

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/05-01/13 OA**

**Date of the original: 22 August 2014**

**Date of the redacted version: 21 October 2014**

**THE APPEALS CHAMBER**

**Before:**

**Judge Sang-Hyun Song, Presiding Judge  
Judge Sanji Mmasenono Monageng  
Judge Akua Kuenyehia  
Judge Erkki Kourula  
Judge Anita Ušacka**

**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 AND NARCISSE ARIDO**

**Public Redacted Version**

**Decision on the requests for the Disqualification of the Prosecutor, the Deputy  
Prosecutor and the entire OTP staff**

*shs*

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

**The Office of the Prosecutor**  
Ms Fatou Bensouda, Prosecutor  
Mr James Stewart, Deputy Prosecutor

**Counsel for Mr Jean-Pierre Bemba Gombo**  
Mr Nicholas Kaufman

**Counsel for Mr Aimé Kilolo Musamba**  
Mr Paul Djunga Mudimbi

**Counsel for Mr Jean-Jacques Kabongo Mangenda**  
Mr Jean Flamme

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

**Counsel for Mr Narcisse Arido**  
Mr Göran Sluiter

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**Registrar**  
Mr Herman von Hebel

*shs*

The Appeals Chamber of the International Criminal Court,

Having before it the “Request for disqualification of the Prosecution from the investigation and prosecution of Mr Aimé Kilolo Musamba” dated 28 February 2014 and registered on 3 March 2014 (ICC-01/05-01/13-233-Conf-tENG); the “Response to the 3 March 2014 ‘Request for disqualification of the Prosecution from the investigation and prosecution of Aimé Kilolo Musamba and Jean-Jacques Kabongo Mangenda’” of 12 March 2014 (ICC-01/05-01/13-250-Conf-tENG); and the “Defence Observations on the ‘Request for disqualification of the Prosecution from the investigation and prosecution against Mr Aimé Kilolo Musamba’ (ICC-01/05-01/13-233-Conf)” of 19 March 2014 (ICC-01/05-01/13-275-Corr-tENG),

After deliberation,

By majority, Judge Anita Ušacka dissenting,

*Renders the following*

## DECISION

- 1) The abovementioned requests for the disqualification of the Prosecutor, the Deputy Prosecutor and the entire staff of the Office of the Prosecutor are rejected.
- 2) The Appeals Chamber orders the parties in the present proceedings to file public redacted versions of their respective confidential submissions by 16h00 on 29 August 2014.

### **I. PROCEDURAL HISTORY**

1. On 3 March 2014, pursuant to article 42 (7) and (8) of the Statute, Mr Aimé Kilolo Musamba (hereinafter: “Mr Kilolo”) filed the “Request for disqualification of the Prosecution from the investigation and prosecution of Mr Aimé Kilolo

*phs*

Musamba”<sup>1</sup> (hereinafter: “Request for Disqualification”), requesting that the Appeals Chamber disqualify the Prosecutor, the Deputy Prosecutor and the entire staff of the Office of the Prosecutor (hereinafter: “OTP”) from the ongoing investigation and prosecution against him for alleged offences under article 70 of the Statute (hereinafter: “*Bemba et al.* case”), submitting that their impartiality might reasonably be doubted in the present case.<sup>2</sup>

2. On 12 March 2014, Mr Jean-Jacques Kabongo Mangenda (hereinafter: “Mr Kabongo”), another suspect in the *Bemba et al.* case, filed the “Response to the 3 March 2014 ‘Request for disqualification of the Prosecution from the investigation and prosecution of Aimé Kilolo Musamba and Jean-Jacques Kabongo Mangenda’”<sup>3</sup> (hereinafter: “Mr Kabongo’s Response to the Request for Disqualification”), requesting that the Appeals Chamber grant the Request for Disqualification and apply its ruling equally to the proceedings against him.<sup>4</sup>

3. On 13 March 2014, the Prosecutor filed the “Prosecution request to respond to the ‘Réponse à la requête du 3 mars 2014 aux fins de récusation de l’Accusation dans le cadre de l’enquête et des poursuites visant M. Aimé Kilolo Musamba et M. Jean-Jacques KABONGO MANGENDA’, to file its response as part of a Consolidated Response, and to request an extension of page and time limits”, requesting that the Appeals Chamber (1) allow her to respond to Mr Kabongo’s Response to the Request for Disqualification, (2) allow her to file her response as a consolidated response (including her response to the Request for Disqualification), and (3) grant her an extension of the page and time limits.<sup>5</sup>

4. On 14 March 2014, the Appeals Chamber issued the “Order on the filing of submissions and consolidated comments on the requests for disqualification of the

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<sup>1</sup> ICC-01/05-01/13-233-Conf-tENG (OA), dated 28 February 2014 and registered on 3 March 2014, with confidential *ex parte*, Registry, Prosecutor, Mr Kilolo, Mr Bemba and Mr Mangenda only, Annex 1, ICC-01/05-01/13-233-Conf-Exp-Anx1 (OA) and public Annex 2, ICC-01/05-01/13-233-Anx2 (OA).

<sup>2</sup> Request for Disqualification, paras 1, 37.

<sup>3</sup> ICC-01/05-01/13-250-Conf-tENG (OA).

<sup>4</sup> Mr Kabongo’s Response to the Request for Disqualification, p. 12.

<sup>5</sup> ICC-01/05-01/13-254-Conf (OA).

Prosecutor, the Deputy Prosecutor and the other members of the Office of the Prosecutor”<sup>6</sup> (hereinafter: “Order of 14 March 2014”).

5. On 19 March 2014, pursuant to the Order of 14 March 2014, Mr Fidèle Babala Wandu (hereinafter: “Mr Babala”), another suspect in the *Bemba et al.* case, filed the “Defence Observations on the ‘Request for disqualification of the Prosecution from the investigation and prosecution against Mr Aimé Kilolo Musamba’ (ICC-01/05-01/13-233-Conf)”, to which he filed a corrigendum on the same day<sup>7</sup> (hereinafter: “Mr Babala’s Response to the Request for Disqualification”), supporting the Request for Disqualification.

6. On 4 April 2014, the Prosecutor filed the “Prosecution’s consolidated response to Defence requests for the disqualification of the Prosecutor, the Deputy Prosecutor and the other members of the Office of the Prosecutor from the case against Kilolo, Mangenda and Babala”<sup>8</sup> (hereinafter: “Prosecutor’s Consolidated Response”), requesting that the Appeals Chamber reject the three requests for disqualification because “[n]one of the grounds to disqualify the Prosecutor, the Deputy Prosecutor and the Prosecution staff has any merit”.<sup>9</sup>

7. On 2 June 2014, Mr Kilolo filed the “Addendum à la ‘Requête aux fins de récusation de l’Accusation dans le cadre de l’enquête et des poursuites visant M. Aimé Kilolo Musamba (ICC-01/05-01/13-233-Conf)’”<sup>10</sup> (hereinafter: “Addendum to the Request for Disqualification”), attaching the [REDACTED] as an annex thereto (hereinafter: “Annex to the Addendum to the Request for Disqualification”) and requesting, *inter alia*, that the Appeals Chamber take note of the new information contained in the Annex to the Addendum to the Request for Disqualification.<sup>11</sup>

<sup>6</sup> ICC-01/05-01/13-257 (OA).

<sup>7</sup> “CORRIGENDUM of the Defence Observations on the ‘Request for disqualification of the Prosecution from the investigation and prosecution against Mr Aimé Kilolo Musamba’ (ICC-01/05-01/13-233-Conf)”, ICC-01/05-01/13-275-Corr-tENG (OA).

<sup>8</sup> ICC-01/05-01/13-314-Conf (OA).

<sup>9</sup> Prosecutor’s Consolidated Response, para. 59.

<sup>10</sup> ICC-01/05-01/13-449-Conf (OA), with confidential *ex parte* Annex 1, Mr Kilolo only, ICC-01/05-01/13-449-Conf-Exp-Anx1-tENG (OA). The documents were dated 1 June 2014 and registered on 2 June 2014.

<sup>11</sup> Addendum to the Request for Disqualification, para. 7.

8. On 6 June 2014, following an order from the Appeals Chamber,<sup>12</sup> Mr Kilolo filed a redacted confidential *ex parte*, available to Mr Kilolo and the Prosecutor only, version of the Annex to the Addendum to the Request for Disqualification<sup>13</sup> (hereinafter: “Redacted Annex to the Addendum to the Request for Disqualification”).

9. On 10 June 2014, the Prosecutor responded to the Addendum to the Request for Disqualification and the Redacted Annex to the Addendum to the Request for Disqualification<sup>14</sup> (hereinafter: “Prosecutor’s Response to the Addendum”), submitting that “[a]lthough titled an ‘addendum’, the Statement is in fact a reply to the Prosecution’s 4 April 2014 Response to the Request” and that it should be dismissed *in limine* for violating regulation 24 (5) of the Regulations of the Court.<sup>15</sup>

10. On 12 June 2014, Mr Kabongo filed the “Demande aux fins de réplique à la réponse du Procureur ICC-01/05-01/13-481 conf [sic] 10-06-2014 à l’addendum à la demande de récusation de l’Accusation dans le cadre de l’enquête et des poursuites visant M. Aimé KILOLO MUSAMBA et M. Jean-Jacques KABONGO MANGENDA”,<sup>16</sup> to which he filed a corrigendum<sup>17</sup> (hereinafter: “Mr Kabongo’s Request for Leave to Reply”), requesting leave to reply to the Prosecutor’s Response to the Addendum.

11. On 13 June 2014, the Prosecutor filed the “Prosecution’s Request for Reclassification of ICC-01/05-01/13-481-Conf”<sup>18</sup> (hereinafter: “Prosecutor’s Request for Reclassification”), in which she indicated that the Prosecutor’s Response to the

<sup>12</sup> “Order on the filing of submissions on the addendum to the request for the disqualification of the Prosecutor, the Deputy Prosecutor and other members of the Office of the Prosecutor”, 4 June 2014, ICC-01/05-01/13-458 (OA).

