

ANNEX 3

**Cour
Pénale
Internationale**



La Présidence

**International
Criminal
Court**

The Presidency

Internal memorandum
Memorandum interne

To À	Judge Anita Ušacka	From De	The Presidency <i>shs</i>
Date	24 September 2010	Through Via	
Ref.	2010/PRES/122-2	Copies	Judge Akua Kuenyehia, President of the Appeals Division
Subject Objet	Decision on the request of Judge Anita Ušacka of 16 February 2010 to be excused from participating in the exercise to reclassify documents in the appeals proceedings related the case of <i>The Prosecutor v. Bosco Ntaganda</i> , pursuant to article 41(1) of the Rome Statute and rule 35 of the Rules of Procedure and Evidence		

The Presidency of the International Criminal Court (hereinafter "Court"), composed of the President (Judge Sang-Hyun Song), the First Vice-President (Judge Fatoumata Demele Diarra) and the Second Vice-President (Judge Hans-Peter Kaul), hereby decides on the request of Judge Anita Ušacka of the Appeals Chamber (hereinafter "applicant") dated 16 February 2010 wherein she requested to be excused from sitting in proceedings to reclassify documents in the appellate record related to the case of *The Prosecutor v. Bosco Ntaganda* (hereinafter "case").

The request for excusal is denied.

Factual Background

Following the decision of the Appeals Chamber of 16 February 2010 to review the classification of documents in the record of the appellate proceedings related to the case, the applicant, by memorandum of that same date classified as confidential, requested the Presidency to excuse her from participating in the reclassification exercise (hereinafter "request"), pursuant to article 41(1) of the Rome Statute (hereinafter "Statute") and rule 33 of the Rules of Procedure and Evidence (hereinafter "Rules").¹

¹ 2010/PRES/122.

The request is based on the applicant's previous involvement in the pre-trial phase of the case, in the course of which she participated in a decision unsealing and reclassifying the warrant of arrest for Mr Bosco Ntaganda (hereinafter "Decision")² and in a related *ex parte* hearing, before being assigned to the Appeals Division on 13 March 2009.

The applicant states that she does not believe that her impartiality might reasonably be doubted were she to participate in the reclassification exercise.³ Nonetheless, in light of article 41(2)(a) of the Statute and rule 35 of the Rules, the applicant "feel[s] that it is [her] ethical duty to request to be excused".⁴

Decision

The request 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, finds the request to be without merit.

The applicant brings the request on the ground that she signed a decision related to unsealing and reclassifying the warrant of arrest and took part in a related procedural hearing.

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 article 41(2)(a) of the Statute provides, in relevant part, that:

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 ...

The Presidency has previously found that the capacities with which the second sentence of article 41(2)(a) is concerned are those by virtue of which the impartiality of

² Decision to unseal the warrant of arrest against Bosco Ntaganda, ICC-01/04-02/06-18, 28 April 2008.

³ Request, page 3.

⁴ Request, page 3.

a judge might reasonably be doubted.⁵ The Presidency found this interpretation most consistent with the objective of ensuring that the impartiality of judges cannot reasonably be reproached, at the same time as ensuring the efficient conduct of proceedings.⁶

Accordingly, the Presidency turns now to assess whether the applicant's previous involvement in the case may give rise to a reasonable ground to doubt her impartiality.

In the Decision, the Pre-Trial Chamber considered a discrete procedural application by the Prosecutor for the unsealing of the warrant of arrest for Mr Bosco Ntaganda, concluding that "it is no longer necessary for the warrant of arrest against Bosco Ntaganda to remain under seal".⁷ The Decision does not address any further matters. The applicant submits that "[t]he 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".⁸ Further, the applicant submits that "[t]he Pre-Trial Chamber was tasked only with determining whether the basis for the initial classification of the warrant of arrest continued to exist".⁹ The Presidency notes also the submission of the applicant that she only participated in that single decision in the case.¹⁰

The Presidency finds that such limited prior involvement does not constitute a ground on which the impartiality of the applicant, in respect of the current reclassification exercise, might reasonably be doubted.¹¹

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

⁵ Decision on the request of 16 September 2009 to be excused from sitting in the appeals against the decision of Trial Chamber I of 14 July 2009 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, 23 September 2009, as contained in ICC-01/04-01/06-2138-AnxIII, 13 November 2009, page 6 (hereinafter "Decision of 23 September 2009").

⁶ Decision of 23 September 2009, page 6; See also Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, 19 March 2010, as contained in ICC-02/05-01/09-76-Anx2, 19 March 2010.

⁷ Decision, page 5.

⁸ Request, page 3.

⁹ Request, page 3.

¹⁰ Request, page 3.

¹¹ See also Decision of 23 September 2009, page 8.

The Presidency notes that the applicant desires her request to remain confidential. Considering, however, that this decision elucidates the Presidency's understanding of article 41(2) of the Statute and noting the applicant's observation that this is a matter "pertaining to judicial ethics" and therefore is of relevance to all judges, the Presidency sees no reason for this decision to remain confidential and request the applicant to provide her views on this matter by 11 October 2010.