



CONFIDENTIAL

THE DISCIPLINARY BOARD OF THE INTERNATIONAL CRIMINAL COURT

Original: English

Reference: SDO-2019-89-DB decision

Date: 19 December 2019

Before:

Mr Assane Dioma Ndiaye, chair
Dr Victor Tsilonis, alternate member
Mr Carel Raymakers, *ad hoc* member

Case: Disciplinary Complaint against Mr Goran Sluiter

Public

Decision of the Disciplinary Board in the Case of Mr Goran Sluiter

Counsel for Mr Goran Sluiter:

Ms Melinda Taylor

Alternate Commissioner:

Mr Alexander H. Milne, Q.C.

1. Summary of procedural history

1.1 Two complaints on alleged misconduct were lodged against Mr Goran Sluiter (hereinafter: "the counsel"), by Mr Árpád Béla Gyula Tivadar (Julius) von Boné (hereinafter "the complainant") and the Office of the Prosecutor on 2 April 2015 and on 4 August 2015, respectively.

1.2 The Alternate Commissioner issued his reports on both complaints, on 31 October 2018 and on 26 March 2019 respectively, recommending their transmission to the Disciplinary Board for further investigation and, the matters being identical, to be considered together by the same Disciplinary Board (the Board).

1.3 Having considered the Alternate Commissioner's report and the evidence gathered, the Board decided to hold a disciplinary hearing on 9 and 10 September 2019.

1.4 Counsel provided submissions and requests to the Board on 6 August 2019, 26 August 2019, 6 September 2019 and during the hearings of 9-10 September 2019.

1.5 On 5 September 2019 the Board responded to Counsel's submissions to hold a closed hearing and submissions related to the competence of the Board.

1.6 On 10 September 2019 the Board decided to remove the complaint lodged by the Office of the Prosecutor and the evidence gathered by the Alternate Commissioner from the file.

1.7 After deliberations and consultations of Alternate Commissioner and Counsel the Board decided to postpone the hearing and invite the complainant to testify. Subsequent public hearings were held on 25 and 26 November 2019.

1.8 Additional submissions and requests to the Board were provided on 6 November 2019 and during the hearing of 25 and 26 November 2019.

1.9 At the hearing of 25 November 2019 the complainant was heard as a witness. The counsel was also heard and made a statement in his own case.

1.10 On 26 November 2019 pleadings were presented by the Alternate Commissioner Mr Milne and the Defence Counsel Ms Taylor. At her pleading Ms Taylor referred to documents, which were handed over to the Board.

1.11 After deliberations the Board gave an oral decision on key issues of the complaint on 26 November 2019 and announced that a further reasoned written decision will be delivered at a later date.

2. Complaint

Based on a complaint filed by complainant at the ICC Registrar on 2 April 2015 the counsel is alleged to having committed misconduct and unethical behaviour:

2.1 By addressing directly the client of another counsel without going through or without the permission of that counsel, in violation of the duties cast upon him as counsel, in particular those laid down at articles 7(1), 24(1), 27(1), 28 and 31(a) of the Code of Professional Conduct for Counsel (hereinafter the "Code");

2.2 By his telephone call of 19 March 2015 and his fax messages of 19 and 21 March, he interfered with complainant's activities to advise Witness 727 of his rights under Rule 74 of the Rules and Procedure and Evidence ("RPE") and to prepare Witness 727 for his testimony" – an alleged violation of article 70(1)(c) of the Statute and possible violation of articles 7(1), 24(1), 27 (1), 28, and 31(a) of the Code.

3. Summary of facts

3.1 In a decision issued on 10 December 2014 ¹ the ICC Trial Chamber V (a) relieved the counsel as duty counsel from further representation of a witness and instructed the Counsel Support Section ("CSS") to assign a new counsel to the witness with immediate effect.