<sup>13</sup> ICC-01/05-01/13-449-Conf-Exp-Anx1-Red (OA), confidential *ex parte*, Mr Kilolo and Prosecutor only.

<sup>14</sup> “Prosecution Response to the Kilolo Defence’s Addendum to its Request for the disqualification of the Prosecutor, the Deputy Prosecutor and the other members of the Office of the Prosecutor from the case against Kilolo”, ICC-01/05-01/13-481-Conf (OA), with confidential Annex A, ICC-01/05-01/13-481-Conf-AnxA (OA), and Annex B ICC-01/05-01/13-Conf-AnxB (OA).

<sup>15</sup> Prosecutor’s Response to the Addendum, para. 4 (footnote omitted); *see also* para. 25.

<sup>16</sup> ICC-01/05-01/13-486-Conf (OA), dated 11 June 2014 and registered on 12 June 2014.

<sup>17</sup> “Corrigendum à la demande aux fins de réplique à la réponse du Procureur ICC-01/05-01/13-481 conf [sic] 10-06-2014 à l’addendum à la demande de récusation de l’Accusation dans le cadre de l’enquête et des poursuites visant M. Aimé KILOLO MUSAMBA et M. Jean-Jacques KABONGO MANGENDA”, ICC-01/05-01/13-486-Conf-Corr (OA), dated 12 June 2014 and registered on 13 June 2014.

<sup>18</sup> ICC-01/05-01/13-493-Conf-Exp (OA), dated 12 June 2014 and registered on 13 June 2014, confidential *ex parte*, Appeals Chamber and Prosecutor only.

Addendum had been filed with the wrong classification, with the result that it had been erroneously notified to all the defence teams in the present proceedings.<sup>19</sup>

12. On 19 June 2014, the Appeals Chamber issued the “Order on the reclassification of documents and decision on request for leave to reply”,<sup>20</sup> in which it (i) ordered the reclassification of the Prosecutor’s Response to the Addendum and its two annexes as confidential *ex parte*, available to Mr Kilolo and the Prosecutor only, (ii) ordered measures to maintain the confidentiality of the protected information, and (iii) rejected Mr Kabongo’s Request for Leave to Reply.

## II. PRELIMINARY ISSUES

### A. Mr Babala’s Response to the Request for Disqualification

13. In Mr Babala’s Response to the Request for Disqualification, he requests that the Appeals Chamber “entertain and grant Mr Kilolo’s Request”.<sup>21</sup> Thus, like Mr Kilolo and Mr Kabongo, he seeks the disqualification of the Prosecutor, the Deputy Prosecutor and the other staff members of the OTP from the *Bemba et al.* case. However, he does not present any additional arguments to those presented by Mr Kilolo. Accordingly, the Appeals Chamber will not separately address Mr Babala’s Response to the Request for Disqualification.

### B. Confidentiality of the proceedings

14. The Appeals Chamber notes that, as the investigations in relation to the *Bemba et al.* case are still ongoing, many of the filings relating to the pre-trial proceedings are classified as confidential or confidential *ex parte*. For the same reason, many of the filings before the Appeals Chamber were filed confidentially. Nevertheless, the existence of the article 70 investigations is public knowledge.<sup>22</sup>

15. In light of the above, the Appeals Chamber orders the parties in the present proceedings to file public redacted versions of their respective confidential submissions to the extent possible and insofar as this has not yet been done.

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<sup>19</sup> Prosecutor’s Request for Reclassification, paras 4-5.

<sup>20</sup> ICC-01/05-01/13-505 (OA).

<sup>21</sup> Mr Babala’s Response to the Request for Disqualification, p. 5.

<sup>22</sup> *E.g.*, on 5 December 2013, the Pre-Trial Chamber issued a public redacted version of the warrants of arrest; *see* ICC-01/05-01/13-1-Red2-tENG.

### **C. Admissibility of the Addendum to the Request for Disqualification**

16. The Prosecutor submits that the Addendum to the Request for Disqualification should be summarily dismissed for having been filed in violation of regulation 24 (5) of the Regulations of the Court as it is, in effect, a reply to the Prosecutor's Consolidated Response.<sup>23</sup>

17. Regulation 24 (5) of the Regulations of the Court stipulates that "[p]articipants may only reply to a response with the leave of the Chamber" concerned. The matter at hand relates to a request for disqualification under article 42 (7) of the Statute. In that regard, rule 34 (2) of the Rules of Procedure and Evidence sets out a specific procedure. Notably, it provides that the applicant must attach "any relevant evidence" to the request. Furthermore, rule 34 (2) provides that the person concerned by a request for disqualification must be given an opportunity to make written submissions on the request.

18. The Appeals Chamber notes that the principal objective of the Addendum to the Request for Disqualification is to submit the [REDACTED], which was annexed thereto, to the Appeals Chamber, in order to further substantiate specific arguments made in the Request for Disqualification. While the Addendum to the Request for Disqualification recalls and repeats some of the arguments made in the Request for Disqualification itself, it does not contain any significant additional substantive submissions.

19. In these circumstances, it is appropriate for the Appeals Chamber to accept the Addendum to the Request for Disqualification and, in particular, to consider the [REDACTED]. Although, as stated above, rule 34 (2) of the Rules of Procedure and Evidence requires that a request for disqualification should include the relevant evidence, it appears that the [REDACTED] was obtained *after* the Request for Disqualification was filed. Furthermore, the Appeals Chamber recalls that the Prosecutor was given an opportunity to make written observations on the Addendum to the Request for Disqualification,<sup>24</sup> in conformity with rule 34 (2) of the Rules of

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<sup>23</sup> Prosecutor's Response to the Addendum, paras 1, 4-6.

<sup>24</sup> See Order of 14 March 2014.



Procedure and Evidence. Accordingly, the Appeals Chamber finds the Addendum to the Request for Disqualification to be admissible.

### III. MERITS OF THE REQUESTS FOR DISQUALIFICATION

20. Mr Kilolo and Mr Kabongo submit that there are sufficient grounds to reasonably question the Prosecutor's impartiality, due to her simultaneous involvement in the case of *Prosecutor v. Jean Pierre Bemba Gombo* (hereinafter: "*Bemba case*") and in the *Bemba et al.* case.

21. However, before addressing the various arguments of Mr Kilolo and Mr Kabongo (set out below in Section B.), the Appeals Chamber will set out the relevant legal framework and background (Section A.).

#### A. Relevant legal framework and background

##### 1. *Standard for disqualification of the Prosecutor and procedure relevant to offences under article 70 of the Statute*

22. Article 42 (7) of the Statute provides that

Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, *inter alia*, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

23. Furthermore, rule 34 of the Rules of Procedure and Evidence, entitled "*Disqualification of a judge, the Prosecutor or a Deputy Prosecutor*", provides as follows:

1. In addition to the grounds set out in article 41, paragraph 2, and article 42, paragraph 7, the grounds for disqualification of a judge, the Prosecutor or a Deputy Prosecutor shall include, *inter alia*, the following:

- (a) Personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties;
- (b) Involvement, in his or her private capacity, in any legal proceedings initiated prior to his or her involvement in the case, or initiated by him or her subsequently, in which the person being investigated or prosecuted was or is an opposing party;

- (c) Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned;
- (d) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.

2. Subject to the provisions set out in article 41, paragraph 2, and article 42, paragraph 8, a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based. The request shall state the grounds and attach any relevant evidence, and shall be transmitted to the person concerned, who shall be entitled to present written submissions.
3. Any question relating to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by a majority of the judges of the Appeals Chamber.

24. The Appeals Chamber has previously addressed the interpretation of article 42 (7) of the Statute in the case of *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, holding that

[t]he use of the term “objectively” in rule 34 of the Rules of Procedure and Evidence and the phrase “might reasonably be doubted” in article 42 (7) of the Statute indicates that it is not necessary to establish an actual lack of impartiality on the part of the Prosecutor. Rather, the question before the Appeals Chamber is whether it reasonably appears that the Prosecutor lacks impartiality. In determining whether there is such an appearance of partiality, the Appeals Chamber considers that this determination should be based on the perspective of a reasonable observer, properly informed. [Footnotes omitted.]<sup>25</sup>

25. In relation to a request for the disqualification of a judge, the Plenary of Judges has stated 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.<sup>26</sup>

<sup>25</sup> “Decision on the Request for Disqualification of the Prosecutor”, 12 June 2012, ICC-01/11-01/11-175 (OA 3) (hereinafter: “*Gaddafi OA 3 Decision*”), para. 20.

<sup>26</sup> “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*”, 23 June 2014, ICC-01/05-01/13-511-Anx, para. 18, referring to “Decision of the plenary of judges on the Defence

26. The Appeals Chamber notes that, in common with the judges, the Prosecutor is elected, *inter alia*, because of his/her “high moral character”.<sup>27</sup> Furthermore, the Prosecutor, like the judges, is bound under article 45 of the Statute to exercise his/her functions “impartially and conscientiously”. Accordingly, the Appeals Chamber finds that, despite the obvious difference in the respective roles of the judges and the Prosecutor in the proceedings, a presumption of impartiality is equally applicable to the Prosecutor. Therefore, the Appeals Chamber’s analysis shall be conducted in accordance with the standard set out in the previous paragraph.

### **B. Analysis of Mr Kilolo’s and Mr Kabongo’s arguments**

27. Both Mr Kilolo and Mr Kabongo provide, in essence, two types of arguments in support of their requests to disqualify the Prosecutor. First, they submit that there is an inherent conflict of interest between the Prosecutor’s role in the *Bemba* case and her role in the related proceedings under article 70 of the Statute, i.e. the *Bemba et al.* case. In their view, this gives rise to reasonable doubts regarding the impartiality of the Prosecutor. Second, they make several more specific arguments based on the circumstances of this case.

