

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 <i>The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui</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 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.