

**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**

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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

Registrar
Mr Herman von Hebel

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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

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Musamba”¹ (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.²

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’”³ (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.⁴

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.⁵

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

¹ 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).

² Request for Disqualification, paras 1, 37.

³ ICC-01/05-01/13-250-Conf-tENG (OA).

⁴ Mr Kabongo’s Response to the Request for Disqualification, p. 12.

⁵ ICC-01/05-01/13-254-Conf (OA).

Prosecutor, the Deputy Prosecutor and the other members of the Office of the Prosecutor”⁶ (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 day⁷ (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”⁸ (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”.⁹

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)’”¹⁰ (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.¹¹

⁶ ICC-01/05-01/13-257 (OA).

⁷ “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).

⁸ ICC-01/05-01/13-314-Conf (OA).

⁹ Prosecutor’s Consolidated Response, para. 59.

¹⁰ 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.

¹¹ Addendum to the Request for Disqualification, para. 7.

8. On 6 June 2014, following an order from the Appeals Chamber,¹² 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 Disqualification¹³ (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 Disqualification¹⁴ (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.¹⁵

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”,¹⁶ to which he filed a corrigendum¹⁷ (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”¹⁸ (hereinafter: “Prosecutor’s Request for Reclassification”), in which she indicated that the Prosecutor’s Response to the

¹² “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).

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

¹⁴ “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).

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

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

¹⁷ “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.

¹⁸ 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.¹⁹

12. On 19 June 2014, the Appeals Chamber issued the “Order on the reclassification of documents and decision on request for leave to reply”,²⁰ 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”.²¹ 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.²²

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.

¹⁹ Prosecutor’s Request for Reclassification, paras 4-5.

²⁰ ICC-01/05-01/13-505 (OA).

²¹ Mr Babala’s Response to the Request for Disqualification, p. 5.

²² 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.²³

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,²⁴ in conformity with rule 34 (2) of the Rules of

²³ Prosecutor's Response to the Addendum, paras 1, 4-6.

²⁴ 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.]²⁵

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.²⁶

²⁵ “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.

²⁶ “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”.²⁷ 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”.²⁸ 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”.²⁹ 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

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.

²⁷ See articles 36 (3) (a) and 42 (3) of the Statute.

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

²⁹ 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”.³⁰ 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.³¹ 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.³²

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.³³ 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.³⁴ 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”.³⁵ 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.³⁶

31. In response to these arguments, the Prosecutor submits that she “does not aim to convict an accused at all costs”,³⁷ 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.³⁸ 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

³⁰ Request for Disqualification, para. 21.

³¹ Request for Disqualification, paras 22-24.

³² Request for Disqualification, para. 25.

³³ Mr Kabongo’s Response to the Request for Disqualification, para. 8.

³⁴ Mr Kabongo’s Response to the Request for Disqualification, para. 8.

³⁵ Mr Kabongo’s Response to the Request for Disqualification, para. 9.

³⁶ Mr Kabongo’s Response to the Request for Disqualification, para. 9.

³⁷ Prosecutor’s Consolidated Response, paras 15, 22.

³⁸ 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.³⁹ 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”.⁴⁰ 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”.⁴¹

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”.⁴²

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*.

³⁹ Prosecutor’s Consolidated Response, paras 22-26.

⁴⁰ Prosecutor’s Consolidated Response, paras 26-28.

⁴¹ Prosecutor’s Consolidated Response, para. 28.

⁴² 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,⁴³ 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.⁴⁴

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].⁴⁵ 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

⁴³ Prosecutor's Consolidated Response, para. 16.

⁴⁴ See also *Gaddafi OA 3 Decision*, para. 41.