28. The Appeals Chamber will address Mr Kilolo and Mr Kabongo’s arguments in turn.

#### *1. Is there an inherent conflict of interest because of the Prosecutor’s simultaneous duties in the Bemba case and the Bemba et al. case?*

29. Mr Kilolo submits that “Ms Bensouda was personally involved in the [*Bemba*] [c]ase when she was Deputy Prosecutor” and that, “[a]fter the opening statements at the commencement of the trial, she assumed leadership of the prosecution in the [*Bemba*] [c]ase”.<sup>28</sup> Mr Kilolo further submits that, “[i]n that capacity, she has a legitimate interest in ensuring that the [*Bemba*] [c]ase concludes with the conviction of the Accused”.<sup>29</sup> Mr Kilolo contends that, “[u]nder these circumstances, there is no possibility that she will fulfil her duty under article 54(1)(a) of the Statute to

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Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 10 and “Decision of the plenary of the judges on the ‘Defence Request for the Disqualification of a Judge’ of 2 April 2012”, 5 June 2012, ICC-02/05-03/09-344-Anx, para. 14.

<sup>27</sup> See articles 36 (3) (a) and 42 (3) of the Statute.

<sup>28</sup> Request for Disqualification, para. 20, referring to ICC-01/05-01/08-T-32 and ICC-01/05-01/08-T-33.

<sup>29</sup> Request for Disqualification, para. 20.

investigate incriminating and exonerating circumstances equally since losing the [*Bemba et al.*] [c]ase would obviously and necessarily undermine her prosecution of the [*Bemba*] [c]ase”.<sup>30</sup> He seeks to illustrate this conflict of interest by comparing the activity of the Prosecutor in the case at hand with her alleged inaction in the case of *Prosecutor v. Thomas Lubanga Dyilo* (hereinafter: “*Lubanga case*”), despite the Trial Chamber’s suggestion in that latter case that she conduct an article 70 investigation.<sup>31</sup> In Mr Kilolo’s view, this conflict of interest constitutes “any ground” within the meaning of article 42 (7) of the Statute, on which the Prosecutor may be disqualified.<sup>32</sup>

30. Similarly, Mr Kabongo submits that, in the present case (or in any other comparable case), the Prosecutor will not be able to fulfil her statutory duty of investigating both incriminating and exonerating circumstances because of this conflict of interest.<sup>33</sup> Therefore, in his view, the Prosecutor’s role in the *Bemba* case at this stage of the proceedings precludes her from investigating the *Bemba et al.* case.<sup>34</sup> He further submits that the principle of equality of arms is necessarily breached in a case where the Prosecutor “may hold unprosecuted counsels ‘at her mercy’ by the ‘threat’ which clearly hangs over them”.<sup>35</sup> In his view, for the same reasons, the Prosecutor necessarily lacks the required independence and she should therefore have waited for the *Bemba* case to have been completed before opening the present investigations.<sup>36</sup>

31. In response to these arguments, the Prosecutor submits that she “does not aim to convict an accused at all costs”,<sup>37</sup> and that, according to article 70 (2) of the Statute, it is she who must prosecute offences against the administration of justice, unless the Court requests a State Party to submit a case to its competent authorities.<sup>38</sup> The Prosecutor also submits that her decision to initiate article 70 investigations was based on information that was revealed during the course of the *Bemba* case, which

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<sup>30</sup> Request for Disqualification, para. 21.

<sup>31</sup> Request for Disqualification, paras 22-24.

<sup>32</sup> Request for Disqualification, para. 25.

<sup>33</sup> Mr Kabongo’s Response to the Request for Disqualification, para. 8.

<sup>34</sup> Mr Kabongo’s Response to the Request for Disqualification, para. 8.

<sup>35</sup> Mr Kabongo’s Response to the Request for Disqualification, para. 9.

<sup>36</sup> Mr Kabongo’s Response to the Request for Disqualification, para. 9.

<sup>37</sup> Prosecutor’s Consolidated Response, paras 15, 22.

<sup>38</sup> Prosecutor’s Consolidated Response, para. 20.

prompted her to take appropriate steps to preserve the integrity of the proceedings, pursuant to her functions under articles 54 and 70 of the Statute.<sup>39</sup> The Prosecutor further argues that the speed with which she initiated article 70 investigations in the present case, in contrast to her alleged inaction in the *Lubanga* case, which she disputes, is a false comparison and, in any case, “[e]ach case must be assessed on its own facts”.<sup>40</sup> Therefore, the Prosecutor argues that a comparison with her actions in another case “does not show that [her] assessment in [the *Bemba et al.*] case was influenced by personal or other improper motives”.<sup>41</sup>

32. The Appeals Chamber recalls that article 42 (7) of the Statute stipulates that the Prosecutor or Deputy Prosecutor “shall be disqualified from a case [...] if, *inter alia*, they have previously been involved in any capacity in *that* case before the Court” (emphasis added). Rule 34 of the Rules of Procedure and Evidence provides guidance as to the degree of involvement that is required for disqualification pursuant to article 42 (7) of the Statute, which includes: (i) personal interest in the case; (ii) involvement, in his or her private capacity, in any prior or subsequent legal proceedings involving the person being investigated or prosecuted as an opposing party; (iii) performance of functions, prior to taking office; and (iv) expression of opinions, through the communications media, etc., in relation to the same case.

33. The Appeals Chamber notes that none of the specific scenarios set out in rule 34 of the Rules of Procedure and Evidence apply to the case at hand. In addition, article 42 (7) of the Statute requires previous involvement “in that [same] case”. In the situation at hand, however, there are two cases – the *Bemba* case and the *Bemba et al.* proceedings, which, although related, are indeed “separate and independent”.<sup>42</sup>

34. However, the Appeals Chamber considers that this alone does not settle the question of whether the Prosecutor should be disqualified. Indeed, the question before the Appeals Chamber is whether there is a conflict of interest leading to the conclusion that the impartiality of the Prosecutor might reasonably be doubted in light of the *relationship between the two cases at hand*.

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<sup>39</sup> Prosecutor’s Consolidated Response, paras 22-26.

<sup>40</sup> Prosecutor’s Consolidated Response, paras 26-28.

<sup>41</sup> Prosecutor’s Consolidated Response, para. 28.

<sup>42</sup> Prosecutor’s Consolidated Response, para. 9.

35. In this regard, the Appeals Chamber is of the view that the Prosecutor has merely acted in compliance with the Court's legal framework and pursuant to the duties it imposes upon her. Pursuant to articles 42 and 54 (1) (b) of the Statute, the Prosecutor has the duty to investigate and prosecute crimes within the jurisdiction of the Court, including offences against the administration of justice under article 70 of the Statute. As pointed out by the Prosecutor,<sup>43</sup> such offences will almost always be related to other cases that she is investigating or prosecuting. In this context, the Appeals Chamber notes that rules 162 (2) (c) and 165 (4) of the Rules of Procedure and Evidence, in fact, allow for the "joinder of charges under article 70 with charges under articles 5 to 8". This suggests that the drafters of the Rules of Procedure and Evidence envisaged that charges under article 70 of the Statute may be dealt with in the same proceedings as charges for crimes under articles 6 to 8, including by the same Prosecutor, without this necessarily giving rise to a conflict of interest.

36. As to the argument relating to the purported inaction of the Prosecutor in the *Lubanga* case, the Appeals Chamber considers that this argument is not relevant, given that each case must be assessed on its own merits and that certain actions in one case do not necessarily allow inferences to be drawn as to the appropriate course of action in another case.<sup>44</sup>

37. For the above reasons, the arguments raised under this heading are rejected.

2. *Assessment of the specific allegations made by Mr Kilolo and Mr Kabongo*

(a) **The appointment by the Prosecutor of the same staff members to both the *Bemba* and the *Bemba et al.* cases**

38. Mr Kilolo submits that the Prosecutor violated article 31 of the Code of Conduct of the OTP (hereinafter: "OTP Code of Conduct"), which provides that "[m]embers of the Office shall not participate in any matter in which their impartiality might reasonably be doubted on any ground", by appointing the same staff already responsible for the prosecution of the *Bemba* case to the *Bemba et al.* case, [REDACTED].<sup>45</sup> He further submits that the Prosecutor "appears to have taken it upon herself to see this conflict of interest out, doubtless because in her opinion these

<sup>43</sup> Prosecutor's Consolidated Response, para. 16.

<sup>44</sup> See also *Gaddafi OA 3 Decision*, para. 41.

<sup>45</sup> Request for Disqualification, paras 26, 28.

persons were already more conversant with the [*Bemba*] [c]ase and required very little time to expedite the resolution of the [*Bemba et al.*] case, thereby saving the [*Bemba*] [c]ase”.<sup>46</sup> Mr Kilolo questions whether investigations into exonerating circumstances will be undertaken in such conditions,<sup>47</sup> referring to Trial Chamber I’s statement that

[i]f a team prosecuting a case were to find itself placed in a position of conflict when investigating or prosecuting alleged Article 70 offences, it would then be necessary to refer the issue either to members of the OTP who were uninvolved with the proceedings or, in an extreme situation, to an independent investigator.<sup>48</sup>

39. The Prosecutor submits in response that her choice to appoint the same OTP staff in both cases “was a practical and logical use of lawyers and staff within the Office of the Prosecutor and [this] creates no conflict of interest for them”,<sup>49</sup> and that “[d]uring the investigations, the Prosecut[or] took all necessary precautions to avoid real conflicts”<sup>50</sup> and “prevented lawyers working on the [*Bemba* c]ase from accessing some of the information obtained in the [a]rticle 70 investigation”.<sup>51</sup> She also explains that once the Pre-Trial Chamber had issued the warrants of arrest in the *Bemba et al.* case, she appointed other staff members to work on that case, “for merely practical reasons”.<sup>52</sup> She disputes that Trial Chamber I’s holding applies to the case at hand, because “[t]here, the issue of conflict of interest was raised because any [a]rticle 70 investigations against Prosecution intermediaries could have potentially implicated Prosecution staff who handled those same intermediaries”.<sup>53</sup>

40. The Appeals Chamber recalls that the arguments of Mr Kilolo must be assessed against the relevant standard, namely “whether it reasonably appears that the Prosecutor lacks impartiality”.<sup>54</sup> In the case at hand, the Appeals Chamber considers that Mr Kilolo’s submissions are insufficient to meet the required threshold. The fact that staff members of the OTP who were already familiar with the *Bemba* case also

<sup>46</sup> Request for Disqualification, para. 26.

