

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 14 November 2008

THE PRESIDENCY

Before: Judge Philippe Kirsch, President
Judge Akua Kuenyehia, First Vice-President
Judge René Blattmann, Second Vice-President

**SITUATION IN THE DEMOCRATIC REPUBLIC OF CONGO
IN THE CASE OF
THE PROSECUTOR
*v. GERMAIN KATANGA and MATHIEU NGUDJOLO CHUI***

Confidential

Katanga Defence observations on the composition of the bench

Source: Defence for Mr Germain Katanga

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

[2 names maximum]

**The Office of Public Counsel for the
Defence**

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States Representatives

Amicus Curiae

REGISTRY

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Other

Dear Mr President,

On the 24th day of October 2008 you exercised your functions under Article 61(11) of the Statute in designating the judges for the trial of Germain Katanga.¹ For the reasons provided below the defence request that you reconsider your designation in the interests of justice and, further, to avoid appearance of bias.

Firstly, the defence respectfully submits that the current composition of the bench is too narrowly drawn. The present composition includes, so far as we can tell, no judge with a common law background. The defence recognises that the ICC is a *sui generis* system, based on legal principles some of which are unique to the ICC and some of which have their roots in legal principles developed by international courts (public, criminal or human rights) or domestic courts throughout the world. The ICC is not to be regarded as a hybrid court, based primarily on legal principles derived from common law and civil law systems.

Having said this, the spirit, objectives and the letter of the ICC Statute give high priority to the representation of the principal legal systems of the world in each courtroom. Article 36(8) of the ICC Statute provides that the State parties shall, in the selection of judges, take into account the need, within the membership of the court, for “the representation of the principal legal systems of the world”. This provision would be void of any meaning if judges from similar legal systems were then concentrated in the same Chamber. If the bench is composed of only common law judges, or civil law judges, then, as has been observed, ‘if the bench was regarded as not representative, that might be viewed in specific cases as detracting from the value of the court’s decisions.’

One cannot ignore the fact that, in particular, common law and civil law traditions operate in a fundamentally different manner. In addition, in the present case, counsel for both Mr Katanga and the prosecution have been trained in common law. The case is one of the first, and may yet become the first, to be tried before the ICC. Most of the charges come before the court for the first time. The modalities of participation of the parties and general principles of jurisprudence have yet to be determined or given substance. For the better understanding of new legal issues in the Court room, as well as for the development of ICC jurisprudence, which is still at a preliminary stage, and to do justice to the above considerations, it would be preferable to have a mix of judges for the trial, representing the principal legal systems of the world. It would, in the submission of the defence, be appropriate to include at least one

¹ ICC-01/04-01/07-729.

common law judge on a bench of three judges and the defence accordingly respectfully requests you to revise your original disposition.

Secondly, the Defence regret to raise concern at the appointment of Judge Saiga to the Trial Chamber. The Defence hastens to add that it fully accepts that Judge Saiga satisfies the criteria that she be 'of high moral character, impartiality and integrity'. Our concerns lie not with her undoubted personal qualities, amply demonstrated in her diplomatic service and appointments, but rather with her lack of qualification and experience in the area of criminal practice and international criminal law. It is the understanding of the Defence that Judge Saiga has no legal qualification, whether by way of a law degree, LLM or LLB or equivalent, or professional legal qualification.

The Defence is of the understanding that Judge Saiga is authorised to sit in the Supreme Court of Japan. However, she would not qualify as a judge for the lower courts in Japan (10 years experience as a judge, prosecutor, attorney or law professor).² Professor Toru MIURA, in his article referred to below, offered as a possible explanation for the less stringent requirements demanded of Supreme Court Judges in Japan, which permits a few non-jurists to be members of the Supreme Court, that "the original idea of the Supreme Court was rather closer to a Constitutional court, since it is uncommon to have these people in the appellate courts in other countries."³

In the article referred to below, Kai Ambos states:

while it is true that in Japan even a diplomat without formal legal education can become a judge of the Supreme Court, he or she is one of 15 judges and all the others have a qualification as a lawyer (apart from the diplomat there are six judges, four practising lawyers, two prosecutors, one civil servant, and one professor of law the qualifications to be a judge on the Supreme Court..).⁴

In the ICC, on the other hand, the bench consists of just three judges. A majority of two out of three is sufficient for an ultimate finding of guilt or innocence. Judges at the ICC deal with

² <http://www.courts.go.jp/english/system/system.html#02>

³ Independence, Transparency And Accountability Of The Judiciary In Japan By Mr. Toru MIURA, Professor UNAFEI http://www.unafei.or.jp/english/pdf/PDF_indonesia/session4.pdf at p. 135.

