Cour Pénale Internationale

International Criminal Court

Original: **English**

No.**: ICC-01/05-01/13**
Date: **20 June 2014**

THE PRESIDENCY

Before: **Judge Sang-Hyun Song, President**
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Akua Kuenyehia, Acting Second Vice-President

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO,
AIMÉ KILOLO MUSAMBA,
JEAN-JACQUES MANGENDA KABONGO,
FIDÈLE BABALA WANDU
& NARCISSE ARIDO

Public with Public Annex

Notification of the decision on the defence requests for the disqualification of a judge in case ICC-01/05-01/13

To be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor
Fatou Bensouda
Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo
Nicholas Kaufman

Counsel for Aimé Kilolo Musamba
Mr Ghislain Mabanga

Counsel for Jean-Jacques Mangenda Kabongo
Mr Jean Flamme

Counsel for Fidèle Babala Wandu
Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido
Mr Göran Sluiter

REGISTRY

Registrar
Herman von Hebel

The Presidency of the International Criminal Court;

In the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*;

Noting the defence requests for the disqualification of Judge Cuno Tarfusser from the case before Pre-Trial Chamber II dated 29 April 2014,[1] 1 May 2014[2] and 7 May 2014[3] ("Applications");

Noting that a plenary session of the judges was held on 27 May 2014 in order to consider the Applications;[4]

Hereby notifies the parties and participants of the decision of the Plenary.

Hereby orders the Registrar to transmit this notification to all parties and participants in the case.

Done in both English and French, the English version being authoritative.

Judge Sang-Hyun Song

President

Dated this 20 June 2014

At The Hague, The Netherlands

[1] ICC-01/05-01/13-367.
[2] ICC-01/05-01/13-372.
[3] ICC-01/05-01/13-380.
[4] ICC-01/05-01/13-419 ; ICC-01/05-01/13-433.

Cour Pénale Internationale

International Criminal Court

20 June 2014

Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*

I. Procedural History

1. On 29 April 2014, the defence for Mr Jean-Jacques Mangenda Kabongo filed an application before the Presidency, pursuant to article 41 of the Rome Statute ("Statute"), for the disqualification of Single Judge Cuno Tarfusser ("Judge" or "Single Judge") from the case (ICC-01/05-01/13) of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* ("Suspects"), brought under article 70 of the Statute before Pre-Trial Chamber II, on the ground that his impartiality might reasonably be doubted.[1] On 1 May 2014 and 7 May 2014, the defence for Messrs Aimé Kilolo Musamba[2] and Fidèle Babala Wandu[3] also respectively filed applications for the disqualification of the Judge from the case. The three applications are collectively referred to as the "Applications" and the three defence teams are collectively referred to as the "Defence".
2. On 5 May 2014, the Judge had requested to be excused from exercising any functions of the Presidency in respect of the Applications.[4] That request was granted the same day and Judge Akua Kuenyehia was called upon to carry out his responsibilities as a member of the Presidency in respect of the Applications until their final determination.[5]

[1] Requête en récusation du Juge unique Cuno Tarfusser, ICC-01/05-01/13-367.
[2] Defence Request for the Disqualification of the Single Judge Cuno Tarfusser, ICC-01/05-01/13-372.
[3] Requête de la Défense en vue de solliciter la récusation du Juge unique Cuno Tarfusser pour violation de la règle de l'impartialité, ICC-01/05-01/13-380; ADDENDUM à la Requête de la Défense en vue de solliciter la récusation du Juge unique Cuno Tarfusser pour violation de la règle de l'impartialité, ICC-01/05-01/13-383.
[4] Notification concerning the defence requests for the disqualification of a judge in case ICC-01/05-01/13, ICC-01/05-01/13-385, page 3 and ICC-01/05-01/13-385-Anx1.
[5] Notification concerning the defence requests for the disqualification of a judge in case ICC-01/05-01/13, ICC-01/05-01/13-385, page 3, ICC-01/05-01/13-385-Anx2 and ICC-01/05-01/13-385-Anx3.

