

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

## ANNEX A

**Cour  
Pénale  
Internationale**



La Présidence

**International  
Criminal  
Court**

The Presidency

UNDER SEAL

Internal memorandum  
Memorandum interne

<b>To   À</b>	<b>Judge Akua Kuenyehia (First Vice-President) Judge Sylvia Steiner</b>	<b>From   De</b>	<b>The Presidency</b>
<b>Date</b>	11 April 2008	<b>Through   Via</b>	
<b>Ref.</b>	90-5/PK/RB/GP	<b>Copies</b>	<b>Judge Anita Ušacka</b>
<b>Subject   Objet</b>	<b>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</b>		

The Presidency, comprised of the President (Judge Philippe Kirsch), the Second Vice-President (Judge René Blattmann) and Judge Georghios Pikis, hereby decides the request of Judge Akua Kuenyehia (First Vice-President) and Judge Steiner (hereinafter “the applicants”) of 10 March 2008 to be excused from their functions as judges of Pre-Trial Chamber I (hereinafter “request for excusal”) in the presently under seal case of *The Prosecutor v. Bosco Ntaganda* (hereinafter “*Ntaganda case*”), pursuant to article 41 of the Rome Statute (hereinafter “the Statute”).

The request for excusal is dismissed on the ground that it is wholly without merit.

**Factual background**

On 10 March 2008, by confidential memorandum, the applicants requested the Presidency to excuse them from their functions as judges in the *Ntaganda* case, pursuant to article 41 of the Statute. The same day, in a subsequent confidential memorandum, First Vice-President Kuenyehia requested to be excused from deliberations of the Presidency upon the request for excusal. On 11 March 2008, the remaining members of the Presidency granted that request, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence (hereinafter “the Rules”), to prevent a conflict of interest, bearing in mind the position of First Vice-President Kuenyehia both as a member of the Presidency and as a judge of Pre-Trial

Chamber I (hereinafter “the Chamber”). Pursuant to regulation 11(2) of the Regulations of the Court (hereinafter “the Regulations”), First Vice-President Kuenyehia was therefore treated as being unavailable in relation to deliberations of the Presidency upon the request for excusal. The same day, the Chamber informed the Prosecutor of the request for excusal in the *Ntaganda* case pending before the Presidency.<sup>1</sup> On 13 March 2008, Judge Pikis assumed the responsibilities of First Vice-President Kuenyehia as a member of the Presidency in the request for excusal, in accordance with regulation 11(2) of the Regulations.

The request for excusal is based on the facts set out below. On 12 January 2006, the Prosecutor applied for warrants of arrest against Mr Bosco Ntaganda and Mr Thomas Lubanga Dyilo, pursuant to article 58 of the Statute (hereinafter “Prosecutor’s application”).<sup>2</sup> On 10 February 2006, the Chamber, then composed of Judge Claude Jorda and the applicants, considered, *inter alia*, that a determination of whether a case was admissible was a prerequisite to the issuance of a warrant of arrest against a person. The Chamber found, in relevant part, the *Ntaganda* case to be inadmissible on the ground that it did not meet the gravity threshold of article 17(1)(d) of the Statute and thereby rejected the Prosecutor’s application for a warrant of arrest against Mr Ntaganda based on the inadmissibility of the case against him (hereinafter “decision of the Chamber”).<sup>3</sup>

On 14 February 2006, the Prosecutor appealed the decision of the Chamber to the Appeals Chamber, arguing, *inter alia*, that the Chamber had erred in its interpretation of the gravity requirement in article 17(1)(d) of the Statute. The Appeals Chamber was requested to: determine the correct legal principle in the interpretation of article 17(1)(d) of the Statute; reverse the decision of the Chamber in so far as it declared the *Ntaganda* case inadmissible; declare the *Ntaganda* case admissible; and remit the matter to the Chamber to complete the

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<sup>1</sup> Decision informing the Prosecution of Judges’ request to be excused, ICC-01/04-02/06-16-US.

