

ANNEX 1

**Cour
Pénale
Internationale**



Les Chambres

**International
Criminal
Court**

The Chambers

				Internal memorandum Memorandum interne						
To / À	The Presidency	From / De	Judge Ušacka							
Date	16 February 2010	Through / Via								
Ref.	01/04 (DRC) OA	Copies	Judge Nserekwo, President of the Appeals Division							
Subject / Objet	Request to be Excused									
	CONFIDENTIAL									

BACKGROUND

On 12 January 2006, the Prosecutor filed, under seal, an application with Pre-Trial Chamber I (hereinafter: PTC I), then composed of Judges Jorda, Kuenyehia and Steiner, for a warrant of arrest against Mr. Bosco Ntaganda (ICC-01/04-98). PTC I rejected the application on 10 February 2006 (ICC-01/04-125). The Prosecutor appealed this decision on 14 February 2006 (ICC-01/04-125), and on 13 July 2006 the Appeals Chamber reversed and remanded the matter back to PTC I (ICC-01/04-169), which then issued a warrant of arrest for Mr. Bosco Ntaganda on 22 August 2006. All of these proceedings were initially under seal.

I was temporarily attached to PTC I from 22 June 2007 until 13 March 2009, when I was assigned to the Appeals Division.

On 29 February 2008, eighteen months after PTC I decided on and issued the warrant of arrest, PTC I – then composed of Judge Kuenyehia, Judge Steiner and myself – received the “Prosecution’s Application for Unsealing the Arrest Warrant against Bosco Ntaganda” (ICC-01/04-02/06-15-US-Exp), filed in the record of the *Prosecutor v. Bosco Ntaganda* (hereinafter: *Ntaganda* case). The Prosecutor requested that PTC I unseal the arrest warrant against Mr. Bosco Ntaganda, because in his view, the basis for the initial classification no longer existed.

Thereafter, on 23 April 2008, PTC I held a closed-session hearing with the Prosecutor to “solicit further information from the Prosecution concerning the application for unsealing the arrest warrant against Bosco Ntaganda.” (ICC-01/04-02/06-T-1, lines 7-8) The transcript of the hearing remains under seal.

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On the basis of the information provided by the Prosecutor in the application and in the hearing, on 28 April 2008, I signed one decision in the *Ntaganda* case which:

DECIDES to unseal and to reclassify as public the documents ICC-01/04-02/06-2-US and ICC-01/04-02/06-2-US-Anx.

REQUEST

On 22 September 2008, the Appeals Chamber reclassified as public the Judgment of 13 July 2006 (DRC OA), and two other documents in the record. Today, the Appeals Division decided that the Appeals Chamber should undertake a review of the entire record in the DRC OA appeal in order to determine whether a decision should be rendered by the Appeals Chamber to reclassify any other documents in the record. While these documents would have been filed in the record of the DRC Situation¹, they concern and would be directly related to the case of the *Prosecutor v. Bosco Ntaganda*.

I would therefore like to bring to the attention of the Presidency two of the procedural proceedings mentioned above, firstly, the closed session, *ex parte* hearing held by Pre-Trial Chamber I (hereinafter: PTC I) on 23 April 2008 (ICC-01/04-02/06-T-1-US-ENG); and secondly, the decision taken by PTC I on 28 April 2008 (ICC-01/04-02/06-18) in the *Ntaganda* case.

Under rule 35 of the Rules, a Judge has an affirmative duty to request the Presidency to be excused when the Judge has reason to believe that a ground for disqualification exists. Under this rule, the Judge "shall not wait for a request for disqualification to be made in accordance with article 41." Pursuant to article 41 (2) (a):

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 or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided in the Rules of Procedure and Evidence.

I recognise that article 41 (2) (a) of the Statute, second sentence, is phrased broadly. By itself, it appears to indicate that a judge shall be disqualified if that judge has previously been involved in any capacity in that case before the Court. The Presidency has indicated that it "considers the overriding purpose of article 41 (2) (a) to be the safeguarding of the

¹ Pursuant to Regulations of the Registry, regulation 20 (2).

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integrity of proceedings of the Court by ensuring that no judge participates in a case in which his or her impartiality might reasonably be doubted on any ground" (ICC-01/04-01/06-2138-AnxIII).

On 28 April 2008, I signed one decision in the *Ntaganda* case and took part in the related hearing on 23 April 2008. The decision rendered was of a procedural nature: it did not require a legal assessment of the factual allegations; it did not require a review of the Prosecutor's evidence in the case against Mr. Bosco Ntaganda; nor did it require a determination of guilt or innocence. The Pre-Trial Chamber was tasked only with determining whether the basis for the initial classification of the warrant of arrest continued to exist. Thus, I do not believe that if I participate in appellate proceedings in the DRC Situation, but which are related to the *Ntaganda* case, my impartiality could reasonably be doubted. For these reasons, I am ready, willing and able to commence my judicial duties as they arise in this case.

Nevertheless, I firmly believe that in all matters pertaining to judicial ethics, a cautious approach should be followed, especially in situations such as this one in which the wording of article 41 (2) (a) of the Statute and rule 34 of the Rules is phrased broadly enough to create the potential for ambiguity. For these reasons, and because there is no formal mechanism provided in the Statute, Rules, Regulations or Code of Judicial Ethics in which a Judge may ask for advice when faced with such an issue, I feel that it is my ethical duty to request to be excused, so that the Presidency may decide on this matter pursuant to article 41 (1) of the Statute.

Pursuant to rule 33 (2) of the Rules of Procedure and Evidence, I request that this memorandum is filed with Presidency and kept confidential.