<sup>47</sup> Request for Disqualification, para. 26.

<sup>48</sup> Request for Disqualification, para 27, referring to *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 14 January 2011, ICC-01/04-01/06-T-350-Red2-ENG CT3 WT, p. 17, lines 14-19.

<sup>49</sup> Prosecutor’s Consolidated Response, para. 31.

<sup>50</sup> Prosecutor’s Consolidated Response, para. 32.

<sup>51</sup> Prosecutor’s Consolidated Response, para. 32.

<sup>52</sup> Prosecutor’s Consolidated Response, para. 32.

<sup>53</sup> Prosecutor’s Consolidated Response, para. 31.

<sup>54</sup> “Decision on the Request for Disqualification of the Prosecutor”, 12 June 2012, ICC-01/11-01/11-175 (OA 3), para. 20.

carried out the initial phases of article 70 proceedings arising from that case does not, on its own, give rise to reasonable doubts as to the Prosecutor's impartiality. However, despite the above finding, the Appeals Chamber wishes to underline that, notwithstanding any potential advantages of familiarity, it considers that it is generally preferable that staff members involved in a case are not assigned to related article 70 proceedings of this kind.

**(b) The appointment by the Prosecutor in the *Bemba et al.* case of a staff member accused by Defence witnesses in the *Bemba* case**

41. Mr Kilolo submits that the Prosecutor's conflict of interest is further evidenced by the fact that one of the lawyers she instructed to work on the *Bemba et al.* case, [REDACTED], had been accused by witnesses D-19 and D-18 of "questionable practices"<sup>55</sup> involving [REDACTED].<sup>56</sup> According to Mr Kilolo, [REDACTED] has, at the request of the Prosecutor, conducted an investigation in the *Bemba et al.* case in violation of article 31 of the OTP Code of Conduct.<sup>57</sup> In particular, he submits that [REDACTED], while testifying in the *Bemba* case, witness D-18, who "had received threats of reprisals"<sup>58</sup> from the Congolese authorities, [REDACTED].<sup>59</sup> Mr Kilolo further submits that not only did the Prosecutor fail to initiate investigations against [REDACTED] under article 70 of the Statute, but appointed in the *Bemba et al.* case "the person suspected of committing offences against the administration of justice, thereby allowing him to investigate witnesses who directly and personally accused him" (emphasis in the original),<sup>60</sup> in violation of article 31 of the OTP Code of Conduct.<sup>61</sup>

42. The Prosecutor denies that [REDACTED] pressurised witnesses or influenced their testimony by leaking confidential information about it to their superiors.<sup>62</sup> Further, she submits that witness D-19, contrary to the Defence's submissions, "did not make any accusation against [REDACTED] or any member of the Prosecution"<sup>63</sup>

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<sup>55</sup> Request for Disqualification, para. 30.

<sup>56</sup> Request for Disqualification, paras 29-32, referring to [REDACTED].

<sup>57</sup> Request for Disqualification, para. 31.

<sup>58</sup> Request for Disqualification, para. 30.

<sup>59</sup> Request for Disqualification, para. 30, referring to [REDACTED].

<sup>60</sup> Request for Disqualification, para. 31.

<sup>61</sup> Request for Disqualification, para. 31.

<sup>62</sup> Prosecutor's Consolidated Response, para. 33.

<sup>63</sup> Prosecutor's Consolidated Response, para. 34.



and that witness D-18's accusation that [REDACTED] "is baseless".<sup>64</sup> [REDACTED]<sup>65</sup> [REDACTED].<sup>66</sup> The Prosecutor underscores that "the mere fact that the Prosecutor, the Deputy Prosecutor and their staff conduct both core proceedings and a related Article 70 investigation and prosecution does not automatically call into question their impartiality".<sup>67</sup>

43. The Appeals Chamber finds that the Prosecutor's impartiality may not reasonably be doubted on the basis of Mr Kilolo's argument. After carefully reviewing [REDACTED], the Appeals Chamber notes that, even though witness D-18 stated that he received threats of reprisals from Congolese authorities [REDACTED],<sup>68</sup> it appears that [REDACTED].

44. However, the Appeals Chamber notes that the Addendum to the Request for Disqualification contains [REDACTED].<sup>69</sup> [REDACTED].<sup>70</sup>

45. In response, the Prosecutor [REDACTED].<sup>71</sup> In addition, she submits that [REDACTED].<sup>72</sup>

46. The Appeals Chamber finds that [REDACTED].<sup>73</sup>

47. As to witness D-19, the Appeals Chamber finds that, [REDACTED], witness D-19 merely stated that [REDACTED]<sup>74</sup> and that [REDACTED].<sup>75</sup> Witness D-19 also stated that, [REDACTED].<sup>76</sup> He clarified, however, that [REDACTED].<sup>77</sup>

48. In sum, the Appeals Chamber finds that [REDACTED] witnesses D-18 and D-19, as well as the information contained in the Addendum to the Request for

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<sup>64</sup> Prosecutor's Consolidated Response, para. 35.

<sup>65</sup> Prosecutor's Consolidated Response, para. 34, referring to [REDACTED]; Request for Disqualification, para. 30, footnote 18, referring to [REDACTED].

<sup>66</sup> Prosecutor's Consolidated Response, para. 35, referring to [REDACTED].

<sup>67</sup> Prosecutor's Consolidated Response, para. 17.

<sup>68</sup> Request for Disqualification, para. 30, referring to [REDACTED].

<sup>69</sup> Addendum to the Request for Disqualification, para. 4; Annex to the Addendum to the Request for Disqualification, pp. 10-14.

<sup>70</sup> Annex to the Addendum to the Request for Disqualification, pp. 11, 14-15.

<sup>71</sup> Prosecutor's Response to the Addendum, paras 7-20.

<sup>72</sup> Prosecutor's Response to the Addendum, paras 21-24.

<sup>73</sup> Annex to the Addendum to the Request for Disqualification, pp. 10-15.

<sup>74</sup> [REDACTED].

<sup>75</sup> [REDACTED].

<sup>76</sup> [REDACTED].

<sup>77</sup> [REDACTED].

Disqualification, are insufficient to establish that [REDACTED]'s appointment by the Prosecutor gives rise to reasonable doubts as to the Prosecutor's impartiality. In this regard, the Appeals Chamber recalls that what is at issue is the Prosecutor's impartiality, not whether [REDACTED] may be responsible for misconduct in the course of the proceedings. Despite this finding, the Appeals Chamber encourages the Prosecutor to take all necessary precautions in assigning staff members to avoid a situation where legitimate questions and concerns may be raised, even if these concerns do not meet the threshold required for a finding of disqualification.

**(c) The Prosecutor's alleged personal interest in the present case**

49. Mr Kilolo submits that the Prosecutor opened investigations in the *Bemba et al.* case because the defence in the *Bemba* case team discovered, [REDACTED], that her office was allegedly bribing witnesses and, thus, "the Prosecutor was ultimately seeking to protect herself against the Defence reaction to this offence against the administration of justice".<sup>78</sup> According to Mr Kilolo, this constitutes a "personal interest" within the meaning of rule 34 (1) (a) of the Rules of Procedure and Evidence, which prevents her from impartially heading the investigation and prosecution in the *Bemba et al.* case.<sup>79</sup>

50. The Prosecutor submits that "no Prosecution staff member ever engaged in any improper conduct relating to [REDACTED] and the Prosecutor took no action with respect to [REDACTED], apart from disclosing it to the Defence".<sup>80</sup> She further avers that the argument that she has a "personal interest in the [*Bemba et al.*] case which should disqualify her pursuant to Rule 34(1)" is a "wholly baseless submission".<sup>81</sup>

51. The Appeals Chamber notes that [REDACTED],<sup>82</sup> [REDACTED].

52. The Appeals Chamber finds that [REDACTED]. Regardless of this, however, there is no indication that [REDACTED] prompted the Prosecutor to initiate

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<sup>78</sup> Request for Disqualification, para. 33, referring to Annex 1 to the Request for Disqualification, ICC-01/05-01/13-233-Conf-Exp-Anx1 (OA).

<sup>79</sup> Request for Disqualification, para. 33.

<sup>80</sup> Prosecutor's Consolidated Response, para. 38, footnote 67, stating that "[t]he Prosecution provided all the relevant information to rebut the allegation in relation to [REDACTED] also raised by the Defence in the Main Case to Trial Chamber III on a confidential basis".

<sup>81</sup> Prosecutor's Consolidated Response, para. 37.

<sup>82</sup> ICC-01/05-01/13-233-Conf-Exp-Anx1 (OA).



investigations in the *Bemba et al.* case. Therefore, the Appeals Chamber finds that Mr Kilolo's submission that the Prosecutor opened an investigation in relation to article 70 offences because of [REDACTED] is without merit and dismisses it.

**(d) The Prosecutor's public statement of 24 November 2013**

53. Mr Kilolo submits that the Prosecutor's public statement, which was published on 24 November 2013 on the Court's website, that "it is particularly disturbing that someone who practices the legal profession is accused of intentionally and systematically participating in criminal activities with a view to obstructing the administration of justice",<sup>83</sup> "reflects the opinion that the Prosecutor already had of him, namely that he was *accused* of offences against the administration of justice, whereas he was still only a suspect at the time" (emphasis in the original).<sup>84</sup> Mr Kilolo contends that the Prosecutor's opinion could adversely affect her required impartiality within the meaning of rule 34 (1) (d) of the Rules of Procedure and Evidence.<sup>85</sup>

54. In response, the Prosecutor submits that this "claim is factually incorrect",<sup>86</sup> that she "acted correctly by mentioning the existence of her allegations against [Mr] Kilolo and the other suspects",<sup>87</sup> and that, "[b]y that stage, the [Pre-Trial Chamber] had already found that there were reasonable grounds to believe these allegations and issued the arrest warrants" (footnote omitted).<sup>88</sup>

55. The Appeals Chamber finds that Mr Kilolo's argument is unpersuasive. In his Request for Disqualification, which was filed in French, Mr Kilolo quotes the French version of the original English statement.<sup>89</sup> The French version indeed uses the words "personne [...] *accusée*" ("accused") in the sentence quoted by him (emphasis added).<sup>90</sup> However, the English version of that statement differs from the French version, stating that "[i]t is particularly disturbing that a member of the legal

<sup>83</sup> Request for Disqualification, para. 34, referring to Annex 2 to the Request for Disqualification.

