

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-01/04-01/07**
Date: **20 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

Defence Response to the Presidency's Order dated 19 November 2008

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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[1 name per team maximum]

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

[2 names maximum]

States Representatives

Amicus Curiae

REGISTRY

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Victims and Witnesses Unit

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**Victims Participation and Reparations
Section**

Other

In response to the Presidency's *Order concerning the Observations of Mr Germain Katanga on the composition of the bench of 14 November 2008*, dated 19 November 2008,¹ may I respectfully submit the following observations.

1. Firstly, the defence seeks to maintain the tenor of its original submissions and emphasises that the concern we have is to obtain the best possible tribunal for the trial of Mr Katanga. It is submitted that the matters raised in that submission are sufficient to invoke the President's power to reconsider and recompose the bench of judges in this case. There were matters touched upon in the submission that go to areas that are not my primary concern. There is the further matter that concerns a view of the basic and inherent powers of the Presidency to consider the qualifications of a nominated judge and to review the appropriateness of such appointment. That is not my primary concern, as I am seeking only a reconstituted bench, but may be appropriate for the President to consider as it concerns the extent of his power to review this situation. For that reason it is more fully reviewed here than in the original submission.
2. The President is requested not to treat the observations as a request for disqualification, as provided for in Article 41. The defence is aware, that a request for disqualification is governed by Article 41 of the Statute and Rule 34. Pursuant to Article 41 (1) (c) any question as to the disqualification of a judge shall be decided by an absolute majority of the judges and the challenged judge shall be entitled to present his or her comments on the matter. It follows from this provision that a request for disqualification needs to be submitted to the Trial Chamber.
3. Whether such a request is submitted in due course will depend on the President's decision on the review of the composition of the bench. As to the three grounds relied upon by the defence and referred to in the order, the first two (that the chamber lacks a judge from a common law system and, secondly, that Judge Saiga lacks the required qualifications) are matters that the defence submits *precede* any question as to disqualification. In fact, only when it has been decided what is ultimately the proper composition of the Chamber, should a formal request for disqualification be in order. The reason why the defence has nevertheless informed the President of our concerns

¹ ICC-01/04-01/07-751-Conf.

regarding Judge Saiga's statements in the UN Security Council is that the President may well have been unaware of this, and it could be information relevant to the decision on the constitution of the Trial Chamber under Rule 130, and material to a decision to reconsider.

4. The two preceding matters, lack of a common law judge and Judge Saiga's lack of qualification, should, it is respectfully submitted, be approached procedurally in the following manner.
5. In respect to Judge Saiga's lack of appropriate qualifications, it is submitted that Article 36 (3) (a) is a vital provision in securing a competent and authoritative court, as well as in securing the accused's right to a fair trial. We have already provided our substantive grounds as to why we believe that Judge Saiga lacks the appropriate experience and qualifications.
6. A central question is which procedure is available to secure the proper interpretation and application of Article 36 (3) (a) and to remedy any violation of that provision. It is accepted that Article 41 is not the remedy, not only because of the content of that provision, but also because it would be inappropriate for the Trial Chamber to deal with it.
7. It is submitted that Article 36 (3) (a) is not only a matter for the States parties. Otherwise it would make the provision a dead letter, as it could be subjected to political considerations. Hence, judicial supervision is indispensable.
8. It is submitted that the Presidency has the broad power and duty to ensure the proper functioning of the Court, as has been entrusted to it by Article 38 (3)(a). This provides a basis for reviewing appointments or alternatively the exercise of an implied power to secure the authority of the court in the composition of the bench. It is submitted that Article 38 provides the fundamental procedural basis for the President to reconsider the appointment of Judge Saiga, which in our submission is in violation of Article 36 (3) (a).
9. To the degree that the Presidency would be of the view that it cannot exercise a power of review in relation to elected Judges, although such a position would make Article

36 (3) (a) and a number of other provisions a dead letter, the defence submit that the Presidency has the obligation to exercise its power pursuant to Rule 130 in accordance with the Statute. In other words, the Presidency cannot compose Chambers of individuals if such composition would be in violation of Article 36 (3) (a). The defence submits that the Presidency can review its initial composition decision and notes that neither Rule 130, nor any other Rule, prevents the Presidency from changing compositions, especially when this would be necessary to ensure the proper administration of the Court and is in the interests of justice.

10. If the Presidency is of the view that it cannot deal with the defence's request in substance, then it would be appropriate for the President to indicate what procedure is available to the Defence if the defence wishes to challenge the composition of a Chamber on grounds which are not provided for in Article 41.
11. The defence has already offered its substantive arguments regarding the lack of common law judges in the Trial Chamber. The matter is clearly different from the position of Judge Saiga as the latter may concern both a review of her nomination in general (as indicated above) but in particular, her specific involvement in the trial of Mr Katanga. The lack of a common law judge is a matter regarding composition.
12. The procedural framework is also based on the aforementioned interpretation of Article 38 and the exercise of implied powers to be able to ensure full respect for provisions in the Statute, in this case especially Article 39 (1). Furthermore, from Rule 130 it follows that the Presidency enjoys significant discretion in composing Chambers and should be able to exercise that power flexibly, in the interests of justice.
13. Should the Presidency deny possessing such a power, the defence respectfully request to be informed of the procedure available to the Defence to challenge an unbalanced composition of a Bench.

Yours most sincerely,



David HOOPER
Counsel for Mr Germain Katanga.

The Hague, 20th of November 2008.