

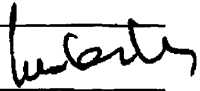
**Cour
Pénale
Internationale**



Judge Cuno Tarfusser

**International
Criminal
Court**

Internal memorandum
Memorandum interne

To À	President Sang-Hyun Song	From De	Judge Cuno Tarfusser 
Date	16 May 2014	Copies:	
Subject Objet	Written submissions on the defence applications for my disqualification in case ICC-01/05-01/13		

1. Pursuant to article 41(2)(c) of the Statute and rule 34(2) of the Rules of Procedure and Evidence, I am hereby submitting my comments on the three requests for my disqualification filed by three of five suspects in case ICC-01/05-01/13, on grounds which - as they put them - can broadly be brought under the heading of my lack of impartiality.
2. I certainly take these most seriously and regret not only the shadow thereby cast on these proceedings (at least on a temporary basis), but also the inevitably ensuing delays. By the same token, I am confident that the Plenary will be able to dispel those shadows, thereby restoring the clarity and serenity which should belong to judicial proceedings as a matter of course.
3. It is my belief that there is no need for me to dwell on the legal interpretation of the relevant provisions and principles. Accordingly, the purpose of this brief is limited and twofold: (i) to provide an overview of the situation existing at the time of the filing of the requests, in light of the relevant procedural developments which led to it, and (ii) to recall the relevant context pertaining to some of the submissions.
4. These proceedings originate from investigations starting longer than a year ago, leading the Prosecutor to believe that a scheme aimed at perverting the course of justice, including by way of bribing witnesses, had been put in place in the context of case ICC-01/05-01/08 - *The Prosecutor v. Jean-Pierre Bemba*. According to the Prosecutor,

this scheme (which allegedly included the commission of a number of offences under article 70 of the Statute) was orchestrated by Jean-Pierre Bemba and implemented through a number of individuals belonging to his network, first and foremost his then lead counsel Aimé Kilolo, as well as his case manager, Jean-Jacques Mangenda, and his former *chef de cabinet*, Fidèle Babala; Narcisse Arido, the fifth suspect, was also found by the Prosecutor instrumental in the implementation of the alleged scheme of witness corruption.

5. I first came to know about these investigations on 3 May 2013, when the Prosecutor submitted her first "Request for judicial assistance to obtain evidence for investigation under Article 70"¹. On 6 May 2013, Pre-Trial Chamber II designated me as Single Judge "responsible for addressing and determining the issues arising in connection with" this request²; in so doing, it highlighted "the urgent nature of the matters arising in connection with the Prosecutor's Request, as well as ... the need to ensure the expeditiousness and efficiency of the proceedings". There followed two other requests from the Prosecutor, on 19 July 2013³ and on 7 October 2013⁴. All of these requests were supported by substantial documentation, including details of money transfers by or through either of the suspects and to the benefit of witnesses in case ICC-01/05-01/08 and logs of telephone calls, placed on the privileged line pertaining to Jean-Pierre Bemba, which involved other suspects in case ICC-01/05-01/13 and Defence witnesses in case ICC-01/05-01/08.
6. From the outset, I realised that the alleged implication in the alleged scheme of two members of the Defence team of Jean-Pierre Bemba called for special caution in addressing the Prosecutor's requests, including for the purposes to ensure that evidence be collected with due regard to the issue of professional privilege. By the same token, it also became soon clear to me that the conversations held between one or more of the individuals allegedly involved in the scheme would become a critical tool for being able to determine the soundness of Prosecutor's allegations.

¹ ICC-01/05-44-Conf-Exp.

² ICC-01/05-45.

³ ICC-01/05-51-Conf-Exp. Confidential, ex parte Annexes to this request were notified on 22 July 2013 by way of an Addendum.

⁴ ICC-01/05-60-Conf-Exp with confidential, ex parte annexes.

7. In the absence of specific statutory provisions or precedent in point, and in light of the supporting material submitted by the Prosecutor, I granted the Prosecutor's request to address the Dutch judicial authorities with a request for intercept of phone communications by and between members of Jean-Pierre Bemba's Defence team. Mindful of the sensitivity of the issue of professional privilege, I also appointed an expert, whom I termed "Independent Counsel", tasked with listening to the intercepts, filtering them and only transmitting those conversations, or sections thereof, "which might be of relevance for the purposes of the investigation"⁵. It was obvious to me that wording "relevance", as a neutral wording, would have to be assessed by Independent Counsel in light of article 54 of the Statute and the Prosecutor's overarching duty to "investigate incriminating and exonerating circumstances equally". The underlying assumption was that no professional privilege could be legitimately claimed whenever crimes were committed by the beneficiaries of such privilege. Fluency in the Lingala language and the possession of a legal background were the skills which would be required from the appointed expert to adequately perform the relevant tasks.
8. Both the procedural mechanism I had devised and the specific candidate I had selected were also considered appropriate by the Dutch judicial authorities, which authorised the Prosecutor's request for intercepts, proceeded to appoint the same person as their own counsel, made all the necessary arrangements to allow him to listen to the conversations and transferred to me the outcome of the Independent Counsel's work⁶.
9. All of this makes it clear that the Prosecutor's Application for a warrant of arrest did certainly not come as a surprise to me. At the time of its submission, I had been familiar with its underlying facts, and much of the material supporting it, for longer than six months. In particular, this familiarity arose from knowledge of the material supporting the three prosecutorial requests lodged between May and October 2013 and the contents of the conversations listened to and transmitted by the Independent

⁵ ICC-01/05-52-Conf-Exp.