¹ ICC-01/09-01/11-1749 Conf

3.2 Pursuant to the Chamber's decision ² of 12 January 2015, the counsel was relieved from representing the second witness as duty counsel, hereinafter referred to as "Witness 727". In this decision Trial Chamber V (A) noted that "the Counsel's insistence that he may not be compelled to reveal what information he provides to his clients would make it impossible to inquire into any breach of the Rule 74 confidentiality. Accordingly, as already determined by the Chamber, the Counsel's uncompromising position on the information he requires passing to his clients, clashes with the consistent regime of confidentiality applied in this case for Rule 74 purposes" and consequently directed the Counsel Support Section (CSS) to appoint another duty counsel to represent the Witness 727.

3.3 The complainant is, like the counsel, a Dutch lawyer. His complaint derives from the fact that, subsequent to the aforementioned decision of the ICC Trial Chamber V (a) of 12 January 2015 he (the complainant) was appointed to represent Witness 727 as duty counsel under Rule 74.

3.4 The complainant was appointed by the CSS in March 2015, and met with Witness 727 in anticipation of the witness giving evidence that month. Witness 727 was a resident of the Netherlands and the ICC made a request to the Kingdom of the Netherlands. That request was handled by the Dutch Examining Magistrate, who appointed the complainant as the witness's counsel on Friday, 13 March 2015. The matter was formalized on Monday, 16 March 2015.

3.5 On 12 March 2015 Witness 727 was summoned by the Dutch Examining Magistrate with a view to executing the request of legal assistance from the ICC.

3.6 On 13 March 2015 the Examining Magistrate consulted with the complainant as counsel of Witness 727. The complainant was appointed to Witness 727 in accordance with the Dutch system on legal assistance.

3.7 On 19 March 2015 the complainant met with Witness 727 for the first time. This meeting took place at the latter's home address. The meeting occurred in company of two plain-clothes police officers from the Dutch police. According to the complainant the meeting went on for approximately one and a half hours. Then the meeting was interrupted when the witness received a telephone call from the counsel. The telephone

² ICC-01/09-01/11-1775 Conf. paras 23-24.

was handed at times to one of the police officers and the complainant who spoke directly with the counsel. The witness informed the complainant what the counsel was saying to him, which was to the effect that the complainant and the officers were asked to leave and discontinue the meeting.

3.8 Soon after the meeting, on the way back to the ICC, the complainant consulted with the Examining Magistrate, who told him that her office had received a fax from the office of the counsel. Annexed to the fax was a letter from the counsel to the complainant saying that the latter's services were no longer required in the case.

3.9 On 19 March 2015 the counsel also sent a fax to the complainant stating that he is representing Witness 727 for many years and that the witness would only use the services of the counsel. The fax also stated that Witness 727 considered the meeting intimidating and unpleasant and that he did not wish to be represented by the complainant. In the fax the counsel said that he was representing the witness in the procedure and that he would represent the witness during the upcoming hearing on 23 March 2015.

3.10 On 20 and 21 March 2015 the complainant again visited Witness 727 with intention to talk with him about the importance to attend the upcoming hearing in Court. At these occasions the complainant talked with the wife of the witness and Witness 727 himself respectively.

3.11 On 20 March 2015 the counsel sent a fax to the complainant on behalf of Witness 727. Attached to the fax was a statement from Witness 727 in which he states that the decision to replace the counsel as lawyer of his choice was taken against his will and that the counsel is the only lawyer authorized to act on his behalf and to communicate with the competent authorities in all his legal matters. The complainant states that he found this fax in his office on Saturday 21 March 2015 and that it was sent from the office of the counsel.

3.12 On 22 March 2015 at the request of the ICC the Dutch Examining Magistrate issued an order to bring Witness 727 by force to the hearing of 23 March 2015.

3.13 On 23 March 2015 Witness 727 was due to give evidence by video-link from an undisclosed location. The proceedings were to be supervised by the Dutch Examining Magistrate, but the Witness 727 failed to attend, as the Magistrate informed the Trial

Chamber. Evidently Mr Michiel Pestman, a colleague in the office of the counsel, informed the Examining Magistrate that the Witness 727 would not attend.

