

ANNEX 4

**Cour
Pénale
Internationale**



La Présidence

**International
Criminal
Court**

The Presidency

Internal memorandum
Memorandum interne

To À	Judge Akua Kuenyehia	From De	The Presidency <i>shs</i>
Date	24 September 2010	Through Via	
Ref.	2010/PRES/261-2	Copies	
Subject Objet	Decision on the request of Judge Akua Kuenyehia of 18 February 2010 to be excused from participating in the exercise to reclassify documents in the appeals proceedings related to the case of <i>The Prosecutor v. Bosco Ntaganda</i> and in all appeals in the case		

The Presidency of the International Criminal Court (hereinafter "Court"), composed of the President (Judge Sang-Hyun Song), the First Vice-President (Judge Fatoumata Dembele Diarra) and the Second Vice-President (Judge Hans-Peter Kaul), hereby decides on the request of Judge Akua Kuenyehia of the Appeals Chamber (hereinafter "applicant") dated 18 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") and from all appeals in the 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, on 18 February 2010 by memorandum classified as confidential, the applicant 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 Furthermore, the applicant requested to be excused from all appeals in the case.

The request for excusal is based upon the previous involvement of the applicant in the pre-trial phase of the case, in the course of which she, *inter alia*, issued a warrant of arrest

¹ 2010/PRES/261.

against Mr Bosco Ntaganda. The applicant therefore considers herself to have “previously been involved ... in that case before the Court” within the meaning of article 41(2)(a) of the Statute.

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 requests to be excused from all appeals arising in the case, as well as to be excused from sitting in the current reclassification exercise, on the grounds that she has been previously involved the pre-trial phase of proceedings in the course of which she issued the warrant of arrest.

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 a judge might reasonably be doubted.² 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.³

² 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”).

³ 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

The applicant has been involved in the pre-trial phase of the case, including the issuing of a warrant of arrest, thus the Presidency must consider whether such involvement necessarily gives rise to reasonable grounds to doubt her impartiality.

The Presidency has previously found that a judge who has been involved in issuing both a warrant of arrest and a decision on the confirmation of charges may not sit in later appeals in the case.⁴ This does not determine whether a judge who has sat only in the warrant of arrest is similarly necessarily excused.

Pursuant to article 58(1)(a) of the Statute, the legal standard to be applied by a pre-trial chamber when issuing a warrant of arrest is whether there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court". This differs from the standards applied at later stages. The standard applicable to the confirmation of charges hearing is that there must be "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged",⁵ whereas at the trial stage, "the Court must be convinced of the guilt of the accused beyond reasonable doubt".⁶ The Appeals Chamber has found that "when disposing of an application for a warrant of arrest under article 58(1) of the Statute, a Pre-Trial Chamber should not require a level of proof that would be required for the confirmation of charges or for conviction".⁷ The level of proof required at the warrant of arrest stage is less rigorous than at later stages, demanding an assessment more *prima facie* in nature.

The Presidency notes that the practice of the *ad hoc* tribunals is that a judge who has been involved in proceedings using a standard of proof similar to the issuance of a warrant of arrest before the Court is not prevented from involvement in appellate proceedings. Pursuant to article 19 of the Statute of the International Criminal Tribunal for the former

article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence, ICC-02/05-01/09-76-Anx2, 19 March 2010.

⁴ Decision on the request of the 16 February 2010 to be excused from sitting in the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 20 November 2009 and from sitting in all future appeals arising in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence, ICC-01/04-01/07-1949-Anx2, 8 March 2010; Decision on the request of 15 July 2010 to be excused from sitting in the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 and from sitting in all future appeals arising 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, 16 July 2010, as contained in ICC-01/04-01/06-2524-Anx2, 20 July 2010.

⁵ Rome Statute, article 61(7).

⁶ Rome Statute, article 66(3).

⁷ Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-73, 3 February 2010, paragraph 30.

Yugoslavia, a judge of the Trial Chamber must review an indictment in order to be satisfied that a *prima facie* case has been established by the Prosecutor.⁸ The Rules of Procedure and Evidence of that tribunal provide that the judge who has reviewed an indictment shall not be disqualified from sitting as a member of the Appeals Chamber.⁹ The Presidency considers this to reflect a belief that the impartiality of a member of the Appeals Chamber is not ordinarily to be doubted by reason of that judge's prior involvement in making a preliminary assessment as to whether there are initial grounds to bring a matter within the Court's jurisdiction.

This view is consistent with the practice of the European Court of Human Rights whereby a judge who has taken a pre-trial decision involving a level of proof such as whether there are *prima facie* grounds informing the charge, is not ordinarily prohibited from later involvement at trial level.¹⁰ The jurisprudence of the European Court of Human Rights indicates that it is only when the level of proof applied by a judge at the pre-trial level is higher than a *prima facie* assessment of the charge, that that judge's impartiality could objectively be questioned by later participation in the trial. For example, in *Hauschildt v. Denmark*, the applicable standard of law which the judge applied at pre-trial level was whether there was a "particularly confirmed suspicion" that the accused had committed the crime with which he had been charged.¹¹ Such a level of proof at the pre-trial stage required that the judge had a very high degree of clarity as to the guilt of the applicant and was therefore considered to give rise to reasonable grounds to doubt the impartiality of that judge in the trial. The assessment made by a judge of the Court in issuing a warrant of arrest pursuant to article 58 of the Statute requires no such particularly confirmed suspicion of guilt.

Based on the above assessment, it is not immediately apparent that the applicant having issued a warrant of arrest in the case necessarily gives rise to reasonable grounds to doubt her impartiality in appellate proceedings generally. For that reason, the applicant's request to be generally excused from participating in all appeals in the case, including the reclassification exercise, on the ground that she issued the warrant of arrest is hereby denied. Should, however, the Appeals Chamber be seised with an appeal in which the abovementioned ground gives rise to a specific reason to doubt the applicant's impartiality, she may seise the Presidency.

⁸ See also Statute of the International Criminal Tribunal for Rwanda, article 18.

⁹ Rules of Procedure and Evidence of the ICTY, rule 15(C).

¹⁰ *Hauschildt v. Denmark*, no. 10486/83, Judgment of 24 May 1989, paragraph 50; See also *Jasiński v. Poland*, no. 30865/96, Judgment of 20 December 2005, paragraph 55.

¹¹ *Hauschildt v. Denmark*, no. 10486/83, Judgment of 24 May 1989, paragraph 52.

The Presidency shall make public the request for excusal and this decision, noting that the applicant has expressed her consent in accordance with rule 33(2) of the Rules.