

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Internal memorandum
Memorandum interne

To À	Judge Philippe Kirsch, President of the International Criminal Court	From De	Judge Hans-Peter Kaul, President of the Pre-Trial Division
Date	20 October 2006	Through Via	
Ref.		Copies	Judges of the Pre-Trial Division
Subject Objet	Request by the President of the Pre-Trial Division, on behalf of the Judges of the Pre-Trial Chamber I and Pre-Trial Chamber II, to the President of the Court to convene the Plenary		

I. Introduction

1. The Judges of the Pre-Trial Division have been seized of the issue of the separation of the Senior Legal Adviser to the Pre-Trial Division from the pending Uganda and DRC proceedings, insofar as they concern cases on which the Senior Legal Adviser allegedly worked while a member of the Office of the Prosecutor (OTP). The issue was addressed by the Prosecutor through various procedural avenues. In this, he was joined by the Defence Counsel in the Case of the Prosecutor vs. Thomas Lubanga Dyilo. These events and their possible implications require a definitive and timely solution.

II. Procedural History

2. On 9 January 2006, the OTP filed an Internal Memorandum entitled "Request for Presidency to Ensure Limitation of the Scope of Duties of Senior Legal Adviser to the Pre-Trial Division, to Prevent Future Challenges to the Appearance of Impartiality of the Judges of that Division" (hereinafter "Request") with the Presidency (see Annex 1). In this document, the OTP requested the Presidency to take measures to ensure that the Senior Legal Adviser to the Pre-Trial Division be separated from the cases on which he had allegedly previously worked while a Legal Adviser in the OTP, namely the pending cases in the Uganda and DRC situation. It was suggested either that the Senior Legal Adviser isolate himself or that the Presidency address this

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issue at the administrative level on the basis of Article 38 (3)(a) of the Statute or refer the matter to the Plenary.

3. On 10 January 2006, Pre-Trial Chamber I and Pre-Trial Chamber II received a "Notice of OTP Request Addressed to the Presidency" (hereinafter "Notice") (ICC-02/04-01/05-75 and ICC-01/04-97), in which the Prosecutor notified the Pre-Trial Chambers concerned of the submission of the "Request" to the Presidency, highlighting only the essence of the administrative relief sought before the Presidency (see Annexes 2 and 3). The "Notice" did not include a copy of the "Request" mentioned above.

4. Moreover, on the same day, the Prosecutor addressed a letter to the President of the Pre-Trial Division (060110/LMO-sv), notifying him of the "Request" of 9 January 2006 and providing him with a copy thereof (see Annex 4)

5. The Presidency, by Internal Memorandum of 26 January 2006 entitled "Decision of the Presidency on the Memorandum of the Prosecutor of 9 January 2006" (hereinafter "Decision"), declined to grant the Prosecutor's request for relief, by noting that it neither had the competence to deal with the matter itself, nor did it find any basis on which to refer the matter to the Plenary (see Annex 5). A copy of this "Decision" was communicated to the Judges of Pre-Trial Chamber I and Pre-Trial Chamber II, as well as to the President of the Pre-Trial Division, attaching the "Request" of the Prosecutor dated 9 January 2006.

6. The OTP responded to and commented on the Presidency's "Decision" in a further Internal Memorandum dated 10 February 2006. By Internal Memorandum (11-2/PK/HA/AJ) dated 8 March 2006 (see Annex 6), the Presidency forwarded a copy of the Prosecutor's Memorandum of 10 February 2006 to the Judges of Pre-Trial Chamber I and Pre-Trial Chamber II, as well as to the President of the Pre-Trial Division, for their information.

7. On 10 February 2006, the President of the Pre-Trial Division addressed the OTP in an Internal Memorandum informing the Prosecutor that, following the Presidency's "Decision" of 26 January 2006, the matter remained under active consideration by the Judges of the Pre-Trial Division (see Annex 7).

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8. By Internal Memorandum of 15 March 2006, the President of the Pre-Trial Division informed the Prosecutor of the further developments within the Pre-Trial Division (see Annex 8). The Judges had concluded that the Division could not act on the basis of the Prosecutor's "Request" and highlighted some important procedural issues in relation to said "Request".