<sup>2</sup> Prosecutor’s Application for Warrants of Arrest, Article 58, ICC-01/04-98-US-Exp.

<sup>3</sup> Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, ICC-01/04-118-US-Exp-Corr.

review under article 58 of the Statute for the issuance of a warrant of arrest against Mr Ntaganda.<sup>4</sup>

On 13 July 2006, the Appeals Chamber decided that: an initial determination of the admissibility of a case was not a prerequisite for the issuance of a warrant of arrest pursuant to article 58 of the Statute; although the Chamber had a discretion pursuant to article 19(1) of the Statute to address the admissibility of a case on an application for the issuance of a warrant of arrest that is made *ex parte*, Prosecutor only, that discretion should be exercised only in appropriate circumstances; in the instant case, the initial determination of the Chamber on admissibility had been unwarranted in relation to the Prosecutor's application for a warrant of arrest for Mr Ntaganda; and, in addressing the question of admissibility, the Chamber had erred in law in its interpretation of article 17(1)(d) of the Statute.<sup>5</sup> As a result of those findings, the Appeals Chamber reversed the decision of the Chamber in so far as it declared the *Ntaganda* case inadmissible and remitted to the Chamber the Prosecutor's application for a warrant of arrest against Mr Ntaganda for completion of the review under article 58(1) of the Statute (hereinafter "judgment of the Appeals Chamber of 13 July 2006").<sup>6</sup>

On 22 August 2006, the Chamber, after having completed the review of the Prosecutor's application pursuant to article 58 of the Statute, in line with the judgment of the Appeals Chamber of 13 July 2006, issued a warrant of arrest against Mr Ntaganda.<sup>7</sup>

On 29 February 2008, the Prosecutor requested the Chamber, now composed of Judge Anita Ušacka and the applicants, to unseal the warrant of arrest against Mr Ntaganda (hereinafter "Prosecutor's application for unsealing the warrant of arrest").<sup>8</sup> The present request for

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<sup>4</sup> Prosecutor's Appeal against Pre-Trial Chamber I's 10 February 2006 "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC-01/04-125-US-Exp; Prosecutor's Document in Support of the Appeal, ICC-01/04-120-US-Exp.

<sup>5</sup> Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', ICC-01/04-169-US-Exp, paragraphs 1-3, 46 and 53. That judgment consisted of an opinion of the majority and a separate and partly dissenting opinion of Judge Pikis.

<sup>6</sup> Judgment of the Appeals Chamber of 13 July 2006, page 2 and paragraph 90.

<sup>7</sup> Decision on the Prosecution Application for a Warrant of Arrest, ICC-01/04-02/06-1-US-Exp.

<sup>8</sup> Prosecutor's Application for Unsealing the Arrest Warrant against Bosco Ntaganda, ICC-01/04-02/06-15-US-Exp.

excusal before the Presidency was triggered by the Prosecutor's application for unsealing the warrant of arrest.<sup>9</sup>

### Request for excusal

By the request for excusal, the applicants note the duties and responsibilities of judges of the Court pursuant to articles 41 and 46(1)(a) of the Statute and rules 24(2)(a) and 35 of the Rules, in particular, the obligation upon all judges to make a request to be excused in the absence of a request for disqualification, whenever a judge has reason to believe that a ground for disqualification exists in relation to him or her; and that 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.<sup>10</sup> The applicants consider that the test set out in article 41(2)(a) of the Statute is objective and is not concerned with the actual impartiality or lack of impartiality of judges; "[i]t aims at securing the appearance of impartiality of the judges of the Court *vis-à-vis* the outside world".<sup>11</sup>

By the request for excusal, the applicants consider that there is reason to believe that their impartiality in the *Ntaganda* case might reasonably be doubted on the following three grounds:

1. in rejecting the Prosecutor's warrant of arrest, the Chamber decided unanimously that the case was inadmissible on the basis that it did not meet the gravity threshold in article 17(1)(d) of the Statute;
2. the judgment of the Appeals Chamber of 13 July 2006 did not reverse the decision of the Chamber on the inadmissibility of the *Ntaganda* case on its merits as the *ratio decidendi* of that judgment was confined to an error made by the Chamber on the timing of the determination on admissibility; and
3. they have previously analysed and determined the admissibility of the *Ntaganda* case, on the basis of information available to the Chamber at the time of the Prosecutor's

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<sup>9</sup> Request for excusal, page 3.