⁴⁵ 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”.⁴⁶ Mr Kilolo questions whether investigations into exonerating circumstances will be undertaken in such conditions,⁴⁷ 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.⁴⁸

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”,⁴⁹ and that “[d]uring the investigations, the Prosecut[or] took all necessary precautions to avoid real conflicts”⁵⁰ and “prevented lawyers working on the [*Bemba* c]ase from accessing some of the information obtained in the [a]rticle 70 investigation”.⁵¹ 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”.⁵² 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”.⁵³

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”.⁵⁴ 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

⁴⁶ Request for Disqualification, para. 26.

⁴⁷ Request for Disqualification, para. 26.

⁴⁸ 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.

⁴⁹ Prosecutor’s Consolidated Response, para. 31.

⁵⁰ Prosecutor’s Consolidated Response, para. 32.

⁵¹ Prosecutor’s Consolidated Response, para. 32.

⁵² Prosecutor’s Consolidated Response, para. 32.

⁵³ Prosecutor’s Consolidated Response, para. 31.

⁵⁴ “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"⁵⁵ involving [REDACTED].⁵⁶ 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.⁵⁷ In particular, he submits that [REDACTED], while testifying in the *Bemba* case, witness D-18, who "had received threats of reprisals"⁵⁸ from the Congolese authorities, [REDACTED].⁵⁹ 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),⁶⁰ in violation of article 31 of the OTP Code of Conduct.⁶¹

42. The Prosecutor denies that [REDACTED] pressurised witnesses or influenced their testimony by leaking confidential information about it to their superiors.⁶² 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"⁶³

⁵⁵ Request for Disqualification, para. 30.

⁵⁶ Request for Disqualification, paras 29-32, referring to [REDACTED].

⁵⁷ Request for Disqualification, para. 31.

⁵⁸ Request for Disqualification, para. 30.

⁵⁹ Request for Disqualification, para. 30, referring to [REDACTED].

⁶⁰ Request for Disqualification, para. 31.

⁶¹ Request for Disqualification, para. 31.

⁶² Prosecutor's Consolidated Response, para. 33.

⁶³ Prosecutor's Consolidated Response, para. 34.

and that witness D-18's accusation that [REDACTED] "is baseless".⁶⁴ [REDACTED]⁶⁵ [REDACTED].⁶⁶ 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".⁶⁷

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],⁶⁸ it appears that [REDACTED].

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

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

46. The Appeals Chamber finds that [REDACTED].⁷³

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

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

⁶⁴ Prosecutor's Consolidated Response, para. 35.

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

⁶⁶ Prosecutor's Consolidated Response, para. 35, referring to [REDACTED].

⁶⁷ Prosecutor's Consolidated Response, para. 17.

⁶⁸ Request for Disqualification, para. 30, referring to [REDACTED].

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

⁷⁰ Annex to the Addendum to the Request for Disqualification, pp. 11, 14-15.

⁷¹ Prosecutor's Response to the Addendum, paras 7-20.

⁷² Prosecutor's Response to the Addendum, paras 21-24.

⁷³ Annex to the Addendum to the Request for Disqualification, pp. 10-15.

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [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".⁷⁸ 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.⁷⁹

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".⁸⁰ 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".⁸¹

51. The Appeals Chamber notes that [REDACTED],⁸² [REDACTED].

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

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

⁷⁹ Request for Disqualification, para. 33.

⁸⁰ 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".

⁸¹ Prosecutor's Consolidated Response, para. 37.

⁸² 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",⁸³ "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).⁸⁴ 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.⁸⁵

54. In response, the Prosecutor submits that this "claim is factually incorrect",⁸⁶ that she "acted correctly by mentioning the existence of her allegations against [Mr] Kilolo and the other suspects",⁸⁷ 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).⁸⁸

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.⁸⁹ The French version indeed uses the words "personne [...] *accusée*" ("accused") in the sentence quoted by him (emphasis added).⁹⁰ 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

⁸³ Request for Disqualification, para. 34, referring to Annex 2 to the Request for Disqualification.

⁸⁴ Request for Disqualification, para. 34.

⁸⁵ Request for Disqualification, para. 34.