3. In the course of the proceedings, on 9 May 2014, the defence for Mr Kilolo Musamba also made a request to the Presidency to suspend the Judge from the case until a decision was reached on the Applications ("Suspension Application").[6]
4. On 16 May 2014, the Judge filed a written submission on the Applications, which was notified to the parties on 21 May 2014 ("Submission").[7]
5. Also on 16 May 2014, the Prosecutor submitted observations on the Applications and on the Suspension Application.[8]
6. On 17 May 2014, the defence for Mr Bemba Gombo filed a response to the Applications.[9]
7. On 19 May 2014, the Presidency declined to consider the Suspension Application on the ground that it lacked jurisdiction.[10]
8. On 26 May 2014, the defence for Mr Babala Wandu made an urgent application before the Presidency to reply to the Submission.[11] That application was denied by the Plenary[12] the same day.[13]
9. On 27 May 2014, a plenary session of judges was convened in accordance with article 41(2)(c) of the Statute and rule 4(2) of the Rules of Procedure and Evidence ("Rules").[14] The plenary session was attended in person by Judges Song ("Chair"), Monageng, Kuenyehia, Kourula, Ušacka, Trendafilova, Aluoch, Fernandez De Gurmendi, Ozaki, Morrison, Herrera-Carbuccia, Fremr, Eboe-Osuji and Henderson ("Plenary"). Judge Ozaki, whilst present during some of the plenary session, was absent at the time of voting.

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[6] Defence Request for the Automatic Temporary Suspension of the Single Judge Pending Decision on Defence Submission ICC-01/05-01/13-372, ICC-01/05-01/13-388.
[7] Written Submissions on the defence applications for my disqualification in case ICC-01/05-01/13, ICC-01/05-01/13-419-Anx (annexed to Second Notification concerning the defence requests for the disqualification of a judge in case ICC-01/05-01/13, ICC-01/05-01/13-419.)
[8] Prosecution's Observations on the Kilolo, Mangenda, and Babala Defences' Requests to Disqualify the Single Judge Cuno Tarfusser and the Kilolo Defence's Request for the Automatic Temporary Suspension of the Single Judge, ICC-01/05-01/13-404-Conf. Redacted to ICC-01/05-01/13-404-Red.
[9] Jean-Pierre Bemba Gombo's response to the defence requests for the disqualification of the Single Judge Cuno Tarfusser, ICC-01/05-01/13-405.
[10] Decision on 'Defence Request for the Automatic Temporary Suspension of the Single Judge Pending Decision on Defence Submission ICC-01/05-01/13-372', ICC-01/05-01/13-407.
[11] Demande URGENTE de réplique à « WrittenSubmission on the defence applications for my disqualification in case ICC-01/05-01/13 » (ICC-01/05-01/13-419-Anx), ICC-01/05-01/13-425.
[12] As composed in the paragraph below.
[13] The defence for Mr Babala Wandu was notified of this by email on 26 May 2014.
[14] Notification concerning the defence requests for the disqualification of a judge in case ICC-01/05-01/13, ICC-01/05-01/13-385, page 3.

10. Later that day, the Presidency notified the parties that, following deliberations in plenary, the Applications had been denied and a reasoned decision of the Plenary would follow in due course.[15]

II. Preliminary Procedural Issues

A. Application for Leave to Reply to the Written Submission of the Judge

11. The defence for Mr Babala Wandu applied to the Presidency for leave to reply to the Submission. The Plenary was notified of the application by the Presidency and denied it for the reasons below.
12. The Plenary considered that the 'equality of arms' perspective, entailing an application, response and reply, which exists between parties in litigation, is not an automatic consideration between a party and a judge trying a case. The presumption of impartiality attaching to a judge continues until and unless a decision has been rendered to disqualify a judge from the proceedings and, pending such time, judicial control should not be impaired.
13. Whilst this does not exclude the possibility of a plenary of judges seeking further information or submissions in the course of disqualification proceedings from either the challenged judge or the parties, these were not considered necessary in the instant proceedings. Further, it was noted that the present request for leave to reply to the Submission was, in any case, filed on the eve of the plenary session, whereas the parties had been given due notice of the scheduling of the plenary session and the Submission had been notified to the parties in good time on 21 May 2014.

B. Joinder of the Defence Applications

14. In the interests of judicial economy, the Plenary decided to consider the Applications jointly and deliver a single decision thereupon. The Applications raise the same or similar substantive issues and are directed against the same or related decisions of the Single

[15] Third Notification concerning the defence requests for the disqualification of a judge in case ICC-01/05-01/13, ICC-01/05-01/13-433, page 3.