⁴ Kai Ambos, 'Witness Proofing' before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman, *Leiden Journal of International Law*, 21 (2008), pp. 911-916, footnote 22, relying on information given by Professor Dr Makoto Tadaki, Chuo-University, Tokyo, for this information. Indeed, the Japanese Supreme Court web-site states that "Justices of the Supreme Court shall be appointed from among persons with a broad vision and extensive knowledge of the law. At least ten Justices must be selected from among those who distinguish themselves as judges, public prosecutors, attorneys, and professors or assistant professors of legal science at universities; the rest do not need to be jurists." see <http://www.courts.go.jp/english/system/system.html#02>

highly technical, legal matters many of which are yet to be established. Given these circumstances, the Defence submits that it is essential that all three judges have, as a very minimum, a law degree. The nomination of candidates to a Trial Chamber, where issues of guilt and innocence fall to be determined, should, therefore, be based also on the lower court criteria, and not exclusively on Supreme Court qualifications which may be less demanding in certain States, such as Japan.

It is respectfully submitted that Judge Saiga's nomination as trial judge is in violation of the spirit, objectives and letter of the ICC Statute. Whilst it is true that Article 36(3)(a) of the ICC Statute only requires that the candidates 'possess the qualifications required in their respective States for appointment to the highest judicial offices', for the above reasons, Judge Fumiko Saiga's qualifications for appointment to the Japanese Supreme Court are misleading, given that she fails to meet the requirements for qualification as a lower court judge. It would be a surprising scenario if a person did not meet the requirements to be nominated as a trial judge in his or her own country, but could be nominated a trial judge at the ICC.

Moreover, Article 36(3)(a) does not stand on its own but must be read in conjunction with Article 36(3)(b), which requires either established competence in criminal procedure or established competence in relevant areas of international law, (such as international humanitarian law and the law of human rights) and extensive experience in a professional legal capacity which is relevant to judicial work.⁵ This provision was modelled on corresponding provisions in the ILC draft Statute of the ICC,⁶ in relation to which the ILC made the following comment:

Article 6 lays down the basic requirement that judges be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. It also addresses the difficult issue of the balance of qualifications required of the judges as between criminal law and criminal trial experience (*the importance of which was stressed in many comments by States and during the*

⁵ Kai Ambos, *Ibid*, footnote 22 "The most recent example is the election as judge of Fumiko Saiga from Japan. This 'judge' may have long diplomatic experience, but she does not even have a law degree. In diplomatic circles her election has been justified by the fact that in Japan even persons without legal education are, under certain conditions, eligible to the Supreme Court, so that Art. 36(3)(a) ICC Statute – (only) requiring that the candidates applicable. However, this is unconvincing, given that subpara. (a) does not stand alone but must be read in conjunction with the following subpara. (b), which qualifies the eligibility requirements and, in any case, requires 'extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court' (subpara. (b)(ii)). Indeed, subparagraph (b) has been the object of fierce discussions in Rome and New York.

⁶ J. Jones, 'Composition of the Court', *The Rome Statute of the International Criminal Court* (Cassese Gaeta, and Jones eds. 2002) at p. 242 .

debate in the Sixth Committee) and expertise in the field of international law. [Emphasis added]

(2) In order to strike an appropriate balance between these two needs, article 6 provides for separate elections of persons nominated with qualifications in criminal law and procedure or international law. The requirement of criminal trial experience is understood to include experience as a judge, prosecutor or advocate in criminal cases. The requirement of recognized competence in international law may be met by competence in international humanitarian law and international human rights law.⁷ [Emphasis added]

In light of the concerns expressed during the debate in the Sixth Committee regarding the need to secure appropriate legal experience, it is submitted that the reference to international law implies that the candidate must have been engaged in the legal aspects and practice of this field. There would thus be a distinction between human rights advocacy, and human rights law. The latter would be satisfied by experience in a legal capacity at human rights courts (such as the ECHR), but not through the provision of advice in a political capacity concerning 'gender issues', or through the attendance of seminars on such issues.

