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**Report of the Court on the new composition of the Appeals Division
and the excusal of judges***

A. Introduction

1. The plenary of judges decided by consensus, at its meeting of 13 March 2009, on the new composition of the three divisions (Pre-Trial, Trial and Appeals). This composition was confirmed by majority vote at a subsequent plenary of judges on 8 June 2009.

2. In its report of 13 May 2009 on the work of its twelfth session,¹ the Committee on Budget and Finance:

“expressed concern with the financial implications that the composition of the Appeals Division could have in terms of the amount of work the two “contaminated” judges may be able to engage in over the next few years, as well as the impact on any legal officers working with these judges. The Committee requested that a detailed report outlining the scope of the issues, the potential costs for major programme I and the impact on the establishment of efficiency measures within the Court be provided along with a revised staffing structure prior to its next session”.

3. The current report addresses these issues. The report on the revised staffing structure has been submitted separately.

B. Relevant provisions

4. The following is a list of the relevant provisions regarding the possible excusal or disqualification of a judge from sitting in the Appeals Chamber on a particular appeal, and his or her subsequent replacement. Additional relevant texts are annexed.

1. The Rome Statute of the International Criminal Court

Article 41

Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.

* Previously issued as ICC-ASP/8/CBF.2/7.

¹ ICC-ASP/8/5.

2. a) 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 or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.
- b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.
- c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

2. The Rules of Procedure and Evidence

Rule 33

Excusing of a judge, the Prosecutor or a Deputy Prosecutor

1. A judge, the Prosecutor or a Deputy Prosecutor seeking to be excused from his or her functions shall make a request in writing to the Presidency, setting out the grounds upon which he or she should be excused.
2. The Presidency shall treat the request as confidential and shall not make public the reasons for its decision without the consent of the person concerned.

3. The Regulations of the Court

Regulation 12

Service within the Appeals Chamber

In the event that a member of the Appeals Chamber is disqualified, or unavailable for a substantial reason, the Presidency shall, in the interests of the administration of justice, attach to the Appeals Chamber on a temporary basis a judge from either the Trial or Pre-Trial Division, subject to article 39, paragraph 1. Under no circumstances shall a judge who has participated in the pre-trial or trial phase of a case be eligible to sit on the Appeals Chamber hearing that case; nor shall a judge who has participated in the appeal phase of a case be eligible to sit on the pre-trial or trial phase of that case.

Regulation 15

Replacements

1. The Presidency shall be responsible for the replacement of a judge pursuant to rule 38 and in accordance with article 39 and shall also take into account, to the extent possible, gender and equitable geographical representation.

C. Recent developments

5. On 10 March 2009, the term of office of six judges came to an end. Following the election of new judges by the Assembly of States Parties, the judges are required, in accordance with rule 4, sub-rule 1, of the Rules of Procedure and Evidence (“the Rules”), to “meet in plenary session not later than two months after their election”. At this session, the judges are required to elect the President and Vice-Presidents (rule 4, sub-rule 1 (a)) and to “assign judges to divisions” (rule 4, sub-rule 1 (b)). Under rule 4, sub-rule 4, decisions of the plenary sessions shall be taken by the majority of judges present. The new composition of the divisions was determined by consensus at the judges’ plenary session of 13 March 2009, and confirmed by majority vote at the plenary of 8 June 2009.

6. The divisions are now composed as follows:

- The judges assigned to the Pre-Trial Division are: Judge Hans-Peter Kaul, Second Vice-President of the Court; Judge Sylvia Steiner; Judge Ekaterina Trendafilova; Judge Sanji Mmasenono Monageng and Judge Cuno Tarfusser;²
- The judges assigned to the Trial Division are: Judge Fatoumata Dembele Diarra, First Vice-President of the Court; Judge Elizabeth Odio Benito; Judge René Blattmann; Judge Sir Adrian Fulford; Judge Bruno Cotte; Judge Joyce Aluoch; and Judge Christine Van den Wyngaert; and
- The judges assigned to the Appeals Division are: Judge Sang-Hyun Song, President of the Court; Judge Akua Kuenyehia; Judge Erkki Kourula; Judge Anita Ušacka; and Judge Daniel David Ntanda Nsereko.

Considerations at the plenary

7. Assignment of judges to the various divisions is made on the basis of the nature of the functions each one will perform and the qualifications and experience of individual judges. This is done in a manner ensuring that each division benefits from an appropriate combination of expertise in criminal law and procedure and international law.

8. In addition, the plenary considered it important that the Appeals Division, as the instance of last resort, should in principle be composed of judges with the most experience within the International Criminal Court. The view was expressed that, given the limited number of only 18 judges available at the Court, out of which only 16 judges were currently serving,³ all judges working in Pre-Trial or Trial Chambers would need to be excused at some point if they were subsequently assigned to the Appeals Division, and had to work on an appeal from a Chamber where they had previously served. The only alternative would be to assign only newly elected judges to the Appeals Division. There was a good measure of agreement that this solution would not be in the best interest of the Court, as these newly elected judges would not be as familiar with the Court, its working methods and jurisprudence.

² Judge Fumiko Saiga, who passed away on 24 April 2009, had been assigned to the Pre-Trial Division during the 13 March 2009 plenary. She had been temporarily attached by the Presidency to the Trial Division in order to be part of the Trial Chamber II bench in the Katanga-Ngudjolo proceedings.