9. The Prosecutor, by Internal Memorandum dated 28 March 2006, addressed the President of the Pre-Trial Division, requesting information as to whether the Senior Legal Adviser to the Pre-Trial Division was currently rendering advice to Pre-Trial Chambers I and II (see Annex 9). The President of the Pre-Trial Division declined to disclose any information on possible case-related activities of the Senior Legal Adviser, by Internal Memorandum dated 17 May 2006 (see Annex 10).

10. By letter of 31 March 2006, the Prosecutor informed the Defence Counsel to Mr. Thomas Lubanga Dyilo, Mtre Jean Flamme, of the alleged previous activities of the Senior Legal Adviser to the Pre-Trial Division and of the remedies sought by the OTP. In response, the Defence Counsel addressed the President of the Pre-Trial Division on 4 May 2006 by noting that "[J]e me vois dans l'obligation (...) de me joindre à la demande du Procureur" (see Annex 11).

11. In a letter dated 16 June 2006 (see Annex 12), the President of the Pre-Trial Division replied to Defence Counsel Mtre Jean Flamme, and notified him of the course of events, referring among others to the "Decision" of the Presidency and the Internal Memorandum of the President of the Pre-Trial Division to the OTP dated 15 March 2006.

12. On 31 August 2006, the Prosecutor submitted to Pre-Trial Chamber I (ICC-04-01/06-373, see Annex 13) and Pre-Trial Chamber II (ICC-02/04-01/05-108, see Annex 14) an "Application to Separate the Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice Regarding the Case" (hereinafter "Application").

13. In these "Application[s]", the OTP requested that Pre-Trial Chamber I and II separate the Senior Legal Adviser from rendering any advice on the DRC, respectively Uganda cases, on the basis that he was allegedly previously involved in these cases as a member of the OTP before joining the Pre-Trial Division as Senior Legal Adviser. In addition, the OTP requested that the Senior Legal Adviser be separated from the cases, pending the decision of the Chambers.

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14. On 5 October 2006, Mtre Jean Flamme, Defence Counsel to Thomas Lubanga Dyilo, submitted to Pre-Trial Chamber I a “Réponse à la demande du Procureur du 31 août 2006 ‘Prosecutor’s Application to Separate Senior Legal Adviser to the Pre-Trial Division from Rendering Legal Advice Regarding the Case’” (hereinafter “Réponse”) (see Annex 15). The Defence Counsel joined the Prosecutor’s “Application” to Pre-Trial Chamber I of 31 August 2006 and requested that the Chamber take note of the “réserves les plus expresses de la Défense quant aux activités exercées dans le passé par Monsieur Gilbert Bitti, pour la Chambre Préliminaire I.”

III. Request by the Judges of Pre-Trial Chamber I and Pre-Trial Chamber II

15. The Judges of Pre-Trial Chamber I and Pre-Trial Chamber II would like to draw attention specifically to the Prosecutor’s “Request” of 9 January 2006 and all documents subsequently submitted regarding the same matter, in particular the Prosecutor’s “Application[s]” of 31 August 2006.

16. In addition, the Judges of Pre-Trial Chamber I would like to recall the initiatives taken by Defence Counsel Mtre. Flamme on this matter, in particular the “Réponse” submitted on 5 October 2006.

17. The Judges of Pre-Trial Chamber I and Pre-Trial Chamber II have discussed these issues during several formal Coordination Meetings of the Division and in numerous further informal consultations and have informed the President of the Pre-Trial Division, by letter(s) of the Presiding Judges dated 20 October 2006, that they [i.e. the Judges of Pre-Trial Chambers I and II] are agreed that the Senior Legal Adviser shall, *ex abundanti cautela*, be temporarily relieved from any functions he might have in relation to the Case of the Prosecutor vs. Thomas Lubanga Dyilo, respectively the Case of the Prosecutor vs. Joseph Kony et al., until further notice (see Annex 16). This measure should in no way be seen as prejudging the issues set out below.

18. Therefore, the President of the Pre-Trial Division, by Decision of 20 October 2006, at the request of the Judges of Pre-Trial Chambers I and II, provisionally separated the Senior Legal

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Adviser from the above mentioned cases (Annex 17), pending the decision of the Plenary on the matter referred to below.

