

Pursuant to the Pre-Trial Chamber I's instruction, dated 29/09/2010, this document is reclassified as Public

## **ANNEX 1**

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**



Les Chambres

The Chambers

**Internal memorandum  
Memorandum interne**

<b>To   À</b>	<b>Presidency</b>	<b>From   De</b>	Judge Akua Kuenyehia  Judge Sylvia Steiner 
<b>Date</b>	10 March 2008	<b>Through   Via</b>	
<b>Ref.</b>	ICC-01/04-02/06/memo/1	<b>Copies</b>	Judge Anita Ušacka Judge Hans-Peter Kaul
<b>Subject   Objet</b>	Requests to be excused		

**CONFIDENTIAL**

The purpose of this memorandum is to respectfully request that Judge Akua Kuenyehia and Judge Sylvia Steiner be excused, pursuant to article 41 of the Statute from their functions in the case of *The Prosecutor v. Bosco Ntaganda*.

It is noted from the outset that the proceedings in this case are still under seal.

On 10 February 2006, the Pre-Trial Chamber I ("the Chamber") – then composed of Judge Claude Jorda (Presiding Judge), Judge Akua Kuenyehia and Judge Sylvia Steiner – issued the "Decision on the Prosecution's Application for Warrants of Arrest, Article 58"<sup>1</sup> ("the Decision") in which the Chamber decided to issue a warrant of arrest for Thomas Lubanga Dyilo but rejected the application for the issuance of a warrant of arrest for Bosco Ntaganda based on the inadmissibility of the case against him.

The Decision of the Chamber was appealed by the Prosecution and on 13 July 2006, the Appeals Chamber rendered its "Judgement on the Prosecution's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecution's

<sup>1</sup> The Prosecution's Application, ICC-01/04-98-US-Exp; Decision on the Prosecution's Application for Warrants of Arrest, Article 58, ICC-01/04-118-US-Exp-Corr.

Application for Warrants of Arrest, Article 58''<sup>2</sup> ("The Judgement") in which the Appeals Chamber decided:

- (i) that an initial determination of the admissibility of the case was not a prerequisite for the issuance of a warrant of arrest and should be carried out only when it is appropriate in the circumstances of the case;<sup>3</sup> and
- (ii) that an initial determination of the case was not warranted in relation to the Prosecution's Application for a warrant of arrest for Bosco Ntaganda;<sup>4</sup>

As a result, the Appeals Chamber (i) remanded the Prosecution's Application for a warrant of arrest for Bosco Ntaganda to the Chamber for completion of the review provided for in article 58(1) of the Statute, excluding expressly any initial determination of the admissibility of the case;<sup>5</sup> and (ii) decided that should the Chamber issue a warrant of arrest, it should identify the appropriate organ responsible for the preparation and transmission of the request for arrest and surrender.<sup>6</sup>

On 22 August 2006, the Chamber, after undertaking the limited review requested by the Appeals Chamber and, in particular, without carrying out any further determination of admissibility, issued a warrant of arrest against Bosco Ntaganda.<sup>7</sup>

Subsequently, on 7 February 2007 the Registrar filed a request for instructions on the execution of the warrant of arrest,<sup>8</sup> which was granted by the Chamber in its 6 March 2007 "Decision on the execution of decision ICC-01/04-02/06-1-US".<sup>9</sup> This decision was in accordance with the Appeals Chamber request to identify the appropriate organ responsible for the preparation and transmission of the request for arrest and surrender, and was a necessary step for the execution of the Registry's cooperation request for the arrest and surrender of Bosco Ntaganda.

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<sup>2</sup> ICC-01/04-169-US-Exp.

<sup>3</sup> ICC-01/04-169-US-Exp, page 2 and paras. 2 and 42.

<sup>4</sup> ICC-01/04-169-US-Exp, page 2 and para. 53.

<sup>5</sup> ICC-01/04-169-US-Exp, page 2 and paras. 91 and 92.

<sup>6</sup> ICC-01/04-169-US-Exp, page 2.

<sup>7</sup> ICC-01/04-02/06-1-US-Exp and ICC-01/04-02/06-2-US-Exp.

<sup>8</sup> ICC-01/04-02/06-5-US-Exp.

<sup>9</sup> ICC-01/04-02/06-8-US.