Judge. Further, it is noted that the Submission addresses the Applications together.[16] Moreover, issuing a single decision upon the Applications does not prejudice the Judge or the parties, nor does it prevent the Plenary from considering the merits of each application separately if necessary.

III. Relevant Law

15. Pursuant to article 41(2)(a) of the Statute, "[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground". Non-exhaustive grounds for disqualification are set out in that article and further in rule 34 of the Rules.
16. The Plenary reiterates its previous jurisprudence in its Decision of 11 June 2013 in the case of *The Prosecutor v. Thomas Lubanga Dyilo*[17] and its Decision of 5 June 2012 in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*,[18] wherein it was established that it is not necessary for an applicant seeking to disqualify a judge to show actual bias on behalf of the judge; the appearance of grounds to doubt his or her impartiality will be sufficient.[19]
17. The relevant standard of assessment is whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge.[20] This standard is concerned not only with whether a reasonable observer could apprehend bias, but whether any such apprehension is objectively reasonable.[21]
18. Moreover, there is a strong presumption of impartiality that is not easily rebutted. The plenary of judges has previously found that:

> "the disqualification of a judge [is] not a step to be undertaken lightly, [and] a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice. When assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training,

[16] ICC-01/05-01/13-419-Anx, paragraph 1.
[17] Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3040-Anx ("*Lubanga* Decision").
[18] Decision of the plenary of the judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012, ICC-02/05-03/09-344-Anx ("*Banda/Jerbo* Decision").
[19] *Lubanga* Decision, paragraph 9; *Banda/Jerbo* Decision, paragraph 11.
[20] *Lubanga* Decision, paragraph 9; *Banda/Jerbo* Decision, paragraph 11.
[21] *Lubanga* Decision, paragraph 10; *Banda/Jerbo* Decision, paragraph 13.

capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case." [22] [Footnotes omitted]

IV. Grounds for disqualification

A. Ultra Vires Appointment of Independent Counsel

19. The defence for Messrs Kilolo Musamba and Babala Wandu argue that the Judge unilaterally and unlawfully appointed Independent Counsel in violation of the rights of the defence, representing a judicial overstep into the realms of prosecutorial investigation and transforming the Judge from an impartial arbiter into an investigator and secondary prosecutor.[23] It is further argued that the Judge instructed Independent Counsel, during monthly *ex parte* status conferences, to assist the Prosecutor, requiring him to seek only inculpatory evidence for the purposes of the Prosecution's investigation, and in violation of attorney/client confidentiality,[24] thereby personally interfering with the scope and methodology of the investigation of the Suspects.[25]

B. Violation of Privileged Status of Communications

20. The Defence submit that the Single Judge's unauthorised monitoring of the privileged telephone conversations of counsel and the case manager prior to waiving their immunities establishes his lack of impartiality and violates the principle of privileged communications as guaranteed, *inter alia*, by article 67(1)(b) of the Statute, rule 73 of the Rules and articles 7(4) and 8 of the Code of Professional Conduct for Counsel.[26]

C. Ultra vires Application to Waive Immunity

21. The defence for Messrs Kilolo Musamba and Mangenda Kabongo argue that the Single Judge unlawfully and *proprio motu* applied to the Presidency, and in his capacity as Second Vice-President,[27] to waive the immunities of counsel and the case manager

[22] *Lubanga* Decision, paragraph 10; *Banda/Jerbo* Decision, paragraph 14.
[23] ICC-01/05-01/13-372, paragraphs 9 and 13; ICC-01/05-01/13-380, paragraphs 22 and 25.
[24] ICC-01/05-01/13-372, paragraphs 12 to 13 citing ICC-01/05-52-Red2; ICC-01/05-01/13-380, paragraph 19.
[25] ICC-01/05-01/13-372, paragraph 8.
[26] ICC-01/05-01/13-367, paragraphs 3 and 4; ICC-01/05-01/13-372, paragraphs 13 and 14; ICC-01/05-01/13-380, paragraphs 20, 21, 22, and 52.
[27] ICC-01/05-01/13-367, paragraph 5. The defence for Mr Mangenda Kabongo point to the fact that the application was written on Presidency letter heading.