⁶ ICC-01/05-01/13-6-Conf-Exp-AnxA; ICC-01/05-01/13-6-Conf-Exp-AnxB.

Counsel in as many as three reports made available to the Court between August and November 2013⁷.

10. It is not for me, or for these submissions, to reiterate my judicial findings on the Prosecutor's Application under article 58. I also do not find it appropriate to address in detail the "complaint", captivating and suggestive as it may sound, that I was too "swift" in deciding upon it. It is obvious, or should be, that there are circumstances when particular celerity is demanded from a judge and judicial professionalism and efficiency may indeed require that a significant amount of things be accomplished in one day. In this particular case, factors dictating urgency included the awareness that there might have been a leak as to the existence of the investigation on the part of two staff members (who are currently the subject of disciplinary proceedings).
11. I wish nevertheless to note that, ever since the opening of the case, not one line has been devoted by any of the suspects to counter either the merits of the allegations contained in the Prosecutor's Application and the materials supporting it, or the content of the conversations detailed in the reports by the Independent Counsel.
12. The sheer amount of litigation originated in connection with this case - which, to this date, amounts to as many as 26 filings in the situation and 401 in the case (including approximately as many as 134 filings by Defence teams, 81 by the Prosecutor, 71 by the Registrar, and about 101 by the Single Judge or the Chamber), most of them with attachments, has only concerned issues of a preliminary or procedural nature, at their best peripheral to the merits of the case. They ranged from requests for leave to appeal decisions I had issued to requests for disclosure; from requests for reclassification to requests for financial assistance, or to transfer the proceedings before the Dutch judicial authorities. More than once, while investigating the factual background alleged by one of the parties in support of their requests, I came to discover that it was not accurate and that outright lies had been submitted (suffice it to mention the instance where Counsel for Mr Mangenda requested an extension of the time limit for lodging a request for leave to appeal by alleging that he had not been notified of the relevant

⁷ ICC-01/05-59-Conf-Exp; ICC-01/05-64-Conf-Exp and Conf-Exp-Anx thereto (both ICC-01/05-64-Conf-Exp, ICC-01/05-66-Conf-Exp and their confidential, ex parte annexes were reclassified as confidential on 16 December 2013, subject only to the redaction of the name of Independent Counsel).

decision⁸, a fact blatantly contradicted by his signature on the receipt of a DHL shipment containing a cd with that decision⁹). In the same perspective, it is worth noting that the request for disqualification submitted by Aimé Kilolo boldly misrepresents the 29 July 2013 Decision¹⁰ by purporting that it instructed Independent Counsel “with finding *incriminating* evidence only as opposed to both *incriminating and exculpatory* evidence”¹¹ (emphasis in the original text). As seen above¹², no such reference to incriminating evidence is to be found either in that decision or in the transcripts of the relevant status conferences also referred to by the Defence for Mr Kilolo. As early as on 30 August 2013, in the context of a status conference devoted to clarifications on the terms of the mandate vested in Independent Counsel, I made it clear to Independent Counsel that he was “the independent counsel nominated by the Chamber” and that he was not to “report to OTP”, but “to the Chamber”¹³.

13. By the same token, in some instances I came to detect inefficiencies and mistakes on the part of the Prosecutor and promptly issued orders redressing the situation in favour of the Defence: I will only refer here to the “Decision on the ‘Requête en communication de la version originale des enregistrements sonores et des entretiens téléphoniques visés par le Procureur dans la pièce ICC-01/05-01/13-19-Conf-AnxI.I’ submitted by the Defence for Mr Babala”¹⁴, ordering the Prosecutor to disclose a number of audio files attached to the Prosecutor’s Application under article 58.
14. It was, and still is, my strong belief that an expedite pre-trial phase was critical to these proceedings. I therefore impressed an accelerated pace to my own decision-making (with the full and invaluable support by my team), which not infrequently led to several decisions being issued in the course of the same week, to the shortening of the time limits for responses and to dispose of requests within a few days (and, when warranted, a few hours¹⁵). I was, and remain, convinced that the earlier the pre-trial phase would be concluded, either way, the better it would be, including for the

⁸ ICC-01/05-01/13-86-Conf.

⁹ ICC-01/05-01/13-109; ICC-01/05-01/13-102-Conf and confidential annex 2 thereto.

¹⁰ ICC-01/05-52-Conf-Exp.

¹¹ ICC-01/05-01/13-372, para 12, footnote 27.

¹² Paragraph 7.

