

ANNEX II



**Internal memorandum
Memorandum interne**

To À	Judge Akua Kuenyehia	From De	The Presidency <i>Jhianu</i>
Date	16 July 2010	Through Via	
Ref.	2010/PRES/416-2	Copies	

Subject | Objet 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

The Presidency, 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 upon the request of Judge Akua Kuenyehia of the Appeals Chamber (hereinafter "applicant") of 15 July 2010 to be excused from sitting in the anticipated appeal of the Prosecutor against the decision rendered by Trial Chamber I on 8 July 2010 in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (hereinafter "appeal") and from sitting in all future appeals arising in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (hereinafter "case").

The request for excusal is granted.

Factual background

On 15 July 2010, by memorandum classified as confidential, the applicant requested that the Presidency excuse her from sitting in the appeal anticipated from the Prosecutor, following the decision of Trial Chamber I granting him leave to appeal its "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU"¹ of 8 July 2010, and from all future appeals in the case, pursuant to article 41(1) of the Rome Statute (hereinafter "Statute") and rule 33 of the Rules of Procedure and Evidence (hereinafter "Rules"). The request for excusal is based upon the previous

¹ ICC-01/04-01/06-2517-Conf; ICC-01/04-01/06-2517-Red.

involvement of the applicant during the pre-trial phase of the case, in the course of which the applicant, *inter alia*, issued a warrant of arrest for,² and confirmed the charges against,³ Mr Thomas Lubanga Dyilo. The applicant therefore considers that she has "previously been involved ... in that case before the Court" within the meaning of article 41(2)(a) of the Statute.

Decision

The request for excusal is properly before the Presidency in accordance with article 41 of the Statute and rule 33 of the Rules.

The applicant has requested to be excused from sitting in the appeal and in all future appeals arising in the case. The Presidency finds the request for excusal to be well founded. Article 41(1) of the Statute, in relevant part, provides that "[t]he Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute...". Article 41(2)(a) of the Statute further provides 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 the capacity referred to in the second sentence of article 41(2)(a) to be one which might lead the impartiality of a judge to be reasonably called into doubt.⁴

Noting the terms of article 41(1) and 41(2)(a) of the Statute, the Presidency finds that the impartiality of the applicant might reasonably be doubted considering her previous involvement in the pre-trial phase of the case and, as such, the request for excusal in the present appeal and all future appeals in the case is granted. The Presidency, pursuant to rule 38 of the Rules and regulations 12 and 15 of the Regulations of the Court, shall, for the purpose of the present appeal and all future appeals arising in the case, treat the applicant as unavailable and proceed with her replacement in the Appeals Chamber.

² Warrant of Arrest, ICC-01/04-01/06-2-tEN, 10 February 2006.

³ Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, 29 January 2007.

⁴ 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, ICC-01/04-01/06-2138-AnxIII, 23 September 2009.

The President of the Appeals Division shall henceforth follow the same procedure prescribed by the Presidency in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,⁵ promptly informing the Presidency of the advent of any appeal in the case, in order for it to proceed with the replacement of the applicant in a timely fashion in accordance with this decision.

Noting that the applicant has consented to the Presidency making public the request for excusal and the reasons for its decision thereon in accordance with rule 33(2) of the Rules, this decision and the request for excusal will be annexed to the decision of the Presidency replacing the applicant in the Appeals Chamber for the purpose of the appeal.

⁵ Decision on the request of 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.