3.14 On 24 March 2015 an e-mail was sent by Mr Michiel Pestman to the Dutch Examining Magistrate, in which the Dutch Magistrate was criticised for appointing another counsel than the counsel.

3.15 On the same day articles appeared in Dutch newspapers. These articles stated that Witness 727, an important witness, who would make incriminating statements against William Ruto of Kenia in the relevant ICC case, was hiding. The articles quoted Mr Pestman as his counsel in making critical comments on the Examining Magistrate for her role in the case. It referred to the ICC as the international institution of justice who was 'forcing the Witness 727 to testify' despite threats to his family.

3.16 On 25 March 2015 Witness 727 attended a hearing at the District Court of The Hague. After the hearing he was arrested and detained by the Dutch authorities in order to make him available to testify before the ICC the next day through a video link with Dutch court premises. In the subsequent period Witness 727 was represented by the counsel and his colleague Mr Michiel Pestman.

3.17 On 2 April 2015 a disciplinary complaint was filed by the counsel on behalf of Witness 727 against the complainant at the Dean of the Rotterdam Bar Association. At the same day the aforementioned complaint against the counsel was filed by the complainant at the Registrar of the ICC.

4 Summary of positions of the parties

4.1 Position of the complainant

4.1.1 At the Board hearing of 25 November 2019 the complainant confirmed the description of the complaint as it was presented to him based on the quote in the summons of the counsel to appear before the Board dated 6 August 2019.

4.1.2 The complainant was first approached by the ICC Registry in early March 2015. He was appointed as duty counsel a few days prior to his visit to Witness 727 on 19 March 2015. The complainant was informed by that time that Witness 727 was a protected witness, who was facing certain problems and had serious concerns regarding his and his family's security. Moreover, the complainant was informed that the Trial Chamber had replaced the counsel of the Witness 727 but he initially did not know the identity of the previous counsel.

4.1.3 The complainant did not have contact details of the Witness 727 other than his address. He did not undertake any action to contact the counsel who acted on behalf of Witness 727 prior to his assignment. He visited Witness 727 on 19 March 2015 together with two police officers.

4.1.4 On 19 March 2015 the complainant had a long conversation with Witness 727. The two policemen were present in the house for security reasons. They were sitting in the background and did not participate in the conversations between the complainant and Witness 727. The spouse of Witness 727 was also present in the house but did not participate either. The conversation was amicable. During the meeting the Witness 727 was kind and friendly towards the complainant as he offered him tea and asked him about his experience working in Africa, the countries and situations he was professionally involved in. At that point in time the complainant did not want to get into the merits of the case. He felt that he had gained the confidence of Witness 727 regarding the issues of safety and security and he wanted to touch upon some topics that the Victims and Witnesses Unit had asked him.

4.1.5 After approximately one and a half hour the meeting was interrupted by a telephone call on the mobile phone of Witness 727. The complainant could hear the telephone conversation that took place. It became clear to him that it was the counsel who had been relieved of his functions as counsel to this Witness 727 by the ICC. The complainant could hear Witness 727 summing up the topics he had discussed with the counsel.

4.1.6 At a certain point Witness 727 gave the telephone to the complainant. The complainant identified himself and the counsel told him that the complainant was not the counsel, but the counsel was the counsel and he was dealing about the

matter with the Examining Magistrate in The Hague. He could hear the counsel telling Witness 727 over the phone that both the police officers and the complainant had to leave. As a result of the telephone call the witness finally told the complainant that he had no other choice than asking him and the officers to leave the house.

4.1.7 On Saturday 21 March 2015 the complainant found a fax in his office. The fax was sent by the counsel. Attached to the fax was a statement allegedly made by the counsel on behalf of Witness 727. The fax asserted that the complainant was not to represent Witness 727 and that the Witness 727 wanted to be represented only by the counsel in "all proceedings". A fax with similar content was also sent by the counsel's law firm to the Examining Magistrate, who then informed the complainant accordingly.

