

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/04-01/06**  
Date: **7 September 2012**

**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. THOMAS LUBANGA DYILO***

**Public with two public annexes**

**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

**Counsel for the Defence**  
Ms Catherine Mabilie  
Mr Jean-Marie Biju Duval

**Legal Representatives of the Victims**  
Mr Luc Walley  
Mr Franck Mulenda  
Ms Carine Bapita Buyangandu  
Mr Paul Kabongo Tshibangu

**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 Keïta

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**  
Ms Silvana Arbia

**Deputy Registrar**  
Mr Didier Preira

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

**Defence Support Section**  
Mr Esteban Peralta Losilla

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

**Other**  
Appeals Chamber

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

**NOTING** the “Acte d’appel de la Défense de M. Thomas Lubanga à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparation’ rendue par la Chambre de première instance I le 7 août 2012” (“appeal”) in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“case”);<sup>1</sup>

**NOTING** the request for excusal filed before the Presidency on 15 July 2010 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, inter alia, from sitting in all future appeals in the case on the basis of her previous involvement in the pre-trial phase of the case, in the course of which she issued a warrant of arrest for, and confirmed the charges against, Mr Thomas Lubanga Dyilo;<sup>2</sup>

**NOTING** the decision of the Presidency of 16 July 2010 pursuant to article 41 of the Statute, granting the request for excusal in all future appeals in the case on the ground of the Judge’s previous involvement in the case;<sup>3</sup>

**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;

**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 considering 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;

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<sup>1</sup> ICC-01/04-01/06-2917.

<sup>2</sup> Annex I.

<sup>3</sup> Annex II.

**HEREBY DECIDES:**

For the purpose of the appeal, to temporarily attach Judge Ekaterina Trendafilova, currently assigned to the Pre-Trial Division, 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 Ekaterina Trendafilova.

**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.

  
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Judge Sang-Hyun Song  
President

Dated this 7 September 2012  
At The Hague, The Netherlands

## **ANNEX I**

**Cour  
Pénale  
Internationale**



Les Chambres

The Chambers

**International  
Criminal  
Court**

**Internal memorandum  
Memorandum interne**

<b>To   À</b>	<b>Presidency</b>	<b>From   De</b>	<b>Judge Kuenyehia</b>
<b>Date</b>	15 July 2010	<b>Through   Via</b>	
<b>Ref.</b>	01/04-01/06	<b>Copies</b>	
<b>Subject   Objet</b>	Request for recusal pursuant to article 41 (1) of the Statute and rule 33 of the Rules of Procedure and Evidence		

**CONFIDENTIAL**

1. On 8 July 2010, Trial Chamber I rendered the “Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations With the VWU”, staying the proceedings against Mr Thomas Lubanga Dyilo for the Prosecutor’s non-compliance with orders of the Trial Chamber.<sup>1</sup> On 14 July 2010, the Prosecutor filed a request for leave to appeal Trial Chamber I’s decision.<sup>2</sup> On 15 July 2010, Trial Chamber I granted the Prosecutor’s request for leave to appeal its decision of 8 July 2010. Pursuant to article 41 (1) of the Statute and rule 33 of the Rules of Procedure and Evidence, I hereby request to be recused from this appeal and all future appeals in this case.

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 arrest<sup>3</sup> and confirmed the charges against the suspects.<sup>4</sup> 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

<sup>1</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2517-Conf, para. 31. A redacted version of the decision was filed on the same day as ICC-01/04-01/06-2517-Red.

<sup>2</sup> “Urgent Prosecution’s Application for Leave to Appeal the Trial Chamber I’s decision of 8 July 2010 staying the proceedings for abuse of process”, ICC-01/04-01/06-2520-Conf.

<sup>3</sup> ICC-01/04-01/06-2.

<sup>4</sup> ICC-01/04-01/06-803.

request or the reasons for its eventual decision on this request (second sentence of rule 3E (2) of the Rules of Procedure and Evidence).

## **ANNEX II**



**Cour  
Pénale  
Internationale**



La Présidence

**International  
Criminal  
Court**

The Presidency

**Internal memorandum  
Memorandum interne**

<b>To   À</b>	Judge Akua Kuenyehia	<b>From   De</b>	The Presidency <i>J. Branny</i>
<b>Date</b>	16 July 2010	<b>Through   Via</b>	
<b>Ref.</b>	2010/PRES/416-2	<b>Copies</b>	

**Subject | Objet** Decision on the request of 15 July 2010 to be excused from sitting in the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 and from sitting in all future appeals arising 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

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 of the Appeals Chamber (hereinafter "applicant") of 15 July 2010 to be excused from sitting in the anticipated appeal of the Prosecutor against the decision rendered by Trial Chamber I on 8 July 2010 in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (hereinafter "appeal") and from sitting in all future appeals arising in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (hereinafter "case").

The request for excusal is granted.

**Factual background**

On 15 July 2010, by memorandum classified as confidential, the applicant requested that the Presidency excuse her from sitting in the appeal anticipated from the Prosecutor, following the decision of Trial Chamber I granting him leave to appeal its "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU" of 8 July 2010, 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"). The request for excusal is based upon the previous

<sup>1</sup> ICC-01/04-01/06-2517-Conf; ICC-01/04-01/06-2517-Red.

involvement of the applicant during the pre-trial phase of the case, in the course of which the applicant, *inter alia*, issued a warrant of arrest,<sup>2</sup> and confirmed the charges against,<sup>3</sup> Mr Thomas Lubanga Dyilo. The applicant therefore considers that she has “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 applicant has 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.<sup>4</sup>

Noting the terms of article 41(1) and 41(2)(a) of the Statute, the Presidency finds that the impartiality of the applicant might reasonably be doubted considering her 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 rule 38 of the Rules and regulations 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 applicant as unavailable and proceed with her replacement in the Appeals Chamber.

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<sup>2</sup> Warrant of Arrest, ICC-01/04-01/06-2-tEN, 10 February 2006.

<sup>3</sup> Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007.

<sup>4</sup> 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.

The President of the Appeals Division shall henceforth follow the same procedure prescribed by the Presidency in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,<sup>5</sup> promptly informing the Presidency of the advent of any appeal in the case, in order for it to proceed with the replacement of the applicant in a timely fashion in accordance with this decision.

Noting that the applicant has 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 applicant in the Appeals Chamber for the purpose of the appeal.

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<sup>5</sup> 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. ICC-01/04-01/07-1949-Anx2, 8 March 2010.