



**Cour
Pénale
Internationale**
**International
Criminal
Court**

La Présidence
The Presidency

Internal memorandum
Memorandum interne

To À	Judge Akua Kuenyehia	From De	The Presidency
Date	4 December 2013	Through Via	
Ref.	2013/PRES/00419-2	Copies	
Subject Objet	Decision on the request to be excused from the exercise of judicial functions in the case of <i>The Prosecutor v. Bosco Ntaganda</i>, pursuant to article 41 of the Rome Statute		

The Presidency, composed of the President (Judge Sang-Huyn Song), the First Vice-President (Judge Sanji Mmasenono Monageng) and the Second Vice-President (Judge Cuno Tarfusser), hereby decides upon the request of Judge Akua Kuenyehia (hereinafter "judge") of 26 November 2013,¹ pursuant to article 41(1) of the Rome Statute (hereinafter "Statute") and rule 33 of the Rules of Procedure and Evidence (hereinafter "Rules"), to be excused from her functions as a judge of the Appeals Chamber in the case of *The Prosecutor v. Bosco Ntaganda*, ("case"), in the appeal of Mr Bosco Ntaganda, of which notice was given on 25 November 2013 ("appeal"),² and to be replaced as a judge in that case pursuant to rule 38 of the Rules (hereinafter "request for excusal").

The request for excusal is granted.

Factual background

The request is made on the ground that during the pre-trial stage of the case, the judge, now in the Appeals Chamber, was originally a member of the Pre-Trial Chamber that

¹ 2013/PRES/00419.

² Acte d'appel de la Défense de M. Bosco Ntaganda à l'encontre de la "Decision on the Defence's application for interim release" rendue par la Chambre préliminaire II le 18 novembre 2013, ICC-01/04-02/06-155.

issued a warrant for the arrest of Mr Ntaganda on 22 August 2006, whilst the appeal before the Appeals Chamber is brought against a decision of 18 November 2013 of the Single Judge of Pre-Trial Chamber II denying Mr Ntaganda's request for interim release,³ which the judge argues is "likely to be directly related to the issues addressed in the decision on the warrant of arrest" that she issued.⁴ The judge takes the view that she has, as such, been "previously involved...in the case before the Court" within the meaning of article 41(2)(a) of the Statute.

Decision

The Presidency recalls its decision of 24 September 2010,⁵ wherein it rejected the request of the same judge to be excused from, *inter alia*, all of her appellate functions in the current case on the ground that she had been previously involved in pre-trial proceedings in the case, having, *inter alia*, issued a warrant of arrest against Mr Ntaganda. Considering that request to be without merit, the Presidency found "it [wa]s 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. For that reason, the applicant's request to be generally excused from participating in all appeals in the case...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 seize the Presidency."⁶

The current appeal is a specific reason upon which the judge's impartiality might be doubted. Given that the appeal is directed against the decision of the Single Judge of Pre-Trial Chamber II denying Mr Ntaganda's application for interim release, the Presidency accepts the arguments of the judge that the appeal is likely to be directly related to issues she previously addressed in the warrant of arrest of 22 August 2006 and grants the

³ Decision on the Defence's Application for Interim Release, ICC-01/04-02/06-147.

⁴ Request for excusal, paragraph 4.

⁵ 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 *The Prosecutor v. Bosco Ntaganda* and in all appeals in the case, ICC-01/04-02/06-30-Anx4.

⁶ ICC-01/04-02/06-30-Anx4.

application. In coming to this decision, the Presidency observed that the impugned decision of the Single Judge relies on the warrant of arrest issued by the judge. In that decision, the Single Judge, noting the finding of the Appeals Chamber that “in a decision under article 60(2) of the Statute, a Pre-Trial Chamber may refer to the decision on the warrant of arrest, without this affecting the *de novo* character of the Pre-Trial Chambers decision”, recalled that the previous findings made by the Pre-Trial Chamber in its decision on the warrant of arrest of 22 August 2006 and its decision on the warrant of arrest of 13 July 2012 had established reasonable grounds to believe that Mr Ntaganda was criminally responsible, pursuant to article 25(3)(a) of the Statute, for war crimes and crimes against humanity. The Single Judge went on to find that the requirement of article 58(1)(a) of the Statute remained satisfied given, *inter alia*, the findings in the two warrants of arrest.⁷

The Presidency notes that the judge has consented to the Presidency making public the request for excusal and the reasons for its decision thereupon, pursuant to rule 33(2) of the Rules. A copy of this decision and the request for excusal shall be annexed to the decision of the Presidency replacing the judge in the case.

⁷ Decision on the Defence's Application for Interim Release, 18 November 2013, ICC-01/04-02/06-147, paragraph 38.