contrary to the principle of separation of organs (including between the judicial organs), and the requirement of judicial independence pursuant to article 40 of the Statute.[28] It is argued that the texts to not foresee that a Judge may make any application to the Presidency regardless of membership of that organ.[29] It is argued that it was for the Prosecutor and not the Single Judge to apply to the Presidency for the waiver of the immunities of Mr Kilolo and Mr Mangenda and such an order should have been given by the Single Judge.[30] By taking it upon himself to make the application, it is argued that the Judge effectively rendered himself an "*interested and affected* party tantamount to a second Prosecutor" or indeed usurped the role of the Prosecutor, and can no longer be considered impartial, thereby making a fair trial impossible.[31]

D. Haste in issuing Arrest Warrant

22. The defence for Mr Kilolo Musamba submits that the speed with which the Judge decided upon the Prosecutor's application for the warrant of arrest for the Suspects, in light of its copious length,[32] calls into question whether the Suspects were accorded proper judicial review and real deliberation before the arrest warrant was issued and the Suspects were deprived of their liberty.[33] It is observed that "within mere hours" of receiving the Prosecutor's application for the warrant of arrest, the Judge had urgently applied to the Presidency for a waiver of the Suspects' immunity and informed them that he was minded to grant the Prosecutor's application.[34] It is argued that the Suspects were thereby unfairly prejudiced from the outset of the proceedings.[35]

E. Rejection of key Defence Applications

(i) Disclosure Application

23. The defence for Mr Mangenda Kabongo argues that in dismissing the defence's application for disclosure of financial records necessary to dispute the existence of reasonable grounds to believe that the Suspect had committed a crime on the basis of exculpatory material in

[28] ICC-01/05-01/13-372, paragraph 31.
[29] ICC-01/05-01/13-372, paragraph 30.
[30] ICC-01/05-01/13-372, paragraphs 28 and 29.
[31] ICC-01/05-01/13-372, paragraph 33 (emphasis in original); ICC-01/05-01/13-367, paragraph 5.
[32] ICC-01/05-01/13-372, paragraphs 18 to 20 and 24.
[33] ICC-01/05-01/13-372, paragraphs 21 and 25.
[34] ICC-01/05-01/13-372, paragraph 19.
[35] ICC-01/05-01/13-372, paragraph 25.

the possession of the Registry, the Judge prevented the Suspect from challenging his arrest and pre-trial detention.[36] Moreover, the Judge later granted the Prosecutor's application for disclosure of the same documents, resulting in a breach of equality of arms and demonstrating the Single Judge's lack of impartiality and bias.[37]

(ii) Application for Reconsideration

24. The defence for Mr Mangenda Kabongo submits that the Judge refused to reconsider his decision denying leave to appeal the appointment of Independent Counsel, whereas reconsideration of irregular decisions is a generally admitted remedy before the *ad hoc* tribunals and common law jurisdictions.[38] In characterising the remedy sought as inadmissible, it is argued that the Judge demonstrated bias.[39]

iii) Application to call live witnesses

25. The defence for Messrs Mangenda Kabongo and Babala Wandu submit that the Single Judge's rejection of Mr Kilolo Musamba's application to call live witnesses on the basis of an improper prejudgment that it was unnecessary, and on an incorrect finding that written statements were of the same probative value as oral questioning, resulted in the denial of a fundamental right under the Statute concerning the attendance and examination of witnesses.[40] It is further submitted that by rejecting the application, the Judge demonstrated a lack of impartiality and an intention to influence the trial in favour of the Prosecution.[41]

(iv) Application for legal assistance

26. The defence for Mr Mangenda Kabongo argues that in rejecting its application concerning the Registrar's decision on an application for legal assistance, the Judge supported an inequality of arms imposed by the Registrar and demonstrated his lack of impartiality and intention to side with the Prosecutor.[42]

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[36] ICC-01/05-01/13-367, paragraph 8, citing ICC-01/05-01/13-73, 9 January 2014.
[37] ICC-01/05-01/13-367, paragraph 9, citing ICC-01/05-01/13-185, 13 February 2014.
[38] ICC-01/05-01/13-367, paragraph 10, citing ICC-01/05-01/13-109, 20 January 2014.
[39] ICC-01/05-01/13-367, paragraph 10.
[40] ICC-01/05-01/13-367, paragraphs 13-15, citing ICC-01/05-01/13-363, 25 April 2014, and referring to article 67(1)(e) of the Statute and rule 121(1) of the Rules.
[41] ICC-01/05-01/13-367, paragraph 15; ICC-01/05-01/13-383, paragraph 28.
[42] ICC-01/05-01/13-367, paragraph 17 and ICC-01/05-01/13-367-Conf-AnxA, citing ICC-01/05-01/13-365, 25 April 2014.