4.1.8 On 24 March 2015 a newspaper article appeared in which Mr Michiel Pestman, a colleague from the law firm of the counsel said that he was the lawyer representing the witness. It was clear to the complainant that the counsel and Mr Michiel Pestman were claiming to represent the witness. He found that a breach of the decision of the Chamber, which was clear and final. According to the complainant the conduct of the counsel was interfering with the administration of justice.

4.1.9 On 26 March 2015 Witness 727 appeared at a Court hearing. The following day the complainant had a meeting with the Witness 727, again on his security concerns. He left the business card of the Head of the Protection of the Victims and Witnesses Unit and agreed with Witness 727 that he would visit the next day.

4.1.10 The complainant returned for the agreed follow-up meeting on the next evening, Saturday 28 March 2015. On that occasion Witness 727 remarkably changed his attitude. He was uncooperative and unwilling to engage in conversation with the complainant. Witness 727 refused to say whether he had spoken to the Victim and Witnesses Unit or to its Dutch equivalent. The complainant describes the witness having said that 'he already had a lawyer'. Although the witness did not say so, the complainant suspected that his change in attitude was due to further contact with the counsel and/or Mr Michiel Pestman.

4.1.11 The complainant perceived the interference of the counsel as obstruction of his undertakings as Duty counsel appointed by the ICC. He considers the actions of the counsel as a breach of article 70 of the Statute as well as article 31 of the Code of Professional conduct.

4.2 Position of Alternate Commissioner

4.2.1 The alternate commissioner is of the opinion that the described activity of the counsel fell within the remit of the Code. The counsel had clearly appeared before the ICC on previous occasions, and was (albeit briefly) duty counsel in respect of another witness before being relieved of that duty. In respect of Witness 727 he was considered but rejected for the role of duty counsel³. Hence, the counsel falls clearly within the parameters of the Code to whom the Code is applicable.⁴

4.2.2 The complaint against the counsel appears to revolve around the prohibition in article 70(1) (c) of the Statute against “obstructing or interfering with the attendance or testimony of a witness” in that the complainant interprets the behavior of the counsel as being designed to obstruct the provision of the witness testimony whereas he (the complainant) felt that he was in a position to persuade the witness to cooperate in a more fulsome manner with the Trial Chamber. The conclusion drawn by the complainant, although perhaps understandable, is based, in part, upon supposition.

4.2.3 In respect of the counsel, it is clear that he was already acting for the witness in other matters. He was therefore entitled to speak with his client in respect of those matters. Moreover the provision of duty counsel to a witness does not appear to create any new obligation for a witness. If a witness is at risk of self-incrimination, the provision of counsel is a service provided by the Court to enable the witness (who may be indigent) to have representation at the expense of the Court. There is no obligation upon the witness to accept that representation, and it could properly be argued that the witness was entitled to reject it.

³ SDO-2019-93 Hearing Transcript 26-11-2019 FRA p.9 paras 12-27 and p.11 paras 1-9

