

## 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:

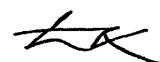
31. Members of the Office shall not participate in any matter in which their impartiality might reasonably be doubted on any ground, and shall request to be excused from any matter as soon as grounds for disqualification arise, especially those indicated in article 42(7) and rule 34(1).

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

---

<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.

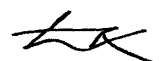
5. In this respect, I wish to highlight the language of article 31 of the Code of Conduct, particularly that “[m]embers of the Office shall not participate in any matter in which their impartiality might reasonably be doubted on any ground” and that any members so affected “shall request to be excused”. 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.

---

<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

---

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