

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/04-01/06

Date: 2 October 2009

**THE PRESIDENCY**

**Before:** Judge Sang-Hyun Song, President  
Judge Fatoumata Dembele Diarra, First Vice-President  
Judge Hans-Peter Kaul, Second Vice-President

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO  
IN THE CASE OF  
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

**Public**

**Order annexing to the “Decision replacing a judge in the Appeals Chamber” of 23 September 2009 the decision of the Presidency on the request of 16 September 2009, pursuant to article 41 of the Rome Statute, to be excused from judicial functions**

**Order to be notified in accordance with regulation 31 of the *Regulations of the Court* to:****The Office of the Prosecutor**

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

**Counsel for the Defence**

Ms Catherine Mabilie

Mr Jean-Marie Biju Duval

**Legal Representatives of the Victims****Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants for  
Participation/Reparation****The Office of Public Counsel for Victims**

Ms Paolina Massidda

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

Mr Xavier-Jean Keïta

**States Representatives****Amicus Curiae****REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

Mr Esteban Peralta Losilla

**Deputy Registrar**

Mr Didier Preira

**Detention Section**

Mr Anders Backman

**Victims and Witnesses Unit**

Ms Maria Luisa Martinod-Jacome

**Other**

Appeals Chamber

Trial Chamber I

**Victims Participation and Reparations  
Section**

Ms Fiona McKay

**THE PRESIDENCY** of the International Criminal Court (“Court”);

**NOTING** Trial Chamber I’s “Decision on the prosecution and the defence applications for leave to appeal the ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’” of 3 September 2009<sup>1</sup> in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“case”) granting leave to appeal against a decision of Trial Chamber I of 14 July 2009 (“appeals”);<sup>2</sup>

**NOTING** the composition of the Appeals Chamber as set out in article 39(2)(b)(i) of the Rome Statute of the International Criminal Court (“Statute”), pursuant to which the Appeals Chamber shall be composed of all the judges of the Appeals Division, which in turn is composed of the President of the Court and four other judges by virtue of article 39(1) of the Statute;

**NOTING** that, following the fourteenth<sup>3</sup> and fifteenth plenary sessions of the judges held on 13 March 2009 and 8 June 2009 respectively, the Appeals Division is composed of Judges Sang-Hyun Song, Akua Kuenyehia, Erkki Kourula, Anita Ušacka and Daniel David Ntanda Nsereko;

**NOTING** that, following a request for excusal from Judge Akua Kuenyehia dated 4 September 2009 which was granted by the Presidency by decision of 15 September 2009,<sup>4</sup> the Presidency issued its “Decision replacing a judge in the Appeals Chamber” of 23 September 2009<sup>5</sup> in which it decided that, for the purpose of the appeals, the Appeals Chamber would be composed of Judges Sang-Hyun Song, Erkki Kourula, Anita Ušacka, Daniel David Ntanda Nsereko and Christine Van den Wyngaert;

**NOTING** that prior to the “Decision replacing a judge in the Appeals Chamber” of 23 September 2009, a further request for excusal had been filed on a confidential basis before the Presidency on 16 September 2009 by Judge Anita Ušacka (“judge”) pursuant to article 41(1) of the Statute and rule 33 of the Rules of Procedure and Evidence (“Rules”),<sup>6</sup> wherein

<sup>1</sup> ICC-01/04-01/06-2107.

<sup>2</sup> ICC-01/04-01/06-2049.

<sup>3</sup> See Press Release of 19 March 2009 entitled “New composition of ICC judicial divisions”, ICC-CPI-2009191I-PR399, available on the website of the Court.

<sup>4</sup> 2009/PRES/439-2.

<sup>5</sup> ICC-01/04-01/06-2138.

<sup>6</sup> 2009/PRES/00460.

the judge requested to be excused from sitting on the appeals on the basis of her previous involvement in one decision during the pre-trial phase of the case;

**NOTING** the Presidency's "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" of 23 September 2009,<sup>7</sup> denying the request for excusal ("Decision") which was issued on a confidential basis in accordance with rule 33(2) of the Rules which provides that "[t]he Presidency shall treat the request as confidential and shall not make public the reasons for its decision without the consent of the person concerned";

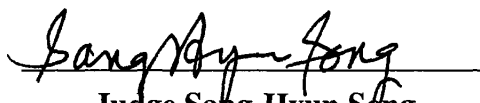
**RECALLING** the Presidency's consideration that the Decision elucidated its understanding of article 41(2) of the Statute and saw no reason for it to remain confidential;<sup>8</sup>

**NOTING** that the judge was requested to provide her views on the matter of publication by 2 October 2009; Noting further that on 1 October 2009, the judge indicated that she "ha[d] no objections to the [Decision] being made public".<sup>9</sup>

**HEREBY:**

**ORDERS** the Registrar to file the attached Decision as Annex III to the Presidency's "Decision replacing a judge in the Appeals Chamber" of 23 September 2009 (ICC-01/04-01/06-2138).

Done in both English and French, the English version being authoritative.

  
Judge Sang-Hyun Song  
President

Dated this 2 October 2009

At The Hague, The Netherlands

<sup>7</sup> 2009/PRES/460-02.

<sup>8</sup> 2009/PRES/460-02, page 7.

<sup>9</sup> 2009/PRES/460-03.