¹³ ICC-01/05-T-2-CONF-EXP-ENG, page 15, lines 13-14 and 25.

¹⁴ ICC-01/05-01/13-99.

¹⁵ ICC-01/05-01/13-57.

Defence, which would benefit from a full-fledged discussion of the merits of the case in the context of the trial (in case the charges were to be confirmed) or see the shadow of the suspected commission of serious offences against the administration of justice lifted from them (in case of non-confirmation). I have been unflinchingly stark in reminding all parties of the need to make their submissions to the point and to exercise the utmost diligence before submitting their filings. In more than one instance, the Defence has certainly benefitted from this celerity: suffice it to mention measures taken on the request for disclosure of information relating to the "anonymous informant" triggering the Prosecutor's investigations where, within ten days, a first decision scheduling a status conference¹⁶ was followed by the order to the Prosecutor to proceed to apply the relevant redactions and disclose the relevant documents¹⁷. I was mindful both of the relationship between this case and case ICC-01/05-01/08, where the repercussions of the alleged offences were likely to be felt, and of the broader need to mark the distance between proceedings under article 70 of the Statute and proceedings brought for core crimes in the jurisdiction of the Court, including in the perspective of the duration of pre-trial detention.

15. The arguments developed by the requesting parties can be divided into two groups: on the one hand, those who amount to an outright challenge to the very existence of the power of the judge to assess and determine the allegations submitted by the Prosecutor (see, for example, the submission that the Single Judge should not have appointed Independent Counsel, or authorised the intercepts of the calls between the suspect and his lawyers, or among members of his Defence teams); on the other hand, those targeting the specific way in which this power has been exercised (see, for example, the complaint that the Judge was "too quick" in deciding on the Prosecutor's Application for a warrant of arrest; criticism levelled against the language I have used in the decisions on the requests for interim release; the grievance that I requested the Presidency to lift the immunity of Mr Mangenda's and Mr Kilolo's prior to their arrest – and, for another applicant, the related complaint that I omitted to request an analogous lift prior to authorising the intercept of the conversations held by Mr

¹⁶ ICC-01/05-01/13-278.

¹⁷ ICC-01/05-01/13-298.

Bemba's lawyers). Not one single argument is based on anything other than the content, or the timing, or the wording of my decisions in these proceedings; not one single argument comes anywhere near the type of grounds for disqualification listed, albeit on a non-exhaustive basis, by article 41(2) of the Statute and rule 34(1) of the Rules of Procedure and Evidence (previous involvement or personal interest in the case, relationship with any of the parties, previous holding of functions possibly leading to forming an opinion of the case or expressions of views relevant to the case in an extra-judicial context).

16. All of the requests for disqualification also rely heavily on the fact that I would have rejected all – or most of - the requests lodged by the Defence teams, while granting all or most of the requests emanating from the Prosecutor. First, I should note that this is not factually accurate, as even the table prepared by the Defence for Mr Kilolo in support of his request that judicial functions be henceforth exercised by the full Chamber¹⁸ - a different forum where arguments almost entirely overlapping with those brought under the heading of the request for disqualification were raised - shows. Second, and more fundamentally, it seems hardly necessary to highlight that the fact of rejecting a request cannot per se be tantamount to the deciding judge being no longer "impartial" to the detriment of that party, and that to hold otherwise would be tantamount to eviscerate the core essence of judicial adjudication.
17. It is not for me to rehearse here the reasons which led me to decide in the way I did. All of my reasoning is to be found in the relevant decisions. Pre-Trial Chamber II is yet to decide, in its full composition, whether there are substantial (as opposed to reasonable) grounds to believe that the crimes alleged have been committed and whether, accordingly, the charges are to be confirmed. In the affirmative, the Trial (and, eventually, the Appeals) Chamber will be able to scrutinise such reasoning and determine its soundness as a matter of fact and of law. The parties are certainly entitled to disagree with judicial findings and the existence of several levels of jurisdiction is a necessary and critical guarantee that judicial determinations only become final after being subjected to review. What the parties are trying to do here, however, seems to

¹⁸ ICC-01/05-01/13-381 and confidential, ex parte Annex 2 thereto.

me to go beyond the natural dialectics inherent to judicial proceedings and become an attempt at interfering with the very possibility to exercise jurisdiction. This attempt cannot be condoned, certainly not for the sake of a suspect's right to privilege (which, as any right, is subject to abuse). Whilst deploring such attempt, I remain utterly confident that the flimsiness of the outstanding requests will emerge. I am also heartened by the thought that, irrespective of the outcome of these requests, the proceedings will soon be able to proceed to the stage where their merits can be serenely and scrupulously assessed, whether for the purposes of the confirmation of the charges or for the determinations to be made at trial. It is the very possibility of the exercise of jurisdiction, including vis-à-vis lawyers, that is at stake here, much more than my own independence, impartiality or professionalism.

18. I made all the determinations required by these proceedings to the best of my professionalism and knowledge of the relevant facts, and to my utmost honest belief. It is therefore with confidence and peace of mind that I submit these comments and defer to your decision.