<sup>10</sup> Request for excusal, page 3.

<sup>11</sup> Request for excusal, page 4

application, "particularly in light of the fact that the issue of the admissibility of the [Ntaganda] case will likely be a foremost/key issue in the proceedings".<sup>12</sup>

### **Preliminary observation**

The Presidency notes, as a point of clarification, that the findings in the judgment of the Appeals Chamber of 13 July 2006, which led to the reversal of the decision of the Chamber on the inadmissibility of the *Ntaganda* case, were not confined, contrary to what is stated in the request for excusal,<sup>13</sup> to an error made by the Chamber as to the timing of a determination on admissibility, but extended to the fact that the Chamber had erred in law in its interpretation of article 17(1)(d) when determining admissibility.

### **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 Presidency, having thoroughly examined the matter before it and having fully appraised itself of the relevant material, finds the request for excusal to be wholly without merit. The Presidency recalls that, pursuant to rule 35 of the Rules, there is a duty upon a judge to request to be excused in the absence of a request for disqualification should he or she believe that a ground for disqualification exists. The Presidency further recalls that, pursuant to article 41 of the Statute, such ground exists where the impartiality of a judge might reasonably be doubted. However, in the instant case, the Presidency has found no objective ground upon which the impartiality of the applicants might reasonably be doubted. The Presidency notes that the examples of grounds for disqualification set out in rule 34 of the Rules concern personal bias or the extra-judicial activities of a judge. Whereas, the circumstances of the instant case concern the effect of appellate proceedings on the lower court; whereby an issue was determined by the Chamber, reversed on appeal and remitted to the Chamber for

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<sup>12</sup> Request for excusal, page 4.

<sup>13</sup> Request for excusal, page 4; see also page 4 above.

consideration in light of the judgment of the Appeals Chamber. In the view of the Presidency, that situation arose as a natural result of the appellate process whereby matters are remitted to lower courts for reconsideration in light of judgments on appeal. The power of the Appeals Chamber to remit matters to the relevant Chamber was acknowledged in the judgment of the Appeals Chamber of 13 July 2006<sup>14</sup> and the consequent reconsideration by a lower court of a matter remitted to it is a natural consequence of that judicial remedy.

The Presidency further notes that the request for excusal was triggered by the Prosecutor's application for unsealing the warrant of arrest against Mr Ntaganda. The Presidency considers that the Prosecutor's application for unsealing the warrant of arrest is, in any event, wholly unrelated to the issues in the *Ntaganda* case and, as such, could not leave any conceivable impression of impartiality on the part of the judges seized of the case.

For the aforementioned reasons, the request for excusal is dismissed.

The Presidency, noting that the request for excusal has been filed in the *Ntaganda* case, directs that this memorandum be filed under seal in the present proceedings, and noting that the applicants have consented to the request for excusal being made public<sup>15</sup>, directs that once the seal has been lifted on the relevant documents<sup>16</sup>, this decision be made public pursuant to rule 33(2) of the Rules.



**Judge Philippe Kirsch**

**President**

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<sup>14</sup> Judgment of the Appeals Chamber of 13 July 2006, paragraph 91. Judge Pkiki dissented from the chosen remedy of the majority, see Judgment of the Appeals Chamber of 13 July 2006, paragraphs 42-48

<sup>15</sup> Request for excusal, page 5

<sup>16</sup> Set out at page 5 of the request for excusal.