⁴ SDO-2019-93 Hearing Transcript 26-11-2019 FRA p.41 paras 12-26

- 4.2.4 The role of duty counsel was to assist and advise the witness in the process of testimony and to ensure that the witness is aware of the scope and limits of his rights and entitlements.
- 4.2.5 The complainant evidently interpreted his role as encouraging the witness to attend and testify. That is admirable in that he was acting in the best interests of an effective trial – it was not, however, his principal aim. Provided that the witness was advised regarding the consequences of his actions, and understood both his rights and his obligations to the Court, the role of duty counsel cannot be to act as a “persuader” on behalf of the Court. The obligations of Counsel are set out clearly under article 24 of the Code.
- 4.2.6 The complaint is essentially not so much that the counsel interfered with the witness but that the counsel actions impeded the efforts of the complainant: this is not the same as “obstructing or interfering with the attendance or testimony of a witness”.
- 4.2.7 In light of the above the alternate commissioner is of the view that the complaint made – in the terms expressed – is not made out.
- 4.2.8 However that is not the end of the matter. Whilst the counsel represented the witness in some capacity, outside the remit of the ICC, it was the complainant who was appointed to represent the witness before the Court. It was a matter for the witness as to whether or not he would cooperate with the complainant. However, the counsel would undoubtedly have been aware that the complainant was appointed by the ICC.
- 4.2.9 Whilst the counsel was entitled to communicate with his own client (i.e. the witness in respect of extraneous matters), he should not have addressed Witness 727 in relation to ICC matters except through or with the permission of the complainant. In his exchanges with the witness on 19 March 2015, in which he attempted to persuade the witness to stop speaking to the complainant when the latter was present in his capacity as Court appointed representative, the counsel appears to have been in violation of Article 28 of the Code which clearly states that *“Counsel shall not address directly the client of another counsel except through or with the permission of that counsel”*. The behaviour described by the complainant, if proven, goes beyond a lack of

courtesy to a professional colleague, and would potentially amount to a breach of article 28 of the Code.

4.2.10 Article 28 is an important provision in the Code designed to protect the relationship of trust between the client and counsel, and prevent the undermining of that relationship through unauthorized interventions by other counsel.

4.2.11 With respect to the complaint the important date – perhaps a turning point in the proceedings – was 19 March 2015 when the complainant had first visited the witness to inform him of his appointment as legal representative by the ICC. The complainant describes being made welcome and enjoying fruitful initial discussions with the witness. There is no direct evidence to contradict this description. As of that day the complainant was the legitimately appointed counsel for the witness in respect of the ICC, and the counsel was aware of this, having been discharged from the position himself. Subsequent changes of mind by the witness (whether influenced by others or not) are irrelevant to this.

4.2.12 Whilst the counsel was entitled to speak to the witness in respect of those matters upon which he acted (asylum application etc.), he was not entitled to prevent the complainant pursuing his duties as Court appointed counsel for the purposes of the witness' testimony before the ICC.

4.2.13 In March 2014 the asylum procedure was completed.⁵ Witness 727 had no need for an asylum lawyer. When the counsel called the witness he was clearly giving advice which was directly related to the ICC procedure. The hearing at the Dutch Examining Magistrate cannot be seen as an isolated domestic procedure. It was one case for the ICC.

4.2.14 The counsel did not attempt to discuss the case regarding witness 727 with complainant prior to his interference in March 2015. He was clearly breaking the Code of Conduct of the ICC.

⁵ SDO-2019-92 Hearing transcript 25-11-2019 FRA p.88 para 17

4.3 Position of the counsel and his defence counsel

4.3.1 The counsel presented his defence in the aforementioned submissions of his counsel and during the hearings of 9 September and 25 and 26 November 2019. The counsel provided the Board with a statement, which was handed over on 25 November 2019. He showed his willingness to answer questions of the Alternate Commissioner and Board members. The pleading was presented by his Counsel on 26 November 2019.

4.3.2 The counsel drew the attention of the Disciplinary Board to events which purported to clarify the counsel's understanding of the applicable legal framework related to the interactions which took place on 19 March 2015, in particular⁶:

a. The decision of the ICC Registrar to appoint the complainant to represent 727 in matters that exclusively pertained to the operation of Rule 74 of the ICC Rules of Procedure and Evidence, which also drew the complainant's attention to the fact that the counsel acted for the witness, and was his Counsel of choice;

b. The omission on the part of the ICC Registry and the complainant to notify the counsel of this appointment, or the complainant's appointment by the Dutch Magistrate;

c. The complainant's decision to utilize Dutch police services (rather than the ICC Victims and Witness Unit) to approach 727, which firstly, created a clear appearance that he was acting within the framework of Dutch law, and secondly, generated significant consequences for 727 under Dutch law, which triggered a duty on the part of the counsel to provide advice to 727, concerning the implications of meeting with the complainant, in the presence of Dutch police (who are not covered by legal professional privilege), vis-à-vis 727's right to asylum under Dutch law;

d. Subsequent developments, which indicate that both the counsel and the complainant understood this interaction to fall within the framework of Dutch law and Dutch proceedings;

e. The fact that Dutch authorities (including the Magistrate seized of the cooperation request) accepted the counsel's ongoing right to interact with, and advise 727 of his rights and obligations under Dutch law;

