganda) OA	Copies	
Subject Objet	Request for recusal		

CONFIDENTIAL

1. Yesterday, Mr Bosco Ntaganda filed the "Acte d'appel de la Défense de M. Bosco Ntaganda à l'encontre de la « Decision on the Defence's Application for Interim Release », rendue par la Chambre préliminaire II le 18 novembre 2013".¹ 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.

2. The reason for my request is my previous involvement in the case of Mr Ntaganda during the pre-trial proceedings, in the course of which I *inter alia* issued a decision on the warrant for his arrest.² I therefore have been "previously involved ... in the case before the Court" (second sentence of article 41 (2) (a) of the Statute).

3. I recall that, on 24 September 2010, the Presidency rejected³ my previous request⁴ to be recused from sitting on all appeals arising from the case of Mr Ntaganda. In its decision, the Presidency noted that:

[I]t is not immediately apparent that the applicant having issued a warrant of arrest in the case necessarily gives rise to reasonable grounds to doubt her impartiality in appellate proceedings generally. For that reason, the applicant's request to be generally excused from participating in all appeals in the case [...] on the ground that she issued the warrant of arrest is hereby denied. Should, however, the Appeals

¹ ICC-01/04-02/06-155 (OA).

² ICC-01/04-02/06-1-US-Exp.

³ See ICC-01/04-02/06-30-Anx4.

⁴ See ICC-01/04-02/06-30-Anx2.

Chamber be seised with an appeal in which the abovementioned ground gives rise to a specific reason to doubt the applicant's impartiality, she may seise the Presidency.⁵

4. The present appeal concerns a decision denying a request for interim release and is therefore likely to be directly related to issues addressed in the decision on the warrant of arrest. As a result, I consider it my duty to request to be excused from the appeal.

5. Pursuant to the 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 and the reasons for its eventual decision on the request.

⁵ ICC-01/04-02/06-30-Anx4, p. 4.



**Cour
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La Présidence
The Presidency

**Internal memorandum
Memorandum interne**

To À	Judge Akua Kuenyehia	From De	The Presidency
Date	4 December 2013	Through Via	
Ref.	2013/PRES/00419-2	Copies	
Subject Objet	Decision on the request to be excused from the exercise of judicial functions in the case of <i>The Prosecutor v. Bosco Ntaganda</i>, pursuant to article 41 of the Rome Statute		

The Presidency, composed of the President (Judge Sang-Huyn Song), the First Vice-President (Judge Sanji Mmasenono Monageng) and the Second Vice-President (Judge Cuno Tarfusser), hereby decides upon the request of Judge Akua Kuenyehia (hereinafter "judge") of 26 November 2013,¹ pursuant to article 41(1) of the Rome Statute (hereinafter "Statute") and rule 33 of the Rules of Procedure and Evidence (hereinafter "Rules"), to be excused from her functions as a judge of the Appeals Chamber in the case of *The Prosecutor v. Bosco Ntaganda*, ("case"), in the appeal of Mr Bosco Ntaganda, of which notice was given on 25 November 2013 ("appeal"),² and to be replaced as a judge in that case pursuant to rule 38 of the Rules (hereinafter "request for excusal").

The request for excusal is granted.

Factual background

The request is made on the ground that during the pre-trial stage of the case, the judge, now in the Appeals Chamber, was originally a member of the Pre-Trial Chamber that

¹ 2013/PRES/00419.

² Acte d'appel de la Défense de M. Bosco Ntaganda à l'encontre de la "Decision on the Defence's application for interim release" rendue par la Chambre préliminaire II le 18 novembre 2013, ICC-01/04-02/06-155.

issued a warrant for the arrest of Mr Ntaganda on 22 August 2006, whilst the appeal before the Appeals Chamber is brought against a decision of 18 November 2013 of the Single Judge of Pre-Trial Chamber II denying Mr Ntaganda's request for interim release,³ which the judge argues is "likely to be directly related to the issues addressed in the decision on the warrant of arrest" that she issued.⁴ The judge takes the view that she has, as such, been "previously involved...in the case before the Court" within the meaning of article 41(2)(a) of the Statute.

Decision

The Presidency recalls its decision of 24 September 2010,⁵ wherein it rejected the request of the same judge to be excused from, *inter alia*, all of her appellate functions in the current case on the ground that she had been previously involved in pre-trial proceedings in the case, having, *inter alia*, issued a warrant of arrest against Mr Ntaganda. Considering that request to be without merit, the Presidency found "it [wa]s not immediately apparent that the applicant having issued a warrant of arrest in the case necessarily gives rise to reasonable grounds to doubt her impartiality in appellate proceedings. For that reason, the applicant's request to be generally excused from participating in all appeals in the case...on the ground that she issued the warrant of arrest is hereby denied. Should, however, the Appeals Chamber be seised with an appeal in which the abovementioned ground gives rise to a specific reason to doubt the applicant's impartiality, she may seise the Presidency."⁶

The current appeal is a specific reason upon which the judge's impartiality might be doubted. Given that the appeal is directed against the decision of the Single Judge of Pre-Trial Chamber II denying Mr Ntaganda's application for interim release, the Presidency accepts the arguments of the judge that the appeal is likely to be directly related to issues she previously addressed in the warrant of arrest of 22 August 2006 and grants the

³ Decision on the Defence's Application for Interim Release, ICC-01/04-02/06-147.

⁴ Request for excusal, paragraph 4.

⁵ Decision on the request of Judge Akua Kuenyehia of 18 February 2010 to be excused from participating in the exercise to reclassify documents in the appeals proceedings related to the case of *The Prosecutor v. Bosco Ntaganda* and in all appeals in the case, ICC-01/04-02/06-30-Anx4.

⁶ ICC-01/04-02/06-30-Anx4.

application. In coming to this decision, the Presidency observed that the impugned decision of the Single Judge relies on the warrant of arrest issued by the judge. In that decision, the Single Judge, noting the finding of the Appeals Chamber that “in a decision under article 60(2) of the Statute, a Pre-Trial Chamber may refer to the decision on the warrant of arrest, without this affecting the *de novo* character of the Pre-Trial Chambers decision”, recalled that the previous findings made by the Pre-Trial Chamber in its decision on the warrant of arrest of 22 August 2006 and its decision on the warrant of arrest of 13 July 2012 had established reasonable grounds to believe that Mr Ntaganda was criminally responsible, pursuant to article 25(3)(a) of the Statute, for war crimes and crimes against humanity. The Single Judge went on to find that the requirement of article 58(1)(a) of the Statute remained satisfied given, *inter alia*, the findings in the two warrants of arrest.⁷

The Presidency notes that the judge has consented to the Presidency making public the request for excusal and the reasons for its decision thereupon, pursuant to rule 33(2) of the Rules. A copy of this decision and the request for excusal shall be annexed to the decision of the Presidency replacing the judge in the case.

⁷ Decision on the Defence's Application for Interim Release, 18 November 2013, ICC-01/04-02/06-147, paragraph 38.