Apart from the above-mentioned request from the Registrar concerning the execution of the warrant of arrest for Bosco Ntaganda, no further application was made by the parties to the proceedings in the case of *The Prosecutor v. Bosco Ntaganda* from 22 August 2006 to 28 February 2008.

On 29 February 2008, the Prosecution filed the first application in the case of *The Prosecutor v. Bosco Ntaganda* since the initiation of the case through the issuance of the warrant of arrest on 22 August 2006.<sup>10</sup> In its application, the Prosecution requested Pre-Trial Chamber I – now composed of Judge Akua Kuenyehia (Presiding Judge), Judge Anita Ušacka and Judge Sylvia Steiner – to unseal the warrant of arrest for Bosco Ntaganda.

Having regard to articles 41 and 46(1)(a) of the *Rome Statute* ("the Statute") and rules 24(2)(a), 33 and 35 of the *Rules of Procedure and Evidence* ("the Rules"), the following is respectfully submitted:

**Timing of the Request:**

- (1) The recent application by the Prosecution for the unsealing of the warrant of arrest for Bosco Ntaganda is the first application, which is unrelated to the Appeals Chamber Judgement, made in the proceedings in the case of *The Prosecutor v. Bosco Ntaganda* since the issuance by the Chamber of the warrant of arrest following the limited review conducted by the Chamber in compliance with the directions given in the Appeals Chamber Judgement; and
- (2) Judge Akua Kuenyehia and Judge Sylvia Steiner are keenly aware of their duties and responsibilities pursuant to articles 41 and 46(1)(a) of the Statute and rules 24(2)(a) and 35 of the Rules, and in particular that:
  - a. there is an obligation on all judges of this Court to make a request to be excused in the absence of a request for disqualification from the parties whenever any judge "has reason to believe that a ground for disqualification exists in relation to him or her"; and
  - b. the failure to "comply with the duty to request to be excused, knowing that there are grounds for doing so" constitutes a serious breach of duty on the part of that judge.

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<sup>10</sup> ICC-01/04-02/06-15-US-Exp.

**Grounds for the Request:**

According to article 41(2)(a) of the Statute, "a judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground". The standard provided for in this provision is an objective standard, which is not concerned with the actual impartiality (or lack of impartiality) of the judges of the Court. It aims at securing the appearance of impartiality of the judges of the Court *vis-à-vis* the outside world. Therefore, even if, as in the present case, Judge Akua Kuenyehia and Judge Sylvia Steiner, are certain that they can perform their functions in a fully impartial manner, they are under an obligation to request to be excused from the case of *The Prosecutor v. Bosco Ntaganda*, if they believe that the outside world might reasonably have doubts concerning their impartiality.

In light of the above, Judge Akua Kuenyehia and Judge Sylvia Steiner believe that there is reason to believe that in the case of *The Prosecutor v. Bosco Ntaganda* their impartiality might reasonably be doubted on the following grounds:

- (1) In the Decision to reject the application for a warrant of arrest for Bosco Ntaganda, the Chamber, on the basis of the information available at that time, ruled on the merits of the issue of admissibility, thereby deciding that the case was inadmissible. The Chamber took a unanimous decision that the case was inadmissible on the basis that it did not meet the gravity threshold provided for in article 17(1)(d) of the Statute;
- (2) The 13 July 2006 Judgement of the Appeals Chamber did not reverse the merits of the Chamber's decision on the determination of the inadmissibility of the case, as the *ratio decidendi* of the decision was confined to an error made by the Chamber on the timing of such a determination; and
- (3) Having previously made an analysis, evaluation and determination of the admissibility of the case and having reached the conclusion, on the basis of the information available to the Chamber at the time the Prosecution's Application was made, that the case against Bosco Ntaganda is inadmissible before this Court, Judge Akua Kuenyehia and Judge Sylvia Steiner, have reason to believe that our impartiality in the case of *The Prosecutor v. Bosco Ntaganda* might reasonably be doubted, particularly in light of the fact that the issue of the admissibility of the case will likely be a foremost/key issue in the proceedings.

Judge Akua Kuenyehia and Judge Sylvia Steiner hereby inform the Presidency that they have no objection to making this request public pursuant to rule 33 of the Rules should the Presidency decide to do so, once the following documents are no longer under seal: (i) the Decision; (ii) the Judgement; and (iii) the warrant of arrest for Bosco Ntaganda.