⁶ SDO-2019-41 20192608 – GS Observations p.8 para. 25

f. The fact that ICC authorities also accepted that the counsel had an ongoing right to interact with, and advise 727 of issues arising under Dutch law (or as concerns his protection), and although 727 insisted that the Respondent attend meeting with the Victims and Witnesses Unit (VWU), the Respondent carefully considered the matter, and obtained the permission of the ICC Trial Chamber to perform, on an exceptional basis, this role in the sphere of the ICC;

g. The complainant's submission to Dutch disciplinary authorities that he did not consider that his status as duty counsel entailed a 'client-counsel' relationship. There is, therefore, no basis for alleging or concluding that the counsel intentionally interfered with a client-counsel relationship, which did not exist.

4.3.3 During the disciplinary procedure the defence counsel and the counsel himself emphasized the fundamental question as to whether the ICC Code regulates the conduct of the counsel as a Dutch lawyer, advising a private client under Dutch law and Dutch human rights law. The defence counsel argued that the ICC cannot interfere with the right of witnesses to obtain legal privileged advice and representation from non-ICC/Dutch lawyers in relation to asylum and protection issues.

4.3.4 The counsel explained why he felt it was necessary to protect Witness 727. The counsel already started to represent this witness in his asylum case at the end of 2011. At that time there was already evidence of security risks for witness 727 and his family. These security risks intensified significantly over the years. At the hearing of 25 November 2019 the counsel clarified that the asylum procedure ended in March 2014.

4.3.5 The counsel stated that only Witness 727 himself could decide whether the situation of duress occasioned by the security threats would for him, in his own mind, outweigh his obligation towards the Court to testify. At the time he was requested to appear as a witness by the Examining Magistrate he felt that this could still threaten his asylum status and in this respect the counsel is of the opinion that he was acting in March 2015 as his asylum counsel in a domestic procedure and not interfering in any ICC procedure.

4.3.6 In the weeks that followed on 19 March 2015 the issue of the appointment of the complainant as duty counsel was occasionally discussed between Witness 727

and the counsel. The counsel continued to inform Witness 727 of his free and unimpeded choice to make use of the services of the complainant.

4.3.7 Counsel for the counsel pointed out that the complainant was not an experienced counsel in this type of work like her client and he did not have any intention to discuss Rule 74 with Witness 727. ⁷The complainant was in fact not well placed. He did not contact the counsel and he came in just a few days before the hearing at the Examining Magistrate.

4.3.8 Reference is made by the counsel to the decisions of the Disciplinary Boards of First Instance and Appeal of the Netherlands. In these decisions the complaint of Witness 727 against the complainant was declared to be well founded. Consequently, according to the Dutch Disciplinary organs the complainant should have withdrawn as duty counsel from the ICC.

4.3.9 The counsel and his defence counsel repeatedly argued that next to the complainant also Witness 727 and Mr Michiel Pestman, the colleague within the law firm of the counsel should be heard as a witness in the disciplinary procedure to provide the Board with a balanced understanding of the events that occurred at the time.

5 Findings of the Disciplinary Board

5.1 The Trial Chamber of the ICC rendered a public decision on 12 January 2015 (following its original decision on 10 December 2014) which set aside any possibility for Witness 727 to be represented by the counsel in relation to the pending ICC Trial. Hence, the Trial Chamber deemed inappropriate to appoint the counsel as duty counsel for Witness 727.

5.2 Bearing the consequences of that decision, the Registry appointed the complainant on 5 March 2015 duty counsel for Witness 727 pursuant to Rule 74 of the RPE.

