

Separate opinion of Judge Cuno Tarfusser

1. I agree that the Prosecutor's Request should be rejected. However, I believe that the reasons for doing so are more fundamental and principled than those indicated in paragraphs 3 and 5 of the decision. In my view, the heart of the matter does not consist in the time lapse between the censored behaviour and the filing of the Request, or in the absence of information suggesting that this behaviour resulted in bringing the Court into disrepute or otherwise affecting the proceedings; neither does it lie in the fact that the Chamber is not the appropriate forum to debate matters of counsel's professional and ethical obligations. More critically, and fundamentally, the Prosecutor's Request must be rejected because it is premised on assumptions which run counter to well-established principles governing the issue of freedom of expression, as enshrined *inter alia* in Article 10 of the ECtHR and since long acknowledged as a fundamental human right and essential foundation of a democratic society.¹
2. More specifically, the Prosecutor seems to ignore that freedom of expression can only be restricted under limited and specific circumstances,² also in light of the need to avoid any "chilling effect" that any interference may have on its exercise;³ that this freedom not only protects information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also extends to those "that offend, shock and disturb" ⁴ and that these

¹ See, among many, ECtHR, *Morice v. France*, "Judgment", 23 April 2015, application no. 29369/10, para. 124; *Animal Defenders International v. United Kingdom*, "Judgment", 22 April 2013, application no. 48876/08, paras 100 ff; *Mouvement Raëlien Suisse v. Switzerland*, "Judgment", 13 July 2012, application no. 16354/06, para. 48; *Stoll v. Switzerland*, "Judgment", 10 December 2007, application no. 69698/01, para 101; *Mamère v. France*, "Judgment", 7 November 2006, application no. 12697/03, para. 19.

² ECtHR, *Axel Springer v. Germany*, "Judgment", 7 February 2012, application no. 39954/08, para. 78; *Lindon, Otchakovsky-Laurens and July v. France*, "Judgment", 22 October 2007, applications nos 21279/02 and 36448/02, para. 45.

³ ECtHR, *Morice v. France*, "Judgment", 23 April 2015, application no. 29369/10, para. 127.

⁴ ECtHR, *Morice v. France*, "Judgment", 23 April 2015, application no. 29369/10, para. 161; *July and Sarl Libération v. France*, "Judgment", 14 February 2008, application no. 20893/03, para. 60.

principles are held even more vigorously when the scrutinised expressions concern matters of public interest, such as, typically, the functioning of the judicial system.⁵ Not only are lawyers also entitled to the right to freedom of expression,⁶ as a fundamental tenet of the independence of the legal profession,⁷ but they - in light of their role “as intermediaries between the public and the courts”- ⁸ should “be able to draw the public’s attention to potential shortcomings in the justice system” and “to comment in public on the administration of justice”.⁹ Lawyers are also entitled to pursue their client’s defence “by means of an appearance on the television news or a statement in the press, and through such channels ... may inform the public about shortcomings” in the proceedings;¹⁰ this, in particular, in respect of high-profile cases having attracted wide media attention.¹¹ Furthermore, freedom of opinion, as a fundamental part of the right secured by Article 10, enjoys an even broader protection: since the truth of value judgements, as opposed to statements of facts, is not susceptible of proof,¹² such value judgments are protected even when delivered in a “harsh” manner, and may be found to

⁵ ECtHR, *Morice v. France*, “Judgment”, 23 April 2015, application no. 29369/10, paras 128, 152-153; *Di Giovanni v. Italy*, “Judgment”, 9 July 2013, application no. 51160/06, para. 71; *Kudeshkina v. Russia*, “Judgment”, 26 February 2009, application no. 29942/05, para. 86; *July and Sarl Libération v. France*, “Judgment”, 14 February 2008, application no. 20893/03, para. 66; *Ormanni v. Italy*, “Judgment”, 17 July 2007, application no. 30278/04, para. 59.

⁶ ECtHR, *Mor v. France*, “Judgment”, 15 December 2011, application no. 28198/09, para. 43; *Gouveia Gomes Fernandes et Freitas e Costa v. Portugal*, “Judgment”, 29 March 2011, application no. 1529/08, para. 46.

⁷ ECtHR, *Morice v. France*, “Judgment”, 23 April 2015, application no. 29369/10, para. 135.

⁸ ECtHR, *Morice v. France*, “Judgment”, 23 April 2015, application no. 29369/10, para. 132; *Mor v. France*, “Judgment”, 15 December 2011, application no. 28198/09, para. 42; *Alfantakis v. Greece*, “Judgment”, 11 February 2010, application no. 49330/07, para. 27.

⁹ ECtHR, *Morice v. France*, “Judgment”, 23 April 2015, application no. 29369/10, paras 134, 167.

¹⁰ ECtHR, *Morice v. France*, “Judgment”, 23 April 2015, application no. 29369/10, para. 138.

¹¹ ECtHR, *Alfantakis v. Greece*, “Judgment”, 11 February 2010, application no. 49330/07, para. 33; *July and Sarl Libération v. France*, “Judgment”, 14 February 2008, application no. 20893/03, para. 67.