F. Rejection of the Majority of Defence Applications

27. The defence for Messrs Mangenda Kabongo and Babala Wandu submit that most applications of the five defence teams have been rejected, including key applications as above, whereas in contrast, most of the Prosecutor's applications have been granted, including those allegedly giving rise to breaches of fundamental principles, demonstrating bias on the part of the Judge.[43]

G. Conduct of the Single Judge

(i) First appearance hearing

28. The defence for Mr Mangenda Kabongo submits that the language used by the Judge during the first appearance of the Suspects not only intimidated the defence, but also served to usurp the role of the Prosecutor, thus demonstrating partiality and bias.[44] It is further submitted that by unilaterally ruling that defence accusations made publicly against the Prosecutor should be reclassified as confidential, the Judge breached the principle of publicity of hearings, thereby shielding the Prosecutor from those allegations and breaching the principle of equality of arms.[45]

(ii) Statements against Defence Counsel

29. The defence for Mr Mangenda Kabongo argues that the Judge made unacceptable and unfounded personal attacks against its defence counsel in public decisions, contrary to article 16 of the United Nations Basic Principles on the Role of Lawyers, amounting to acts of hindrance, intimidation and interference aimed at exerting pressure on counsel for Mr Mangenda Kabongo to dissuade him from intervening in his client's interests.[46] It is argued that by publicly casting doubt on counsel for Mangenda Kabongo's professional standards, the Judge breached the principles of fair trial and free choice of counsel, and demonstrated an appearance of bias.[47]

[43] ICC-01/05-01/13-367, paragraph 16; ICC-01/05-01/13-383, paragraph 21.
[44] ICC-01/05-01/13-367, paragraph 6, citing ICC-01/05-01/13-T-3-Red-FRA WT, 5 December 2014.
[45] ICC-01/05-01/13-367, paragraph 7.
[46] ICC-01/05-01/13-367, paragraph 11, citing, *inter alia*, ICC-01/05-01/13-187, 14 February 2014.
[47] ICC-01/05-01/13-367, paragraph 12.

(iii) Actions and Language contrary to the Presumption of Innocence

30. The defence for Mr Kilolo Musamba argues that the language used by the Judge in the proceedings casts doubt on his impartiality and suggests a presumption of guilt on the part of the Suspects.[48] Reference is made to a decision which according to the defence allegedly makes clear that a Suspect "has been found guilty in the court of public and judicial opinion".[49] Other alleged examples of the Single Judge's use of partial language, proffered by the defence, include the Single Judge's reference to the actual commission of crimes by the Suspects as opposed to the alleged commission of offences.[50]

V. Response of the defence for Mr Bemba Gombo

31. The defence for Mr Bemba Gombo makes the following response to the Applications:

> "1. The Suspect respectfully disagrees with a number of procedural decisions taken by the Single Judge. The Suspect also respectfully submits that his right to a fair legal process has been ruptured by the denial of financial assistance and by the activities of the "Independent Counsel".
> 2. Notwithstanding, the Suspect does not believe that the disqualification process is the correct forum for remedying any prejudice caused to him unless the Presidency should order a newly composed Pre-Trial Chamber to revisit procedural issues decided by the Single Judge."[51]

VI. Observations of the Prosecutor

32. The Prosecutor argues that the Applications are an attempt by the Defence to "tie-up the pre-trial proceedings in the [a]rticle 70 case", and in essence are "fanciful and hyperbolic".[52] In short, the Prosecutor argues that (i) the requests do not meet the high evidential threshold for disqualifying a judge;[53] (ii) the Single Judge's request to the Presidency regarding lifting potential immunities prior to the execution of the arrest