<sup>84</sup> Request for Disqualification, para. 34.

<sup>85</sup> Request for Disqualification, para. 34.

<sup>86</sup> Prosecutor's Consolidated Response, para. 40.

<sup>87</sup> Prosecutor's Consolidated Response, para. 41.

<sup>88</sup> Prosecutor's Consolidated Response, para. 41.

<sup>89</sup> Request for Disqualification, para. 34; Annex 2 to the Request for Disqualification.

<sup>90</sup> Request for Disqualification, para. 34; *see* Annex 2 to the Request for Disqualification, para. 4. The French version of the Prosecutor's press statement of 24 November 2013 is available at [http://www.icc-cpi.int/fr\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement-OTP-24-11-2013.aspx](http://www.icc-cpi.int/fr_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement-OTP-24-11-2013.aspx).

profession *is alleged* to have intentionally and systematically participated in criminal activities aimed at undermining the administration of justice” (emphasis added).<sup>91</sup>

56. It thus appears that the issue raised by Mr Kilolo relates to a potential translation issue, which alone does not call into question the Prosecutor’s impartiality. In any event, even if the Prosecutor had stated that Mr Kilolo was *accused* of offences, as opposed to alleged to have committed such offences, this would not give rise to reasonable doubts as to the Prosecutor’s impartiality. The word “accused” indicates that the guilt of the suspect has not been established and that an accusation has been put forward by the Prosecutor. Clearly, it is one of the primary functions of the Prosecutor to make accusations; doing so does not bring her impartiality into question.

**(e) The Prosecutor’s access to privileged communications in the *Bemba* case**

57. Mr Kabongo objects to the [REDACTED].<sup>92</sup> In Mr Kabongo’s view, [REDACTED].<sup>93</sup> Mr Kabongo submits that in the [REDACTED],<sup>94</sup> [REDACTED].<sup>95</sup> He further submits that the [REDACTED].<sup>96</sup>

58. The Prosecutor denies that she had access to privileged communications because, even though the Pre-Trial Chamber rejected her request, she nevertheless ensured that she, the Deputy Prosecutor and staff members working on the *Bemba* case did not access Mr Kabongo’s conversations that were recorded by the Registrar.<sup>97</sup> The Prosecutor submits that the Pre-Trial Chamber had “already determined that the relevant audio recordings are not privileged within the meaning of

<sup>91</sup> See “Statement of the Prosecutor or the International Criminal Court, Fatou Bensouda, following the issuance of a second warrant of arrest against Jean-Pierre Bemba Gombo, and the arrest of four other individuals”, 24 November 2013, available at [http://www.icc-cpi.int/EN\\_Menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/pages/statement-otp-24-11-2013.aspx](http://www.icc-cpi.int/EN_Menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/pages/statement-otp-24-11-2013.aspx).

<sup>92</sup> Mr Kabongo’s Response to the Request for Disqualification, para. 11, referring to the United Nations Basic Principles on the Role of Lawyers (Havana 1990), articles 16 and 22, and the Code of Conduct for European Lawyers (CCBE), article 2.3.

<sup>93</sup> Mr Kabongo’s Response to the Request for Disqualification, para. 11.

<sup>94</sup> [REDACTED].

<sup>95</sup> Mr Kabongo’s Response to the Request for Disqualification, para. 11.

<sup>96</sup> Mr Kabongo’s Response to the Request for Disqualification, para. 11.

<sup>97</sup> Prosecutor’s Consolidated Response, para. 43, referring to Pre-Trial Chamber, “Decision on the ‘Prosecution’s request for recordings of telephone calls between Messrs Bemba and Mangenda to be referred to Independent Counsel’”, 17 December 2013, ICC-01/05-01/13-48, paras 4-6. This document was filed as confidential, ICC-01/05-01/13-48-Conf, and reclassified as public, pursuant to the Pre-Trial Chamber’s decision of 3 February 2014, ICC-01/05-01/13-147.

Rule 73(1)”<sup>98</sup> and that “[Mr Kabongo]’s Request is based on an erroneous interpretation of legal professional privilege”<sup>99</sup> because “the privilege under Rule 73(1) concerns communication between a suspect or an accused ‘and his or her legal counsel’. It does not extend to conversations between a suspect and an accused and a case manager supporting legal counsel” (footnote omitted).<sup>100</sup> Moreover, the Prosecutor submits that “[t]he fact that the [Pre-Trial Chamber] appointed an independent counsel to screen, amongst others, [Mr Kabongo]’s telephone calls that had been intercepted by the Dutch and Belgian authorities, does not demonstrate that the [Pre-Trial Chamber] re-considered [its] decision that [Mr Kabongo]’s conversations are not privileged” (footnote omitted).<sup>101</sup>

59. The Appeals Chamber finds that the Prosecutor’s impartiality may not reasonably be doubted on the basis of Mr Kabongo’s argument because, according to the Prosecutor, she in fact ensured that neither she nor any member of her office working on the *Bemba* case had access to the conversations of Mr Kabongo that had been recorded by the Registrar and an independent counsel was appointed to screen telephone calls that had been intercepted by the Dutch and Belgian authorities. In those circumstances, the Appeals Chamber does not need to consider arguments that relate to whether certain judicial decisions made in the course of the *Bemba et al.* case were correct, noting, in addition, that no such decisions have come before the Appeals Chamber on appeal.

**(f) The opening of investigations under article 70 of the Statute before requesting the lifting of any immunity that any suspect may have had**

60. Mr Kabongo submits that the Prosecutor failed to take account of his immunity in her investigation and only, “on the eve of the arrests”,<sup>102</sup> sought the lifting of his immunity in the “Prosecution’s Application for Warrant of Arrest”.<sup>103</sup>

61. The Prosecutor submits that she “was not obliged to seek a waiver of immunity to investigate [Mr Kabongo] and the other suspects [...], given that there were

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<sup>98</sup> Prosecutor’s Consolidated Response, para. 44.

<sup>99</sup> Prosecutor’s Consolidated Response, para. 45.

<sup>100</sup> Prosecutor’s Consolidated Response, para. 45.

<sup>101</sup> Prosecutor’s Consolidated Response, para. 45.

<sup>102</sup> Mr Kabongo’s Response to the Request for Disqualification, para. 12.

<sup>103</sup> [REDACTED].

‘grounds to suspect’ that they had committed offences against the administration of justice” (footnotes omitted).<sup>104</sup> She also refers to the Presidency’s holding that the “purposes for which immunity is granted do not include the commission of offences against the administration of justice”<sup>105</sup> and that “[a]rticle 27 [of the Statute] precludes the assertion of any immunity as a bar to the Court’s exercise of jurisdiction” (footnote omitted).<sup>106</sup> Lastly, she recalls that the Presidency “found that the scope of immunities does not extend to the performance of acts by [Mr] [Kabongo] and [Mr] Kilolo which fall under [a]rticle 70 [of the Statute]”.<sup>107</sup>

62. The Appeals Chamber finds that Mr Kabongo’s argument is insufficient to give rise to reasonable doubts as to the Prosecutor’s impartiality. At most, it raises an issue as to the scope of immunity enjoyed by members of defence teams, which is, however, not at issue in the matter at hand. Therefore, the Appeals Chamber dismisses this argument.

**(g) The allegation that the Prosecutor misled the Pre-Trial Chamber about the basis for the Warrants of Arrest**

63. Mr Kabongo submits that the Prosecutor “*falsified* the evidence submitted to the [Pre-Trial Chamber]” in her application for a warrant of arrest by failing to submit the Registrar’s records of the amounts deposited into Mr Bemba’s account to the Pre-Trial Chamber (emphasis in the original).<sup>108</sup> Mr Kabongo further submits that the evidence submitted to the Pre-Trial Chamber for the issuance of an arrest warrant “was based essentially on payments made to the applicant through Western Union and on the *assumption* that those amounts were used to corruptly influence witnesses” (emphasis in the original).<sup>109</sup> Mr Kabongo contends that the amounts deposited into

<sup>104</sup> Prosecutor’s Consolidated Response, para. 49.

<sup>105</sup> Prosecutor’s Consolidated Response, para. 47, referring to The Presidency, Situation in the Central African Republic, “Decision on the urgent application of the Single Judge of Pre-Trial Chamber II of 19 November 2013 for the waiver of the immunity of lead defence counsel and the case manager for the defence in the case of *The Prosecutor v Jean-Pierre Bemba Gombo*”, 20 November 2013, ICC-01/05-01/08-3001 (hereinafter: “Presidency Decision of 20 November 2013”), para. 13. This document was originally filed as under seal *ex parte*, Prosecutor and Registrar only, ICC-01/05-68-US-Exp, and later transferred to the Case ICC-01/05-01/08, pursuant to the Presidency’s order of 28 February 2014, ICC-01/05-01/08-2998-Conf, and reclassified as public, pursuant to the Presidency’s instruction of 2 April 2014.

<sup>106</sup> Prosecutor’s Consolidated Response, para. 48.

<sup>107</sup> Prosecutor’s Consolidated Response, para. 50, referring to Presidency Decision of 20 November 2013, paras 10, 13.

<sup>108</sup> Mr Kabongo’s Response to the Request for Disqualification, para. 13.

<sup>109</sup> Mr Kabongo’s Response to the Request for Disqualification, para. 13.

Mr Bemba's account "correspond exactly to the amounts received via WESTERN UNION" and that "it should therefore have been obvious to the Prosecutor that it would have been impossible to corruptly influence witnesses using funds from an account managed by the [D]etention [C]entre administration".<sup>110</sup> In his view, the Prosecutor's failure to submit the record kept by the Registry to the Pre-Trial Chamber demonstrates her "manifest interest"<sup>111</sup> in the present case.