It is also relevant that the phrase 'relevant experience' in rule 22(1) of the ICC Rules of Procedure and Evidence as concerns the qualifications of defence counsel has been interpreted by the President of the ICC to equate to at least 10 years of experience in the relevant field.⁸ The word 'extensive' implies much greater experience than the word 'relevant'. It is thus arguable that the Judges should possess much more than 10 years of experience 'in a professional legal capacity in a field which is relevant to judicial work'.

⁷ Report of the International Law Commission on the work of its forty-sixth session, p. 30. http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf

⁸ ICC-Pres-RoC72-01-8-10, *Reasons for the "Decision on the Application for Review of Decision of the Registrar's Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel"*, 10 July 2008.

24. [...] The qualifications to be met by counsel, within the scheme of legal assistance paid by the Court, are set out in rule 22(1) which provides, in relevant part, that counsel for the defence shall possess the "necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings". The "necessary relevant experience" to which reference is made in rule 22(1) is currently set at ten years by virtue of regulation 67(1), which does not provide for any waiver in the application of that criterion. The requirement that counsel possess a specific number of years of experience is not unknown to international criminal courts.⁵⁵ The Presidency rejects the applicant's arguments that regulation 67(1) should be set aside and rule 22(1) applied exclusively. There is no apparent conflict between rule 22(1) and regulation 67(1) that would warrant such action. The judges, exercising their functions pursuant to article 52(1), have defined the necessary relevant experience to be held by counsel in unambiguous terms. Furthermore, under the existing regime, the requirement of ten years experience is also applicable to associate counsel. Neither rule 22(1) nor regulation 67(1) differentiate between different types of counsel or the requirements in relation thereto.

26. The Presidency will not proceed further to consider the necessary relevant experience, i.e. the specific number of years, laid down by regulation 67(1). If the Presidency were so minded, granting the Application would, as stated at paragraph 7, in effect, expunge the ten-year criterion in regulation 67(1) from the Regulations of the Court, thereby entailing a de facto amendment to that text. Having said that, the Presidency will recommend that the necessary relevant experience applicable to counsel is given further consideration by the plenum of judges.

Indeed, it would be incomprehensible if the legal requirements for defence counsel would exceed those for the judges.

It is not apparent to the Defence that Judge Saiga has that 'extensive experience' in a professional legal capacity in fields relevant to judicial work.⁹ Judge's Saiga's extensive experience in the ambassadorial and human rights field does not reassure the Defence; her curriculum vitae does not disclose the extent to which her various posts included any legal work, let alone legal work which may be relevant to the ICC proceedings.

The Defence is concerned solely for the position of Mr Katanga. At this stage of the proceedings, and with a long and difficult legal road ahead, the defence seeks to obtain, in his interests, the best qualified bench of judges available. It is difficult to accept that a judge with no formal legal qualification or practical experience in criminal or international criminal law is equipped to discharge the difficult functions of a trial judge in a difficult case, in a new legal order. The defence invite you to make a more appropriate appointment so as to better secure Mr Katanga's fair trial rights.

Finally, The Defence further raises concerns in respect of Judge Saiga's prior involvement in matters directly relevant to the case. Judge Saiga was the Ambassador of Japan to the UN in 2003 – during which time the Secretary-General, the General Assembly and Security Council issued several resolutions concerning the events in Ituri, and noting in particular that the recruitment of child soldiers was an offence under international law.¹⁰

In that period, relevant to our charging document, the Secretary-General issued a report concerning children and armed conflict. The annex to the report lists armed groups responsible for this practice – it expressly names 'Lendu militias' as being responsible.¹¹ On 14 January 2003, this report was submitted to the Security Council for consideration, and debated. During the discussion of the Security Council resolution that would be issued following this report, Japan was invited to participate and Judge Saiga attended as representative of Japan.¹² Judge Saiga is reported to have made numerous comments about the