⁸⁶ Prosecutor's Consolidated Response, para. 40.

⁸⁷ Prosecutor's Consolidated Response, para. 41.

⁸⁸ Prosecutor's Consolidated Response, para. 41.

⁸⁹ Request for Disqualification, para. 34; Annex 2 to the Request for Disqualification.

⁹⁰ 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.

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

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].⁹² In Mr Kabongo’s view, [REDACTED].⁹³ Mr Kabongo submits that in the [REDACTED],⁹⁴ [REDACTED].⁹⁵ He further submits that the [REDACTED].⁹⁶

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.⁹⁷ The Prosecutor submits that the Pre-Trial Chamber had “already determined that the relevant audio recordings are not privileged within the meaning of

⁹¹ 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.

⁹² 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.

⁹³ Mr Kabongo’s Response to the Request for Disqualification, para. 11.

⁹⁴ [REDACTED].

⁹⁵ Mr Kabongo’s Response to the Request for Disqualification, para. 11.

⁹⁶ Mr Kabongo’s Response to the Request for Disqualification, para. 11.

⁹⁷ 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)”⁹⁸ and that “[Mr Kabongo]’s Request is based on an erroneous interpretation of legal professional privilege”⁹⁹ 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).¹⁰⁰ 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).¹⁰¹

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”,¹⁰² sought the lifting of his immunity in the “Prosecution’s Application for Warrant of Arrest”.¹⁰³

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

⁹⁸ Prosecutor’s Consolidated Response, para. 44.

⁹⁹ Prosecutor’s Consolidated Response, para. 45.

¹⁰⁰ Prosecutor’s Consolidated Response, para. 45.

¹⁰¹ Prosecutor’s Consolidated Response, para. 45.

¹⁰² Mr Kabongo’s Response to the Request for Disqualification, para. 12.

¹⁰³ [REDACTED].

‘grounds to suspect’ that they had committed offences against the administration of justice” (footnotes omitted).¹⁰⁴ 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”¹⁰⁵ 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).¹⁰⁶ 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]”.¹⁰⁷

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).¹⁰⁸ 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).¹⁰⁹ Mr Kabongo contends that the amounts deposited into

¹⁰⁴ Prosecutor’s Consolidated Response, para. 49.

¹⁰⁵ 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.

¹⁰⁶ Prosecutor’s Consolidated Response, para. 48.

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

¹⁰⁸ Mr Kabongo’s Response to the Request for Disqualification, para. 13.

¹⁰⁹ 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".¹¹⁰ In his view, the Prosecutor's failure to submit the record kept by the Registry to the Pre-Trial Chamber demonstrates her "manifest interest"¹¹¹ 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".¹¹² 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.¹¹³ 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".¹¹⁴

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

¹¹⁰ Mr Kabongo's Response to the Request for Disqualification, para. 13.

¹¹¹ Mr Kabongo's Response to the Request for Disqualification, para. 13.

¹¹² Prosecutor's Consolidated Response, para. 53.

¹¹³ Prosecutor's Consolidated Response, para. 53.

¹¹⁴ 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.¹¹⁵

67. The Prosecutor submits that this “Congolese conspiracy” claim is “baseless”¹¹⁶ and “fantastical”¹¹⁷ 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.¹¹⁸ 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.¹¹⁹

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.

¹¹⁵ Mr Kabongo’s Response to the Request for Disqualification, para. 14.

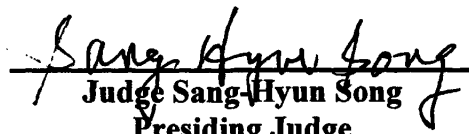
¹¹⁶ Prosecutor’s Consolidated Response, para. 55.

¹¹⁷ Prosecutor’s Consolidated Response, para. 56.

¹¹⁸ Prosecutor’s Consolidated Response, para. 56.

¹¹⁹ 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 21st day of October 2014

At The Hague, The Netherlands