64. The Prosecutor submits that Mr Kabongo's argument in relation to the transfer of money to Mr Bemba's account in the Detention Centre is an "evidentiary matter for determination in the confirmation proceedings".<sup>112</sup> She indicates that the ICC Detention Centre account information comprises part of Mr Bemba's confidential detention record to which she did not have access at the time of the application for the arrest warrant.<sup>113</sup> The Prosecutor further avers that the Pre-Trial Chamber dismissed the question of Mr Kabongo's transfer of money to Mr Bemba as "having no impact on the warrant of arrest".<sup>114</sup>

65. As regards Mr Kabongo's contention that the Prosecutor "falsified the evidence submitted to the [Pre-Trial Chamber]", the Appeals Chamber finds this submission to be speculative and unsubstantiated. Concerning Mr Kabongo's argument in relation to the evidentiary basis for the warrant of arrest, the Appeals Chamber considers that this is indeed an issue that is likely to be determined during the confirmation of the charges proceedings. It does not, in and of itself, indicate any "manifest interest" in the article 70 investigations and therefore is not sufficient to establish that the Prosecutor's impartiality might reasonably be doubted.

**(h) The alleged creation of a "Congolese conspiracy" to save the *Bemba* case and targeting selective defence members**

66. Mr Kabongo submits that the Prosecutor created a "Congolese conspiracy" and "manufactured a second case" in order to "save" the *Bemba* case, and in choosing to

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<sup>110</sup> Mr Kabongo's Response to the Request for Disqualification, para. 13.

<sup>111</sup> Mr Kabongo's Response to the Request for Disqualification, para. 13.

<sup>112</sup> Prosecutor's Consolidated Response, para. 53.

<sup>113</sup> Prosecutor's Consolidated Response, para. 53.

<sup>114</sup> Prosecutor's Consolidated Response, para. 54, referring to "Decision on the 'Requête de mise en liberté' submitted by the Defence for Jean-Jacques Mangenda", 17 March 2014, ICC-01/05-01/13-261, para. 17.

pursue only the Congolese members of the team, the Prosecutor demonstrated a failure of her independence to perform her duties.<sup>115</sup>

67. The Prosecutor submits that this “Congolese conspiracy” claim is “baseless”<sup>116</sup> and “fantastical”<sup>117</sup> and that she “did not exclusively seek the arrest of Congolese members of the Defence team”, as is evidenced by the fact that Mr Kilolo emphasised his Belgian nationality.<sup>118</sup> She further submits that Mr Kabongo’s claim that, “because the Defence filings in the [*Bemba*] [c]ase concerning the authenticity of evidence were drafted in English, it would be inconceivable that the Defence evidence could have been forged without the knowledge of the English speaking members of the team”, is an evidentiary matter for the confirmation proceedings.<sup>119</sup>

68. The Appeals Chamber finds that Mr Kabongo’s submission that the Prosecutor created a “Congolese conspiracy” is not supported by any evidence and therefore dismisses it as speculative.

### 3. Conclusion

69. For the above reasons, the Appeals Chamber finds that Mr Kilolo’s and Mr Kabongo’s arguments do not give rise to reasonable doubts as to the Prosecutor’s impartiality. In light of the foregoing, the Appeals Chamber does not consider it necessary to address the request for disqualification of the Deputy Prosecutor and the entire staff of the OTP as they are based on the same arguments as the request for the disqualification of the Prosecutor.

70. The requests for the disqualification of the Prosecutor, the Deputy Prosecutor and the entire staff of the OTP are thus rejected.

Judge Erkki Kourula appends a separate concurring opinion to this decision. Judge Anita Ušacka appends a dissenting opinion to this decision.

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<sup>115</sup> Mr Kabongo’s Response to the Request for Disqualification, para. 14.

<sup>116</sup> Prosecutor’s Consolidated Response, para. 55.

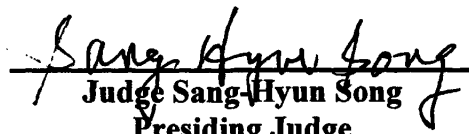
<sup>117</sup> Prosecutor’s Consolidated Response, para. 56.

<sup>118</sup> Prosecutor’s Consolidated Response, para. 56.

<sup>119</sup> Prosecutor’s Consolidated Response, para. 57.



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

  
**Judge Sang-Hyun Song**  
**Presiding Judge**

Dated this 21<sup>st</sup> day of October 2014

At The Hague, The Netherlands

## Separate Concurring Opinion of Judge Erkki Kourula

1. I agree with the majority's conclusion to reject the requests for disqualification. I also agree with the conclusion, at paragraph 40 of the majority opinion, that Mr Kilolo's submissions do not meet the required threshold for the disqualification of the *Prosecutor* with respect to the specific allegation of her appointment of the same staff members to the *Bemba* and *Bemba et al.* cases. Finally, I particularly agree with the majority's statement that, notwithstanding that holding, "it is generally preferable that *staff members* involved in a case are not assigned to related article 70 proceedings of this kind" (emphasis added).

2. However, I would like to more fully explain the reason for my agreement with the above statement. I note that Mr Kilolo alleges<sup>1</sup> that the Prosecutor violated article 31 of the OTP Code of Conduct (hereinafter: "Code of Conduct"), which provides:

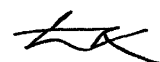
31. Members of the Office shall not participate in any matter in which their impartiality might reasonably be doubted on any ground, and shall request to be excused from any matter as soon as grounds for disqualification arise, especially those indicated in article 42(7) and rule 34(1).

3. I also note that Mr Kilolo makes no arguments regarding either his standing to raise an alleged violation of the Code of Conduct or for the Appeals Chamber to make a determination on such an allegation for purposes of a request for disqualification of the Prosecutor. In light of the complete lack of legal argumentation on these points, I agree with the majority's non-exploration of this specific issue and the standard that it applied in assessing this argument. Indeed, without stating any definitive conclusion, I consider it questionable whether an alleged violation of the Code of Conduct *as such* can be raised before the Appeals Chamber in disqualification proceedings against the Prosecutor.

4. As correctly pointed out by the majority, the Statute specifically provides for the Prosecutor's involvement in a case concerning crimes under articles 6 to 8 of the

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<sup>1</sup> Mr Kilolo raises this argument in relation to the appointment of the same staff of the *Bemba* case to the *Bemba et al.* case, as well as with respect to a specific staff member against whom Mr Kilolo makes more specific arguments regarding alleged misconduct in the *Bemba* case. *See* majority opinion, paras 41-48. For purposes of this opinion, I address the general issue of staff working on a case also being assigned to an article 70 case arising out of that main case, which I consider to subsume these more specific arguments.



Statute *and* related cases arising under article 70 of the Statute.<sup>2</sup> However, I do not consider that this necessarily applies with respect to staff members. I consider it important to differentiate between the Prosecutor, in her supervisory role and as the head of the OTP as a whole, and individual OTP staff members.

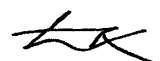
5. In this respect, I wish to highlight the language of article 31 of the Code of Conduct, particularly that “[m]embers of the Office shall not participate in any matter in which their impartiality might reasonably be doubted on any ground” and that any members so affected “shall request to be excused”. It is important to note that voluntary excusal is not the same as disqualification. In this respect, despite the standard of article 31 of the Code of Conduct being the same as that for disqualification proceedings against the Prosecutor (“impartiality might reasonably be doubted”), it is notable that, in the case of non-compliance, the Code of Conduct provides for disciplinary measures against the staff member in accordance with Chapter X of the Staff Rules<sup>3</sup> and does not contemplate disqualification proceedings.

6. In my view, the circumstances of the *Bemba* and *Bemba et al.* cases and the specific way in which the article 70 case is interrelated with the main case, as well as the timing of the commencement of the investigation at the end of the *Bemba* case, could indeed give rise to reasonable doubts as to the impartiality of the *staff members* who, I would note, have been intimately involved in the facts, evidence, and day to day legal strategies of the *Bemba* case. Therefore, I consider that these staff members should have requested their excusal pursuant to their obligations under the Code of Conduct. It follows from this statement that, in my view, the Prosecutor should have given more consideration to the spirit (and *raison d'être*) of the Code of Conduct and not appointed the same staff members to the two cases. The questionable applicability of the Code of Conduct to disqualification proceedings against the Prosecutor pursuant to article 42 (7) of the Statute and the fact that making these appointments does not meet the threshold for disqualification of the Prosecutor does not affect my view in this regard.

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<sup>2</sup> See Majority Opinion, para. 35.

<sup>3</sup> See article 75 of the OTP Code of Conduct, available at: <http://www.icc-cpi.int/iccdocs/oj/otp-COC-Eng.PDF>.



7. Finally, I note that, in her Dissenting Opinion to the present decision, my colleague Judge Ušacka highlights concerns expressed by the International Bar Association regarding the statutory framework of article 70 investigations, particularly the “unilateral authority” given to the Prosecutor in conducting such investigations for which there is “no scope for oversight or accountability”.<sup>4</sup> In my view, this statutory framework presupposes a high level of self-regulation by the Prosecutor. Given that the Code of Conduct is the governing document for the *internal* regulation of staff conduct, this statutory framework further underlines why the Code of Conduct’s provisions should be rigorously adhered to and interpreted broadly, i.e. erring on the side of imposing an overly ethical standard in any questionable cases, by all members of the OTP, from individual staff members up to the Prosecutor herself.

8. In conclusion, I consider that article 31 of the Code of Conduct further supports the statement of the majority that it is generally preferable that staff from a main case not be assigned to a related case of the type currently before the Appeals Chamber.

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

  
Judge Erkki Kourula

Dated this 22<sup>nd</sup> day of August 2014

At The Hague, The Netherlands

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<sup>4</sup> See Dissenting Opinion of Judge Anita Ušacka, para. 7.