⁹ http://www.icc-cpi.int/library/asp/CV.English.Japan.16_july_2007.pdf

¹⁰ See, for instance, Resolution issued by the General Assembly in 2003 concerning the DRC, which condemned "The recruitment and use of child soldiers by armed forces and groups, including the abduction of children throughout the territory of the Democratic Republic of the Congo, in contravention of international human rights standards" stating A/Res/57/233. Situation of human rights in the Democratic Republic of the Congo, 28 January 2003, at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/554/86/PDF/N0255486.pdf?OpenElement>

¹¹ <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/bbb6c3c3a12d265a85256c9100729a9e>

¹² <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20SPV4684.pdf>

gravity of using child soldiers.¹³ The Defence submits that Judge Saiga's following observations particularly affect the perception of her impartiality in the present proceedings:¹⁴

I should like, on behalf of the Japanese Government, to make a number of comments regarding the United Nations work on children and armed conflict.

First, we would like to express our appreciation to the Special Representative of the Secretary-General for Children and Armed Conflict, Mr. Olara Otunnu, for his activities, including field visits to countries caught in or recovering from armed conflict, since such visits can contribute to the promotion of awareness of the importance of the protection of children in situations of armed conflict, who need special attention for their survival. The annex to the most recent report of the Secretary-General includes a list of certain parties to armed conflicts that recruit or use child soldiers. It is not sufficient simply to denounce those who are responsible, but every possible effort — for example, awareness raising and eradicating the culture of impunity — must be made to bring such practices to an end. [emphasis added]

After the debate, the Security Council issued Resolution 1460 (2003), concerning children in armed conflict,¹⁵ which noted “the fact that the conscription or enlistment of children under the age of 15 into the national armed forces or using them to participate actively in hostilities is classified as a war crime by the Rome Statute of the International Criminal Court”, and noted with concern the parties listed in the annex to the Secretary-General's Report (including the Lendu militia).

The Defence is particularly troubled by Judge Saiga's submission that Lendu militia recruited or used child soldiers in 2003. Given that both accused allegedly belonged to the Lendu/Ngiti militia groups, and that they are charged with the use of child soldiers in 2003, Judge Saiga's submission, though perfectly understandable in the context of her then mission, must necessarily give rise to an appearance of bias, within the legal meaning of that phrase, when uttered by the trial judge she now is. Moreover, the determination by the Secretary-General, General Assembly and Security Council, explicitly supported by Judge Fumiko Saiga, that the recruitment and use of child soldiers are crimes under international law undermines any argument by the Defence challenging jurisdiction in respect of those crimes on the basis of a violation of the legality principle.

¹³ Secretary-General Says Using Child Soldiers Can No Longer Be Done With Impunity, as Security Council holds day-long debate on Children and Armed Conflict, Report Identifies 23 Parties to Conflicts On Council's Agenda That Continue to Recruit, Use Children. At: <http://www.un.org/News/Press/docs/2003/sc7631.doc.htm>

¹⁴ <http://domino.un.org/unispal.nsf/f45643a78fcb719852560f6005987ad/8cd7546a5f77ef6085256cb500579f68!OpenDocument>

¹⁵ <http://daccessdds.un.org/doc/UNDOC/GEN/N03/231/16/PDF/N0323116.pdf?OpenElement>

The Defence submits that Judge Saiga's express endorsement of the above resolutions, in particular, in light of references to crimes being committed by Lendu forces, and her submissions during the debates give an appearance of bias. Judge Fumiko Saiga may well be capable of retaining her impartiality in our case. However, in line with the ECHR and ICCPR jurisprudence on this issue, as well as the jurisprudence at other international and domestic criminal courts,¹⁶ it is sufficient to establish an appearance of bias, not an actual bias. This was confirmed by the Appeals Chamber in *Furundzija*, stating that the requirement of impartiality "is violated not only where the decision maker is actually biased but also where there is an appearance of bias", which is established where "... the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias".¹⁷ The Defence submits that the above circumstances meet the threshold of appearance of bias. As stated by one ICTR Chamber, while fully endorsing *Furundzija*, "apprehension of bias test reflex the maxim that "justice should not only be done, but should manifestly and undoubtedly be seen to be done.",¹⁸ a principle viewed as "sacred and overriding" by the Appeals Chamber of the Special Court for Sierra Leone.¹⁹