¹² ECtHR, *Morice v. France*, “Judgment”, 23 April 2015, application no. 29369/10, para. 155; *Lindon, Otchakovsky-Laurens and July v. France*, “Judgment”, 22 October 2007, applications nos 21279/02 and 36448/02, para. 55.

exceed the scope of the freedom only when deprived of sufficient factual basis.¹³ I find it significant that even the Lubanga Precedent,¹⁴ on which the Prosecutor's Request relies to a large extent, acknowledges a "defence counsel's positive duty to advance criticism on any relevant issue that have a proper evidential foundation".¹⁵

3. Having carefully analysed Mr Zokou's impugned statements on the basis of both the video and the transcript through the lens of these principles, it is my considered opinion that they fall squarely within the boundaries of Mr Zokou's right to freedom of expression and opinion. The right of Mr Zokou to intervene in a forum such as the Conference is not and cannot be in dispute; nor is the fact that, in so doing, he fully disclosed his specific role as member of the Defence team for Mr Blé Goudé. His short intervention consisted in providing information on the trial, which he considered relevant to the issues debated during the Conference; as it was to be expected in light of his position, he focussed on some elements of the Prosecutor's case which – according to his own assessment, to which he is entitled both as a citizen and as a lawyer – are weak or implausible; this included the statements to the effect that some of the witnesses called by the Prosecutor would have not "seen or heard" the events and some others would have provided elements which would have "demolished" the Prosecutor's case. If anything, Mr Zokou shared with the public at the Conference some of the value judgements he has formed in light of public developments in his client's case; something he is entitled to and which goes to the core of his responsibilities as counsel for the accused. His

¹³ ECtHR, *Morice v. France*, "Judgment", 23 April 2015, application no. 29369/10, para. 174; *Karpetas v. Greece*, "Judgment", 30 October 2012, application no. 6086/10, para 78; *Floquet-Esmenard v. France*, "Decision", 10 January 2012, page 14; *Alfantakis v. Greece*, "Judgment", 11 February 2010, application no. 49330/07, para. 24.

¹⁴ ICC-01/04-01/06-2433, "Decision on the press interview with Ms Le Fraper du Hellen", 12 May 2010 ("Lubanga Precedent").

¹⁵ Lubanga Precedent, para. 41.

expressions “had a sufficiently close connection with the facts of the case”,¹⁶ avoided any direct, gratuitous reference to either the Chamber or the Prosecutor and did not single out any specific witnesses. I note *en passant* that similar – if not stronger – value judgements can be found in the statements made publicly by Mr Zokou before the Chamber in the context of the opening statements of the trial: at that time, when all the witnesses were yet to be heard, he had said that the Prosecutor had engaged in a “quest for evidence that couldn't be found because it doesn't exist”,¹⁷ and was “waving a magic wand”,¹⁸ with the only objective “to distort the truth”,¹⁹ in an attempt to draw everybody “into their world where absurdity reigns ... an imaginary world constructed by the Prosecutor on the basis of nonsense and a world that I can only call absurdia”.²⁰

4. As to the tone in which the statements were made, they were perfectly in line with the context in which they were delivered: as clarified by the ECtHR, it is covered by the freedom of expression and therefore permissible for individuals engaging in a public debate of public interest to make recourse to exaggeration or provocation (or even sarcasm) as long as the remarks are not manifestly abusive. More specifically, lawyers are entitled to use a tone which is “caustic, or even sarcastic” also in remarks about judges, as long as such

¹⁶ ECtHR, *Morice v. France*, “Judgment”, 23 April 2015, application no. 29369/10, para. 139; *Gouveia Gomes Fernandes et Freitas e Costa v. Portugal*, “Judgment”, 29 March 2011, application no. 1529/08, para. 51.

¹⁷ ICC-02/11-01/15-T-12-Red-ENG, page 64, lines 6-7.

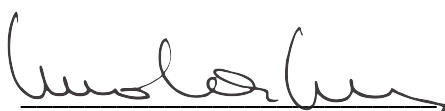
¹⁸ ICC-02/11-01/15-T-12-Red-ENG, page 65, line 13.

¹⁹ ICC-02/11-01/15-T-12-Red-ENG, page 62, line 6. The English version does not quite mirror what was actually said by Mr Zokou in French, which reads as follows: “Le Procureur s’est voulu long, trop long, car il se devait de noyer l’absence absolue de preuves sous une avalanche d’arguties dont la seule fin est de tronquer la vérité” (ICC-02/11-01/15-T-12-Red-FRA, page 68, lines 15-16).

²⁰ ICC-02/11-01/15-T-12-Red-ENG, page 66, lines 4-6.

tone is not insulting.²¹ Finally, no weight can be given to the fact that part of the public attending the Conference laughed in reaction to Mr Zokou's statements, as this reaction is inherent to the dynamics of a public debate and by definition outside Mr Zokou's control.

5. In light of the public and general nature of the elements referred to by Mr Zokou, the Prosecutor's submission that "public commentary on case-related issues also heightens the risk of disclosure of information and of breaching the obligation to respect the confidentiality of information" amounts to speculation; as to the submission that "the manner in which Me Zokou made his comments risked (1) prejudicing ongoing proceedings, by tending to prejudice the public's understanding of the trial; and (2) bringing the Court into disrepute", not only is it not supported by the circumstances of Mr Zokou's behaviour but also seems to rely on the assumption that the Chamber is liable to be influenced by the views held on the trial by members of the public: a proposition which is as extravagant as obviously unsustainable, as such unsuitable to become the basis of a judicial request.



Judge Cuno Tarfusser

Dated 5 June 2018

The Hague, The Netherlands

²¹ ECtHR, *Morice v. France*, "Judgment", 23 April 2015, application no. 29369/10, para. 139; *Gouveia Gomes Fernandes et Freitas e Costa v. Portugal*, "Judgment", 29 March 2011, application no. 1529/08, para. 48.