[48] ICC-01/05-01/13-372, paragraph 34.
[49] ICC-01/05-01/13-372, paragraph 34, citing ICC-01/05-01/13-259, 14 March 2014.
[50] ICC-01/05-01/13-372, paragraph 36, citing ICC-01/05-01/13-259, 14 March 2014, paragraph 13.
[51] Jean-Pierre Bemba Gombo's response to the defence requests for the disqualification of the Single Judge Cuno Tarfusser, ICC-01/05-01/13-405, paragraphs 1 and 2.
[52] ICC-01/05-01/13-404-Conf, paragraphs 4 and 7.
[53] ICC-01/05-01/13-404-Conf, paragraph 12.

warrant was appropriate and justified;[54] (iii) the appointment of an Independent Counsel was within the discretionary authority of the Single Judge;[55] (iv) the circumstances under which the arrest warrant was issued raise no reasonably objective ground for disqualification;[56] (v) a request for disqualification cannot act as a vehicle to attack the prior determinations of a Chamber;[57] and (vi) unfavourable decisions do not, on their own, warrant disqualification.[58]

VII. Written Submission of the Judge

33. The Judge denies any impropriety or bias as alleged by the Defence. The Judge states that he anticipated the Prosecutor's application for a warrant of arrest against the Suspects since he had been familiar with the underlying facts and much of the supporting material for more than six months prior to the issuance of the warrant.[59] The Judge further states 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".[60] The Judge states that the factors dictating urgency in this case included the awareness that there might have been a leak as to the existence of the investigation into the Suspects by staff members of the Court.[61] With respect to Independent Counsel, the Judge notes that there has been a misrepresentation of the decision appointing said counsel, in that no instruction was given for the collection of incriminating as opposed to exculpatory evidence, and further that Independent Counsel was instructed to report to the Chamber as opposed to the Prosecutor.[62]
34. The Judge states that the Applications are based on the content, timing or wording of his decisions and do not come close to the types of grounds for disqualification, albeit non-exhaustive, listed in article 41(2) of the Statute and rule 34(1) of the Rules.[63] The Judge contests the argument that all or most of the applications made by the Defence have failed

[54] ICC-01/05-01/13-404-Conf, paragraphs 13 to 23.
[55] ICC-01/05-01/13-404-Conf , paragraphs 24 to 26.
[56] ICC-01/05-01/13-404-Conf, paragraph 30 to 44.
[57] ICC-01/05-01/13-404-Conf, paragraphs 45 and 46.
[58] ICC-01/05-01/13-404-Conf, paragraph 52, 53 and 57.
[59] ICC-01/05-01/13-419-Anx, paragraphs 5 and 9.
[60] ICC-01/05-01/13-419-Anx, paragraph 10.
[61] ICC-01/05-01/13-419-Anx, paragraph 10.
[62] ICC-01/05-01/13-419-Anx, paragraph 12.
[63] ICC-01/05-01/13-419-Anx, paragraph 15.

whilst all or most of the arguments emanating from the Prosecutor have succeeded.[64] Further, the Judge states that rejecting a request cannot *per se* lead to the deciding judge no longer being impartial to the detriment of that party, and that to hold otherwise would be tantamount to eviscerating the essence of judicial adjudication.[65] The Judge states that whereas the parties are entitled to disagree with judicial findings, the instant Applications are an attempt to interfere with the very possibility of exercising judicial jurisdiction.[66]

VIII. Findings of the Plenary

35. Distinguishing between allegations relating to the interpretation of the law by the Judge and allegations relating to the conduct of the Judge in the proceedings, the Plenary unanimously dismissed the Applications on both grounds, finding that none of the arguments put forward by the Defence substantiated any allegations of bias, or the appearance thereof, either when considered separately or together. Judge Ušacka, whilst agreeing with the findings of the Plenary on both grounds, added a separate concurring opinion on the second ground. The Plenary also observed that the application submitted by the defence for Mr Mangenda Kabongo was unnecessarily immoderate in language.