¹⁶ See, for instance, *Incal v. Turkey*, (2000) 29 E.H.R.R. 449 (E Ct HR), para. 71 ("what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all as far as criminal proceedings are connected, in the accused. In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified"); *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet (No. 2)* H.L.(E) [1999] 2 W.L.R. 272; *R. v. Gough*, [1993] 2 All ER 724, per Lord Goff (House of Lords): "... there must appear to be a real likelihood of bias. Surmise or conjecture is not enough ..."; *Webb v. The Queen* (1994), 181 CLR 41, Deane, J., of the High Court of Australia, stating that the test, "... is whether, in all circumstances, a fair-minded lay observer with knowledge of the material objective facts might entertain a reasonable apprehension that the Judge might not bring an impartial and unprejudiced mind to the resolution of the question in issue". See further: *Prosecutor v. Bagosora et al*, ICTR-98-41, Decision on Motion for Disqualification of Judges, 28 May 2007, para. 6; *Prosecutor v. Karemera et al*, ICTR-98-44, Decision on Motion Karemera for Disqualification of Trial Judges, 17 May 2004, para. 7; *Prosecutor v. Karemera et al*, ICTR-98-44, Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam, 14 June 2007, para. 9; *Prosecutor v. Karemera et al*, ICTR-98-44, Decision on Josph Nzirorera's Motion for Disqualification of Judges Byron, Kam and Joensen, 27 February 2008, para. 4.; *The Prosecutor v. Karemera et al.*, Decision on Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam and Joensen, 7 March 2008, para. 4.

¹⁷ *Prosecutor v. Furundzija*, IT-95-17/1-A, Appeals Chamber's Judgment, 21 July 2000 ("Furundzija AC Judgment"), para. 189; reiterated in: *Prosecutor v. Karemera et al*, ICTR-98-44, Decision on Motion Karemera for Disqualification of Trial Judges, 17 May 2004, para. 8. See also: *Prosecutor v. Sesay*, SCSL-2004-15-AR15, Decision on Defence motion Seeking the Disqualification of Justice Robertson from the Appeals chamber (Sierra Leone AC), 13 March 2004, para. 15 ("the crucial and decisive question is whether an independent bystander so to speak, or the reasonable man, reading those passages will have a legitimate reason to fear that Justice Robertson lacks impartiality. In other words, whether one can apprehend bias"; and: *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet (No. 2)* H.L.(E) [1999] 2 W.L.R. 272, pages 2-3: "The court cannot rely on its knowledge of the integrity of the judge concerned to outweigh the appearance of bias to the eye of the bystander. The reference point must remain the reasonable observer. This is consistent with the test laid down under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms".

¹⁸ *Prosecutor v. Karemera et al*, ICTR-98-44, Decision on Motion Karemera for Disqualification of Trial Judges, 17 May 2004, para. 9; *Furundzija AC Judgment*, para. 189; see also *Prosecutor v. Bagosora et al*, Decision on Motion for Disqualification of Judges, 28 May 2007, para. 7; *Prosecutor v. Karemera et al*, ICTR-98-44, Decision on Motion to Vacate Decisions and for Disqualification of Judges Byron and Kam, 14 June 2007, para.

It is in light of the above concerns, and in the interests of Mr Katanga, that the defence address you on these sensitive issues. We repeat that the Defence in no way wishes that any of the above should be seen as in the least way reflecting on what we accept is the high moral character, impartiality and integrity of Judge Saiga.

Yours most sincerely,



David HOOPER
Counsel for Mr Germain Katanga.

London, 14th November, 2008.

10; *Prosecutor v. Karemera et al.*, ICTR-98-44, Decision on Joseph Nzirorera's Motion for Disqualification of Judges Byron, Kam and Joensen, 7 March 2008, para. 4; *R. v. Sussex Justices* (1923), [1924] 1 K.B. 256, 259 (Lord Hewart); quoted in *Furundzija* AC Judgment, para. 195; *Prosecutor v. Brdjanin & Talic*, IT-99-36, Decision on Application by Momir Talic for the Disqualification and Withdrawal of a Judge (TC), 18 May 2000, para. 9.

¹⁹ *Prosecutor v. Sesay*, SCSL-2004-15-AR15, Decision on Defence motion Seeking the Disqualification of Justice Robertson from the Appeals chamber (Sierra Leone AC), 13 March 2004, para. 16.