³ Following the withdrawal of Judge Mohamed Shahabuddeen and the passing away of Judge Fumiko Saiga, there are currently 16 judges at the Court. Judge René Blattmann’s six-year term was extended on 10 March 2009 for the sole purpose of completing the Lubanga trial, in accordance with article 36 (10) of the Statute.

9. At the plenary, a number of judges currently not serving in the Appeals Division offered to work temporarily on appeals if, pursuant to regulations 12 and 15 of the Regulations of the Court, the two judges concerned by the decision of 13 March 2009 were unable to take part in those appeals because of their previous involvement in the case as Pre-Trial Division judges.

Situation in the Appeals Division

10. Since the new composition of Chambers, three interlocutory appeals have been filed before the Appeals Chamber, in the Kony, Katanga-Ngudjolo and Al Bashir cases. Shortly after the filing of each of the latter two appeals, Judges Kuenyehia and Ušacka requested the Presidency, pursuant to article 41, paragraph 1, of the Statute and rule 33 of the Rules, to be excused from the entirety of the two appeals on the basis of their previous involvement in the pre-trial phases of those cases.

11. The Presidency granted their requests and proceeded with the temporary attachment, for the purpose of those two appeals, of Judge Trendafilova (from the Pre-Trial Division), who is in the process of terminating the Bemba pre-trial proceedings, and Judge Aluoch (from the Trial Division), who has not yet been assigned to a trial.⁴ In so doing, the Presidency relied on regulation 15 of the Regulations of the Court, pursuant to which the Presidency is responsible for the replacement of judges in accordance with article 39 of the Statute, and regulation 12 of the Regulations of the Court, further to which the Presidency shall, in the event that a member of the Appeals Chamber is disqualified, or unavailable for a substantial reason, attach to the Appeals Chamber on a temporary basis a judge from either the Trial or Pre-Trial Division.

12. With regard to the Kony appeal, all judges of the Appeals Division will be dealing with the case.

D. The way forward

13. The experience of the past months clearly indicates that the temporary assignment to the Appeals Division of two judges with previous involvement in specific cases at the pre-trial level will not in practice impair the efficiency of that division. Thanks to the collegial sharing of work, it has been possible to arrange for the excusal of the affected judges. The Presidency has agreed to a standard operating procedure, which will facilitate the smooth application of the statutory requirements.

14. The current situation is such that the two judges newly appointed to the Appeals Division will be able to work on appeals coming out of two of the four current situations, namely Uganda and Central African Republic. In the other two situations, the Democratic Republic of the Congo and Sudan, there may be present and future cases where there will be no excusal issue. For all new situations and new suspects brought before the Court, the two judges will in all probability be fully operational. In addition to this work on various current and future appeals where there are no excusal issues, the two judges concerned may also be called upon to engage in many of the Court's activities outside the courtroom: outreach, speaking to high-level visitors, sitting on recruitment panels, induction for new staff, heading Chambers working groups, and representing the Judiciary on various inter-organ working groups, such as the Africa Strategy Group and the Judicial Capacity Strengthening Programme.

⁴ Upon their publication, the decisions can be consulted on the Court's website.

Workload

15. In terms of workload, the process of preparing the excusal decision has two aspects. For each appeal, the Legal Adviser to the Presidency will spend one day preparing the decision and one member of the Presidency will spend a couple of hours consulting with potential substitute judges. This increased workload will be absorbed by the current Presidency staff and is accepted by the members of the Presidency as part of their normal responsibilities. There are therefore no additional costs foreseen.

Legal officers

16. With regard to the legal officers working for a judge who is excused, the Presidency will apply an efficiency-based policy, which is also reflected in the new staffing structure of Chambers. Legal officers assigned to an excused judge will work for the substitute judge. There is therefore no question that these legal officers would remain idle. This will allow the substitute judges to work simultaneously on the new appeal and to continue with their work in their original division.

Annex

Other relevant legal provisions

Rule 34

Disqualification of a judge, the Prosecutor or a Deputy Prosecutor

1. In addition to the grounds set out in article 41, paragraph 2, and article 42, paragraph 7, the grounds for disqualification of a judge, the Prosecutor or a Deputy Prosecutor shall include, *inter alia*, the following:
 - a) Personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties;
 - b) Involvement, in his or her private capacity, in any legal proceedings initiated prior to his or her involvement in the case, or initiated by him or her subsequently, in which the person being investigated or prosecuted was or is an opposing party;
 - c) Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned; and
 - d) Expression of opinions, through the communications media, in writing or in public actions that, objectively, could adversely affect the required impartiality of the person concerned.
2. Subject to the provisions set out in article 41, paragraph 2, and article 42, paragraph 8, a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based. The request shall state the grounds and attach any relevant evidence, and shall be transmitted to the person concerned, who shall be entitled to present written submissions.
3. Any question relating to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by a majority of the judges of the Appeals Chamber.

Rule 35

Duty of a judge, the Prosecutor or a Deputy Prosecutor to request to be excused

Where a judge, the Prosecutor or a Deputy Prosecutor has reason to believe that a ground for disqualification exists in relation to him or her, he or she shall make a request to be excused and shall not wait for a request for disqualification to be made in accordance with article 41, paragraph 2, or article 42, paragraph 7, and rule 34. The request shall be made and the Presidency shall deal with it in accordance with rule 33.

Rule 38
Replacements

1. A judge may be replaced for objective and justified reasons, *inter alia*:
 - a) Resignation;
 - b) Accepted excuse;
 - c) Disqualification;
 - d) Removal from office; and
 - e) Death.

2. Replacement shall take place in accordance with the pre-established procedure in the Statute, the Rules and the Regulations.

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