## Dissenting Opinion of Judge Anita Ušacka

1. I respectfully dissent from the decision of the majority of the Appeals Chamber not to disqualify the Prosecutor, the Deputy Prosecutor and the entire OTP from the *Bemba et al.* case. For the reasons that follow, I am of the view that, in the specific circumstances of the case, the dual and simultaneous roles of the Prosecutor in the intertwined *Bemba* and *Bemba et al.* cases, would lead any reasonable observer (i.e., someone objectively looking at the situation from the outside, being fully informed of the facts and proceedings at hand) to doubt the Prosecutor's impartiality. In order to preserve the integrity and fairness of the Court's proceedings, I would therefore: (i) disqualify the Prosecutor, the Deputy Prosecutor and the entire OTP from the *Bemba et al.* case; (ii) recall that article 70 (4) (b) of the Statute and rule 162 of the Rules of Procedure and Evidence provide for the appropriate mechanism to preserve the integrity of the Court's proceedings, namely, the Court may request a State Party to take over the investigation and prosecution; and (iii) request the Dutch authorities to exercise jurisdiction over the *Bemba et al.* case pursuant to article 70 (4) of the Statute.

### I. RELEVANT LEGAL FRAMEWORK AND APPLICABILITY OF THE BIAS TEST

2. It is indisputable that, under the Court's legal framework, the Prosecutor has the duty to investigate and prosecute alleged crimes under articles 6, 7 and 8 of the Statute as well as alleged offences under article 70 of the Statute. I also agree with the majority of the Appeals Chamber that offences against the administration of justice under article 70 of the Statute will almost always be related to other cases that are being investigated or prosecuted by the Prosecutor for alleged core crimes and that the Prosecutor is elected, *inter alia*, because of her "high moral character", pursuant to article 42 (3) of the Statute. However, in my view, the issue presently before the Appeals Chamber is whether an objective analysis of the *specific circumstances of the case*, namely the Prosecutor's simultaneous roles in these two intertwined cases gives rise to a *reasonable appearance of bias*, which should lead to the disqualification of the Prosecutor from the *Bemba et al.* case. The failure to assess whether the specific circumstances of a case give rise to a reasonable appearance of bias is contrary to the



Court's legal framework and undermines the rights of the defence, as well as the integrity of the Court.

3. Article 42 (7) of the Statute sets out the standard with respect to the Prosecutor's (and/or Deputy Prosecutor's) impartiality. A plain reading of this provision clearly indicates that it is not necessary to show actual bias on behalf of the Prosecutor (and/or Deputy Prosecutor). Rather, the *appearance* of reasonable grounds to doubt his/her impartiality is sufficient. The Appeals Chamber itself has interpreted the test of article 42 (7) of the Statute as meaning that it is not necessary to establish an actual lack of impartiality on the part of the Prosecutor, but whether the Prosecutor's impartiality "might reasonably be doubted".<sup>1</sup> It further found that, in determining whether there is such an appearance of bias, this determination should be based on the perspective of a "reasonable observer properly informed".<sup>2</sup> This standard, which does not require evidence of actual bias nor impose a rebuttable presumption, ensures fair proceedings by, on the one hand, inspiring confidence (through the standard of requiring only an "appearance"), while, on the other hand, precluding frivolous litigations (by requiring that the appearance must be perceived by a "reasonable" and "fully informed" observer).

4. Pursuant to article 42 (1) of the Statute and rule 34 of the Rules of Procedure and Evidence, the Prosecutor must be independent and impartial in the exercise of her functions, which are key prerequisites for guaranteeing the fairness and integrity of the Court's proceedings. Article 42 (7) and rule 34 provide the framework for the disqualification of the Prosecutor. In this regard, I respectfully disagree with the view expressed in the majority opinion at paragraph 33 that the enumerated conduct for disqualification "requires previous involvement 'in that [same] case'". Rule 34 of the Rules of Procedure and Evidence clearly indicates that the grounds mentioned therein are not exhaustive and the question of whether the conduct in question gives rise to reasonable doubts as to the Prosecutor's impartiality must be assessed in the context of the specific facts of each case. In this sense, the use of the term "in that case" merely indicates one of several scenarios and is not a "requirement" of the provision. I

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<sup>1</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the Request for Disqualification of the Prosecutor", 12 June 2012, ICC-01/11-01/11-175, (hereinafter: "Decision on Disqualification of 12 June 2012"), para. 20.

<sup>2</sup> Decision on Disqualification of 12 June 2012, para. 20.

agree, as expressed in my Dissenting Opinion to the “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*”,<sup>3</sup> in relation to the disqualification of judges, that the disqualification of the Prosecutor (and/or Deputy Prosecutor) should not be undertaken lightly. For this reason, I would assess whether the specific circumstances of the *Bemba et al.* case give rise to a reasonable appearance of bias. However, it is my view that imposing a mandatory rebuttable presumption of impartiality upon a reasonable observer is “erroneous and effectively undermines the purpose of the appearance of bias test”.<sup>4</sup> I fully agree with Steven W. Becker’s analysis that “[o]nly parties may be required to rebut a legal presumption; no such requirement attaches to the informed observer under the apprehension of bias standard”, and imposing a “rebuttable presumption of impartiality upon the reasonable observer is erroneous and effectively undermines the purpose of the appearance of bias test”.<sup>5</sup> In other words, the essence of the appearance of bias test is the perception of a reasonable observer, meaning an ordinary person fully informed of all the relevant facts.<sup>6</sup>

5. I will now refer to the circumstances of the case at hand to assess whether the appearance of bias test warrants the disqualification of the Prosecutor and of the Deputy Prosecutor and the entire OTP staff.

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<sup>3</sup> Decision of 11 June 2013, ICC-01/04-01/06-3040.

<sup>4</sup> Steven W. Becker, “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*”, *The Global Community: Yearbook of International Law and Jurisprudence*, Vol. 2013, pp. 111 *et seq.*, (hereinafter “Becker’s Commentary of the Plenary Decision for the Disqualification of Judge Song”).

<sup>5</sup> Becker’s Commentary of the Plenary Decision for the Disqualification of Judge Song, pp. 111 *et seq.*

<sup>6</sup> The European Court of Human Rights’ “Appearances Doctrine” (“Justice must not only be done, it must also be seen to be done”), which recognised the importance of external/public perception in the 1960’s, and later developed it, giving the maximum weight to appearances of impartiality (objective bias referring to legitimate doubts of the public observer), has the same meaning. *See for example* ECtHR, *Piersack v. Belgium*, application No 8692/79, 1 October 1982, paras 30-31; ECtHR, *De Cubber v. Belgium*, application No 9186/80, 26 October 1984; ECtHR, *Borgers v. Belgium*, application No 12005/86, 30 October 1991, in which, at para. 24, the ECtHR summarised the evolution of this doctrine as follows: “the concept of a fair trial [...] has undergone considerable evolution in the Court’s case law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice”, referring to all previous jurisprudence; *see also* ECtHR, Grand Chamber, *Micallef v. Malta*, application No 17056/06 (2010), para. 98; ECtHR *Kress v. France* 39594/98 (2001); ECtHR, Grand Chamber, *Lobos Machado v. Portugal*, application No 15764/89, 20 February 1996, ECtHR, Grand Chamber, *Ferrantelli and Santangelo v. Italy*, application No 19874/92, 7 August 1996.

## II. APPLYING THE BIAS TEST TO THE CIRCUMSTANCES OF THE *BEMBA ET AL.* CASE

6. Mr Bemba is currently being prosecuted for his alleged responsibility for crimes under articles 7 and 8 of the Statute. I note that, in this case, the last witness testified in November 2013 and the Trial Chamber issued a timetable for the filing of closing briefs and oral closing arguments, even though, at that same time, charges pursuant to article 70 of the Statute were also brought by the Prosecutor against Mr Bemba, his lead defence counsel, his case manager, and two other individuals. What gave rise to the so-called *Bemba et al.* case, which is presently before Pre-Trial Chamber, is [REDACTED], while she was prosecuting Mr Bemba in the *Bemba* case. From the beginning, the profoundly intertwined nature of the proceedings in the *Bemba* and *Bemba et al.* cases was obvious. In that regard, I note that, referring to the *Bemba et al.* case, the Prosecutor herself stated in March 2013 that “[t]hese are serious allegations of offences against the administration of justice. The Prosecution is aware of the far-reaching implications of these allegations on the instant case and with regard to the protection of witness. The Prosecution therefore respectfully requests both confidentiality and urgency. The Prosecution respectfully requests that the Chamber grant the relief requested.”<sup>7</sup>

7. Mr Kilolo and Mr Kabongo both submit, in essence, that because of this clear link between the two cases, the Prosecutor is trying to secure a conviction in the *Bemba* case by initiating investigations against, *inter alia*, Counsel of Mr Bemba, his case manager and defence witnesses. Both also submit that in the present circumstances, it is questionable whether the Prosecutor will indeed investigate both incriminating and exonerating circumstances equally in the proceedings under article 70 of the Statute. In that regard, it should be recalled that any suspect and any accused before the Court has a right to fair proceedings pursuant to article 67 of the Statute, while article 42 (7) of the Statute precludes the Prosecutor’s or Deputy Prosecutor’s involvement “in any matter in which their impartiality might reasonably be doubted on any ground”. In the situation at hand, whether the Prosecutor indeed opened investigations against Mr Bemba’s Counsel, case manager and Defence witnesses in order to secure the conviction of Mr Bemba in the main trial is not at issue. Rather,

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<sup>7</sup> ICC-01/05-44-Conf-Exp, para. 42.



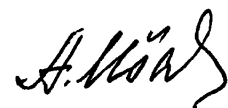


the appearance of such conduct is what matters, because such a perception could potentially prevent an effective defence, as well as undermine the principle of equality of arms and the expeditiousness of the proceedings. For example, Defence witnesses could be discouraged from testifying in favour of Mr Bemba because they fear being prosecuted. Furthermore, in the case at hand, phone conversations between Mr Bemba and his Counsel were monitored, which raises the question of privileged conversations, i.e. communications that are normally protected in order to preserve the confidentiality of Defence strategies. In my opinion, any reasonable observer would perceive that the Prosecutor is a very powerful authority, as well as being Mr Bemba's opponent in the proceedings being conducted against him. Again, this is what the *reasonable appearance of bias* standard, which is enshrined in article 42 (7) of the Statute, requires.<sup>8</sup> I note that, under similar circumstances, the European Court of Human Rights' jurisprudence relevant to the equality of arms is applied according to its "appearance doctrine".<sup>9</sup> Similarly, other international criminal tribunals have adopted specific mechanisms to avoid the potential appearance of partiality, thereby acknowledging the potential for a perception of partiality, which can and must be avoided.<sup>10</sup> In this context, I also note that in a report of July 2013, the International Bar Association (hereinafter: "IBA") indicated that it is "concerned with the statutory

<sup>8</sup> See *supra*, para. 3 and the consistent interpretation thereto given in the Decision on Disqualification of 12 June 2012, para. 20.