19. The Judges of Pre-Trial Chamber I and II consider that the elements set out above make it imperative to convene the Plenary as soon as possible, for the following reasons:

20. The Judges deem that the repeated and insistent references made by the Prosecutor to the issue of the impartiality of the Judges of the Pre-Trial Chambers I and II, linking the issue pertaining to the Senior Legal Adviser to an alleged appearance of bias of the Judges of Pre-Trial Chambers I and II - starting with the Prosecutor's "Request" of 9 January 2006 and culminating in the "Application[s]" of 31 August 2006 - *can* be interpreted as amounting to a request by the Prosecutor, supported by Defence Counsel Mtre Flamme on 5 October 2006, for the disqualification of the Judges of Pre-Trial Chamber I and Pre-Trial Chamber II, or at least to a "question as to the disqualification" of the Judges of Pre-Trial Chambers I and II under Article 41 (2) of the Statute. Various references in the documents of the Prosecutor to the Presidency and the President of the Pre-Trial Division call into question the appearance of impartiality of the judges concerned.¹

21. Moreover, the Prosecutor's Public "Notice" of 10 January 2006 and the "Application(s)" of 31 August 2006, together with the public filing of Defence Counsel Flamme of 5 October 2006, may have raised doubts in public opinion. After all, the issue at hand is not only relevant for the current proceedings before the Pre-Trial Chambers but may also have an impact on the future work of the Court.

¹ See e.g., Internal Memorandum of the Prosecutor to the Presidency dated 10 February 2006 (see Annex 6) para. 4: "(...) it was the OTP's view that the affected Pre-Trial Chambers had a right to know that a situation of appearance of bias **had arisen** (...)" (emphasis added); "Request" by the Prosecutor dated 9 January 2006 (Annex 1), page 2: "Unless a 'wall' is erected between Mr. Bitti and the investigations and cases in which he rendered legal advice while at the OTP, each of the potential litigants before the Pre-Trial Chambers – defence counsel, the OTP and victim's representatives – **will have a compelling basis to move to disqualify** Mr. Bitti and the judges of the Pre-Trial Chambers, based on the appearance of bias." (emphasis added); *ibid.*, page 4: "For these reasons, the Presidency may view this request to exceed the mere administrative sphere and may prefer to **rely upon the procedure set forth in the statute for considering a challenge to the appearance of impartiality of a judge**" (emphasis added); *ibid.*, page 17: "(...) if he is permitted to continue to give legal advice in these proceedings, all future litigants **will have compelling grounds** for applying to disqualify the judges of Pre-Trial Chambers I and II" (emphasis added); "Notice" of 10 January 2006 (see Annexes 2 and 3): "(...) [T]he request seeks imposition of a preventive measure (...) with the aim of **preventing future challenges** by any party to the appearance of impartiality of the judges of the Pre-Trial Division" (emphasis added).

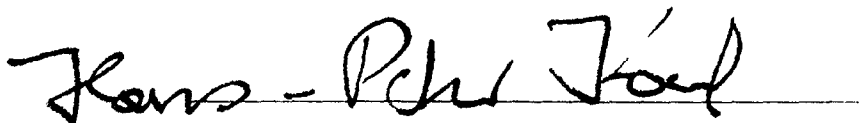
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22. Furthermore, the Judges, in particular those of Pre-Trial Chamber I, would like to stress that there are serious time constraints, as the first hearing for the confirmation of charges before Pre-Trial Chamber I is scheduled to take place on 9 November 2006.

23. Thus, the gravity and urgency of the issue demand that a final decision be taken without further delay by the body competent to examine "any question as to the disqualification of a judge" according to Article 41 (2) of the Statute.

24. The President of the Pre-Trial Division, on behalf of the Judges of Pre-Trial Chambers I and II, therefore forwards the matter to the President of the International Criminal Court, in order for the latter to convene, on the basis of Rule 4 (2) of the Rules of Procedure and Evidence, a special plenary session to examine and, as appropriate, to determine

Whether in light of the foregoing and the procedural history set out above, the "Application[s]" of the Prosecutor of 31 August 2006 and the "Réponse" by the Defence Counsel of 5 October 2006 amount to a request for disqualification of the Judges of Pre-Trial Chambers I and II under Article 41 (2) of the Statute, or to a "question as to the disqualification of a judge" within the meaning of Article 41 (2) of the Statute, and if so, to decide on the matter.

A handwritten signature in black ink, reading "Hans-Peter Kaul", written over a horizontal line.

Judge Hans-Peter Kaul

President of the Pre-Trial Division

Dated this 20th day of October 2006

At The Hague (The Netherlands)