5.3 Although the counsel was aware that as a result of the decision of the Trial Chamber of 12 January 2015 the CSS was instructed to assign a new duty counsel to

⁷ SDO-2019-93 Hearing Transcript 26-11-2019 FRA p. 17, paras 27-28

Witness 727 he made no attempt at all to find out who would be this duty counsel and to communicate with this counsel on the concerns he had regarding the security of the witness and his family.

5.4 During the first meeting between the complainant and Witness 727 of 19 March 2015, the counsel made a telephone call to Witness 727, who informed him of the presence of the new duty counsel. Instead of first consulting with complainant the counsel started talking to and advising Witness 727. During that phone call the counsel requested the complainant to withdraw from the case and informed him of the fact that he would be acting as the said witness's counsel. In other words, the counsel talked to Witness 727 without first seeking authorisation by the Registry's appointed counsel pursuant to Rule 74 of the RPE and Article 15(2) of the Code. Subsequently, following this telephone call, the complainant was obliged to leave Witness 727's house.

5.5 On the same day the counsel sent a fax to the Dutch Examining Magistrate, who was acting as a magistrate in relation to the ICC (and not domestic) proceedings and in this fax the counsel recused the representation of the complainant as duty counsel for Witness 727 and stated that he was the sole counsel of the said witness. The counsel also added that he would represent Witness 727 on the hearing of 23 March 2015.

5.6 The counsel reiterated the same remarks via a fax sent on 20 March 2015 through the telephone line of his Dutch law firm. Attached to the fax was a typed statement of Witness 727. The counsel states that he made this statement together with Witness 727. In the statement the counsel states that he is the only lawyer authorised to act and to communicate with the competent authorities on behalf of Witness 727 in all his legal matters.

5.7 In light of the Trial Chamber's decision of 12 January 2015 and the complainant's appointment by the Registry pursuant to Rule 74 of the RPE, the complainant was the only counsel of Witness 727 pursuant to the Code with the ability to represent the witness pursuant to the Rules and Procedures of the International Criminal Court in which the said witness was called to testify before the ICC. Consequently the Disciplinary Board considers that in these cases a 'client-counsel' relationship exists between the witness and the counsel, irrespectively of the view of the involved persons pursuant to Articles 2, 9(2) and 11 of the Code.

5.8 It is clear to the Board that the hearing of 23 March 2015 fell squarely within the framework of ICC procedure. Thus, the Board holds the view that the counsel's telephone call on 19 March 2015, as well as the faxes sent on 19 and 21 March 2015 to the investigating Magistrate and the fax sent on 20 March 2015 to the complainant from the Dutch telephone line of his law firm Prakken d'Oliveira, constitute professional misconduct pursuant to Arts. 24§1, 27§1, 28, 31(a) of the Code.

5.9 As for the argument presented by the defence that the counsel did not intervene to the complainant's duties since the counsel worked as a Dutch counsel before Dutch proceedings the Disciplinary Board rejects this argument because the procedure before the Dutch Examining Magistrate was clearly linked to the ICC procedures and cannot be seen as a separate domestic procedure.

5.10 Moreover, the argument made by the counsel that the wording of the fax referred to Dutch proceedings provides a clear-cut impression that the counsel was arguing for a comprehensive representation of Witness 727 without providing any specifications.

5.11 Whatever Witness 727 might have experienced during his conversation with the complainant on 19 March 2015, the counsel should have restrained from acting as he actually did pursuant to the Code.

5.12 In light of the above the Board upholds its decision that the hearing of Witness 727 and Mr Michiel Pestman as requested by the defence counsel is considered not useful pursuant to Article 15 (7) of the Rules and Procedures of the Disciplinary Board and the Disciplinary Appeals Board. The position of Witness 727 and Mr Michiel Pestman already appears from the statements and documents provided to the Board. The counsel has not given any indication on what exactly the proposed witnesses could attribute to another view on the clear facts as described above, which took place on and around 19 March 2015 and the following dates.