<sup>9</sup> *Supra*, footnote 6.

<sup>10</sup> See *Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia*, 11 February 1994, last amended on 22 May 2013, rule 77 (C) (ii), and *Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda*, 29 June 1995, last amended on 10 April 2013, rule 77 (C) (ii). Pursuant to these provisions, a Chamber which has reasons to believe that the offence of contempt of the court (comparable offence to those under article 70 of the Statute) has been committed, may instruct the Tribunal's Prosecutor to investigate and prosecute the matter even *proprio motu* and when, in the view of the chamber, the Tribunal's Prosecutor may face a conflict of interest in doing so, the chamber may direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber and/or to prosecute the matter. Similarly, see *Rules of Procedure and Evidence of the Special Court for Sierra Leone*, 16 January 2002, last amended on 28 May 2010, rule 77 (C). See also *Rules of Procedure and Evidence of the Special Tribunal for Lebanon* (hereinafter: STL"), 20 March 2009, last amended on 9 April 2013, Rule 60 *bis*. The STL's provisions on contempt are detailed and specific, indicating that it has benefitted from the experiences and texts of other international tribunals on these matters. The original text of the STL Rules incorporated provisions on Contempt under Rule 134, including the procedural mechanism on the appointment of *amicus curiae* should there be a conflict of interest regarding the alleged offences. In November 2010, the STL moved this rule to 60 *bis* and added "and Obstruction of Justice" in the heading and "upon assertion of the Tribunal's jurisdiction according to the Statute" in the text of Rule 60 *bis* (A). Rule 60 *bis* (E) (ii) guides appointment of *amicus curiae* should there be a conflict of interest regarding relevant conduct; this rule mirrors the ICTY's rule 77(C) (ii), with the difference that the STL has further specified in the beginning of its provisions "where the Prosecutor indicates a preference not to investigate the matter or submit an indictment himself..." followed by "or where in the view of the Contempt Judge, the Prosecutor has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae*..." (emphasis added).



framework which gives the OTP unilateral authority to investigate offences against the administration of justice, as there is no scope for oversight or accountability for such investigations and prosecutions, even when there are apparent conflicts of interest”.<sup>11</sup> The IBA therefore recommended that “[i]n lieu of amending the Statute or Rules [...] the ICC judges consider appointing *amicus curiae* to make recommendations on whether investigations should be launched (and whether they should be conducted internally or externally) when there are strong allegations of false testimony or witness interference but no apparent investigations, regardless of who the alleged offender is”.<sup>12</sup> I fully agree with this recommendation. Not complying with it will, in my view, result in the loss of the public’s trust in the integrity and fairness of the Court’s proceedings.

### III. LEGAL CONSEQUENCES OF THE APPLICATION OF THE BIAS TEST

8. Considering the Prosecutor’s simultaneous involvement in the intertwined *Bemba* and *Bemba et al.* cases, as well as the fact that the Prosecutor decided not to wait until the completion of the *Bemba* case, but instead initiated investigations that gave rise to the *Bemba et al.* case, I would disqualify the Prosecutor, the Deputy Prosecutor and the entire OTP from the *Bemba et al.* case, contrary to the majority of the Appeals Chamber. Even though article 42 (7) of the Statute only expressly refers to the disqualification of the Prosecutor and the Deputy Prosecutor, I am of the view that their disqualification necessarily results in the disqualification of the OTP staff because members of the OTP receive their instructions from the Prosecutor and/or Deputy Prosecutor and may not “act on instructions from any external source” (last sentence of article 42 (1) of the Statute).

9. In my view, each of the further specific arguments by Mr Kilolo and Mr Kabongo are simply additional illustrations of the fact that there is an appearance of bias in the case at hand, which calls into question the fairness of the proceedings in both the *Bemba* and *Bemba et al.* cases. As stated above, the issue is not whether each

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<sup>11</sup> International Bar Association, “Witnesses before the International Criminal Court - An International Bar Association International Criminal Court Programme report on the ICC’s efforts and challenges to protect, support and ensure the rights of witnesses” available at: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=9C4F533D-1927-421B-8C12-D41768FFC11F>, p. 49.

<sup>12</sup> *Ibid.*

of these arguments is speculative or established, but whether, in the present circumstances, the Prosecutor's dual and simultaneous role in the interrelated cases creates confusion and an appearance of bias. In my view, in the circumstances of this case, a reasonable observer properly informed would perceive such an appearance of bias, which warrants the disqualification of the Prosecutor. Therefore, under this approach, there is no need to address any of these specific arguments dealt with at paragraphs 38 *et seq.* of the majority's decision.

10. Having reached that conclusion, I note that article 70 (4) (b) of the Statute and rule 162 of the Rules of Procedure and Evidence provides the appropriate mechanism to preserve the integrity of the Court's proceedings, namely that, as pointed out by the Prosecutor herself,<sup>13</sup> the Court may request that a State Party take over the investigation and prosecution. Furthermore, I note that, among the list of factors that the Court may take into consideration when deciding whether to exercise its jurisdiction, items (e) and (f) of Rule 162 (2) of the Rules of Procedure and Evidence seem to be of particular relevance. In this respect, (e) refers to "[l]inks with an ongoing investigation or a trial before the Court", whereas (f) refers to "evidentiary considerations". In the present case, because of the deep procedural and evidential links between both cases,<sup>14</sup> I am convinced that the Court should have decided not to exercise its jurisdiction and requested that a State Party exercise jurisdiction pursuant to article 70 (4) of the Statute. As regards the evidential link between the two cases, I particularly note that in the *Bemba et al.* case, the Defence was not given access to certain crucial documents, including the transcript of an *ex parte* hearing of 26 March 2014, which I consider relevant to the proceedings at hand.<sup>15</sup> It is my firm view that the Appeals Chamber should have reclassified *proprio motu* said transcript to give the Defence access to it.<sup>16</sup>

<sup>13</sup> Prosecutor's Consolidated Response, para. 20.

<sup>14</sup> See for example, Prosecutor's Notice of Article 70 Investigations, para. 39.

<sup>15</sup> Transcript of the Status Conference held in the *Bemba et al.* case on 26 March 2014, ICC-01/05-01/13-T-5-Conf-EXP-ENG. I note that the redacted version thereof is entirely redacted and thus unknown by the Defence.

<sup>16</sup> I should note that, if I had been aware of this transcript at the time of the decision of the Plenary on the request for the disqualification of Judge Tarfusser (see "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 Aido*" dated 20 June 2014 and registered on 23 June 2014, ICC-01/05-



11. Furthermore, I recall that several State Parties have incorporated offences under article 70 of the Statute into their domestic laws, thereby making cases of offences against the administration of justice that occur at the Court prosecutable by them domestically. This is in particular the case of the Netherlands,<sup>17</sup> the Host State of the Court and a State Party, and of Belgium,<sup>18</sup> also a State Party and of which Mr Kilolo is a citizen. In that regard, I note that, following an order by the Single Judge of Pre-Trial Chamber II<sup>19</sup> requesting observations from the Netherlands on Mr Kabongo's request that he be prosecuted by the Dutch authorities,<sup>20</sup> the Ministry of Foreign Affairs of the Kingdom of The Netherlands indicated that it "sees no reason [...] to prosecute Mr Mangenda Kabongo, under its domestic jurisdiction, for the facts set out in the request".<sup>21</sup> I note, however, that the Pre-Trial Chamber did not make any decision pursuant to article 70 (4) (b) of the Statute and rule 162 (2) (e)-(f) and (4) of the Rules of Procedure and Evidence.

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01/13-511-Anx, and my Separate Opinion thereto at paragraphs 45-49), I would have voted in favour of his disqualification.

<sup>17</sup> See The Netherlands, Acts Amending Provisions of the Penal Code, articles 200, 208A, 361. See also C. Kress et al. (eds), *The Rome Statute and Domestic Legal orders: Constitutional Issues, Cooperation and Enforcement*, Volume II (Nomos Verlagsgesellschaft, 2005), pp. 229-230.

<sup>18</sup> See Belgium, *Law concerning the Cooperation with the International Criminal Court and International Tribunals*, 2004, article 41.

<sup>19</sup> Pre-Trial Chamber II, "Order requesting observations from the Kingdom of the Netherlands and from the other Defence teams on the 'Requête à la Cour de ne pas exercer sa compétence, en application de l'art. 70.4(b) du Statut de Rome et de la règle 162.a, "Demande en dessaisissement" submitted by the Defence for Mr Mangenda", 7 February 2014, ICC-01/05-01/13-162.


<sup>20</sup> "Requête à la Cour de ne pas exercer sa compétence, en application de l'art. 70.4(b) du Statut de Rome et de la règle 162.a, 'Demande en dessaisissement'", 22 January 2014, ICC-01/05-01/13-120-Conf and ICC-01/05-01/13-120-Red-tENG.

<sup>21</sup> Letter dated 24 February 2014 and registered on 25 February 2014, ICC-01/05-01/13-223-AnxIV.

#### IV. CONCLUSION

12. For the reasons set out above, I am of the view that the Prosecutor, the Deputy Prosecutor and OTP staff should be disqualified from the *Bemba et al.* case and I would request that the Dutch authorities exercise jurisdiction over the *Bemba et al.* case pursuant to article 70 (4) of the Statute.

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

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**Judge Anita Ušacka**

Dated this 21<sup>st</sup> day of October 2014

Date of the original: 22 August 2014

At The Hague, The Netherlands