A. Ground One – Interpretation of the Law

36. The first category of allegations, contesting the decisions of the Judge, include the following: the *ultra* vires appointment of "Independent Counsel"; the *ultra vires* application to waive the immunity of lead counsel and the case manager; violating the immunities of counsel and the case manager before such immunities were formally waived; dismissing crucial defence applications, for example the dismissal of leave to appeal, the appointment of Independent Counsel, and the application to call live witnesses; and dismissing the majority of defence requests whilst granting the majority of Prosecution requests.
37. The Defence argue that the decisions rendered by the Judge reveal a pre-disposition to decide matters in favour of the Prosecutor, relying upon his previous rulings during the proceedings. The Plenary holds that the Defence have failed to establish any basis for

[64] ICC-01/05-01/13-419-Anx, paragraph 16.
[65] ICC-01/05-01/13-419-Anx, paragraph 16.
[66] ICC-01/05-01/13-419-Anx, paragraph 17.

disqualification under this head. The matters raised by the Defence concern disputes as to the interpretation of the law, which absent extraordinary circumstances, are not grounds for disqualification.[67]

38. The Plenary has had reference to disqualification proceedings before the International Criminal Tribunal for the former Yugoslavia, which has found that in reviewing decisions for bias "[t]he purpose of that review is not to detect error, but rather to determine whether such errors, if any, demonstrate that the judge or judges are actually biased, or that there is an appearance of bias based on the objective test described above. Error, if any, on a point of law is insufficient; what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant, and not genuinely related to the application of law, on which there may be more than one possible interpretation, or to the assessment of the relevant facts".[68]
39. The Plenary finds that the Defence have not shown that the decisions in question were based on a pre-disposition of the Judge in favour of the Prosecutor or personal investment in a particular outcome by the Judge, or that, having read those decisions, an informed and objective observer would reasonably perceive bias on the part of Judge. Moreover, rejecting the majority of defence applications or granting the majority of Prosecution applications, if indeed the case, does not constitute a reasonable basis for disqualification.
40. The proceedings in case ICC-01/05-01/13 are the first before the Court pursuant to article 70 of the Statute. The ensuing lack of precedence for this case suggests that many legal and procedural issues remain open to interpretation and litigation in the course of the proceedings. Whereas the Defence, in the Applications, might have put forward plausible arguments on the interpretation of the law, there exist equally plausible interpretations motivating the decisions of the Judge. Nonetheless, the issues raised by the Defence in the Applications are precisely the types of issues governed by the Court's appellate process.
41. The Plenary considers that the allegations in the Applications amount to an attempt to convert appellate issues into issues of disqualification and cannot stand. Otherwise all judges would risk being subject to disqualification proceedings when they make adverse rulings against a party. It should be noted, at this juncture, that the Plenary strongly

[67] See United States Supreme Court case of *Liteky v. United States*, 510 U.S. 540 (1994), at 555.
[68] See for example *Seromba*, Decision on Motion for Disqualification of Judges (Bureau), 25 April 2006, paragraph 12 (noting that a showing of an error of law is not sufficient to show bias; "what must be shown is that the rulings are, or would reasonably be perceived as, attributable to a pre-disposition against the applicant"); *Ntahobali*, Decision on Motion for Disqualification of Judges (Bureau), 7 March 2006, paragraph 12; *Karemera et al*., Decision on Motion by Karemera for Disqualification of Judges (Bureau), 17 May 2004, paragraph 13.

discourages frivolous applications, particularly where appropriate recourse is through the appellate process.

B. Ground Two – Conduct of the Judge in the Proceedings

42. In the second category are the complaints concerning the way in which the Judge conducted the case, namely that the Judge: issued the arrest warrant for the Suspects with undue speed; used language demonstrating a pre-conviction of the guilt of the Suspects in both hearings and written decisions, and publicly admonished counsel for one of the Suspects regarding conduct and professional standards.
43. In relation to this category, the Plenary considers that no single event or cumulative pattern of events attributed to the Judge by the Defence constitutes bias or the appearance thereof. The concerns regarding the conduct of the case by the Judge in terms of speed and language do not satisfy the high standards required to establish an appearance of bias. Article 67(1)(c) entitles the accused to be tried without undue delay and the Plenary notes that the Judge was familiar with the case prior to the Prosecution's application for the warrant of arrest. Further, having studied the transcripts and decisions relied upon by the Defence, the Plenary notes that many of the examples employed by the Defence to cast doubt on the impartiality of the Judge due to his choice of language have been taken out of context. The Judge indeed criticised the conduct of counsel for Mr Mangenda Kabongo. However, it is noted that a judge's ordinary efforts at courtroom administration - even stern and short-tempered efforts - remain immune from establishing bias or partiality.[69] The Plenary finds that the criticisms in question were ordinary admonishments in the course of the proceedings and did not go beyond the bounds of what may be considered proper for the purposes of judicial control of the proceedings before the Judge.
44. The Plenary finds that the impugned conduct of the Judge, assessed in its proper context, would not have led a fair-minded and informed observer, having considering all the factors above, to reasonably apprehend bias.