5.13 The Board accepts the argument that the counsel was entitled to contact Witness 727 with respect to domestic legal issues. However, the Board wishes also to stress the importance of Article 15(2) of the Code which clearly stipulates the

communication between counsel and the client that *“When counsel is discharged from or terminates the agreement, he or she shall convey as promptly as possible to the former client or replacement counsel any communication that counsel received relating to the representation, without prejudice to the duties which subsist after the end of the representation”*. The Board took notice of the counsel’s serious concerns and intentions to protect Witness 727. The Board is however of the opinion that these concerns and intentions do not justify his acts, which implicated that the counsel ignored the position of the complainant as officially appointed duty counsel in relation to the ICC procedure. The argument that the complainant was not sufficiently qualified and experienced to protect Witness 727 does not lead to such a justification either, also taking into account that the counsel at the time of his telephone call of 19 March 2015 did not even know the complainant⁸.

5.14 The decision taken by the Dutch Disciplinary organs on the complaint which was filed on behalf of Witness 727 does not lead to such a justification either. According to that decision the complainant should have withdrawn as duty counsel once it became clear to him that Witness 727 did not want to be (further) represented by him, but this does not lead to a justification of the acts of the counsel at the initial stage when the complainant had his first meeting and contact as officially appointed duty counsel for the witness.

5.15 With regard to the sanction to be imposed the Board considers the acts of the counsel as described above as a serious misconduct. However the Board also takes into account that the counsel was trying to act in the best interest of Witness 727, whose interest he served before also in an asylum procedure. The Board further notes that the complaint is filed by another counsel whose acting has also been criticized, and that the counsel has no record of unethical behaviour. Although the counsel contacted the Dean of the Bar Association in Amsterdam, who supported him from a Dutch legal perspective, the Board notes that the counsel should have taken into account the ICC Rules and Regulations about which the Dean admitted ignorance. Finally the Board takes notice of the apologies made by the counsel at the hearing of 25 November 2019 towards the complainant.

⁸ SDO-2019-92 Hearing Transcripts 25-11-2019 FRA p.8, para. 17-22.

DECISION

The Disciplinary Board, after deliberating on this matter, by majority vote, decides:

1) that the counsel committed professional misconduct and violated the duties cast upon him as counsel, in particular those laid down at Articles 24(1), 27(1), 28 and 31(a) of the Code by:

a) addressing directly the client of another counsel without going through or without the permission of that counsel;

b) interfering with complainant's activities to advise Witness 727 of his rights under Rule 74 of the Rules of Procedure and Evidence (ICC-ASP/1/3) and prepare Witness 727 for his testimony; and,

2) to impose on the accused the disciplinary sanction of a public reprimand, which should be entered in counsel's personal file, in accordance with Article 42.1(b) of the Code.

This decision was delivered orally at the hearing of 26 November 2019, when the counsel, was also informed that he may appeal the decision within thirty (30) days as of the date of issuance of the decision.

The Board directs its Secretariat to notify the complainant of this decision accordingly.

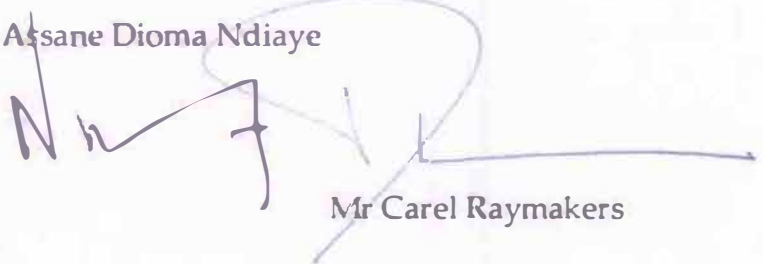
The decision will be published in the Court's website pursuant to Article 41(4) of the Code.

The Hague, 19 December 2019



Dr Victor Tsilonis

Mr Assane Dioma Ndiaye



Mr Assane Dioma Ndiaye

Mr Carel Raymakers