[69] See United States Supreme Court case of *Liteky v. United States*, 510 U.S. 540 (1994), at 556.

IX. Separate Concurring Opinion of Judge Ušacka

45. Judge Ušacka agrees with the decision and reasons of the Plenary above,[70] but raises the following concerns in relation to the propriety of the conduct of the Judge regarding his application to the Presidency for the waiver of the immunities of Mr Kilolo Musamba and Mr Mangenda Kabongo ("Waiver Application").[71]

46. First, as noted by the defence for Mr Mangenda Kabongo, the Waiver Application addressed to the Presidency is drafted on stationary stamped with the "Presidency" letterhead. As a member of the Presidency, the Judge appears to have written the letter in his capacity as Second Vice-President, as opposed to Single Judge. This is a wholly inappropriate blurring of the roles of a Judge and another organ of the Court, considering the terms of article 3(1) and 4 of the Code of Judicial Ethics and article 40 of the Statute which provides that judges shall be independent in the performance of their functions.

47. Secondly, the Judge appears to have addressed his Waiver Application to the Presidency in the form of a request for advice. The Judge informs the Presidency that the Prosecutor was not seeking to waive the immunities of the persons concerned[72] and then goes on to state that: "[h]owever I consider it is for the Presidency to make a finding on such a delicate issue and therefore I am formally requesting the Presidency, whether to waive the privileges and immunities of Aime Kilolo Musamba and Jean Jaques Mangenda Kabongo, or to follow the interpretation given by the Prosecution."[73] It was inappropriate for the Judge to put the matter to the Presidency - the decision maker - in the form of a request for advice.[74] As a Judge, he should have set out a reasoned opinion on the matter, clearly stating his views and asked the Presidency to make a decision.

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[70] In relation to the relevant law, Judge Ušacka having been in the minority in the *Banda/Jerbo* Decision and the *Lubanga* Decision, notes the following article: Global Community: Yearbook of International Law & Jurisprudence 2013, The "Presumption of Impartiality" and Other Errors in the International Criminal Court's Plenary Decision Concerning Judicial Disqualification of the President of the Court in The Prosecutor v. Thomas Lubanga Dyilo, Steven Becker, page 111.

[71] It is noted that for the purposes of considering the Waiver Application, the Presidency was composed of three Judges of the Appeals Chamber, Judges Song, Monageng and Kuenyehia, which could be problematic for the purpose future related appeals.

[72] Arguing that such immunities apply only with respect to the exercise of jurisdiction by national courts with respect to their official capacity before the Court, and do not serve as a limitation to their prosecution under article 70 of the Statute, ICC-01/05-68-AnxI, pages 1 and 2.

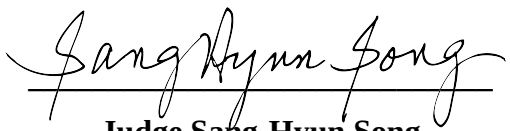
[73] ICC-01/05-68-AnxI, pages 1 and 2.

[74] In accordance with article 57 of the Statute, the powers and functions of the Pre-Trial Chambers belong only to the Judges of those Chambers to exercise and should not be delegated.

48. Finally, rather than setting out his reasoning to the Presidency within the body of the Waiver Application, the Single Judge inappropriately attached to the Waiver Application a draft warrant of arrest for the Suspects.[75]
49. Whilst these elements call into question the propriety of the actions of the Judge, they do not, in and of themselves, meet the high threshold that could lead to a reasonable apprehension of bias warranting disqualification.

In light of the foregoing, the Plenary unanimously:

Dismisses the Applications.



Judge Sang-Hyun Song

President

[75] Article 6 of the Code of Judicial Ethics of the Court, provides that "Judges shall respect the confidentiality of consultations which relate to their judicial functions and the secrecy of deliberations" and the solemn undertaking of judges, set out in rule 5(1)(a) of the Rules, provides similarly.