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No.: **ICC-01/05-01/13**
Date: **29 August 2014**

THE APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU AND NARCISSE ARIDO

Public Redacted Version
with Annex A

Public redacted version of "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", ICC-01/05-01/13-314-Conf, 4 April 2014

Source: **The Office of the Prosecutor**

Document to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. The Prosecution opposes the requests filed by the Defence of Kilolo ("Kilolo's Request"), [1] Mangenda ("Mangenda's Request") [2] and Babala ("Babala's Request") [3] to disqualify the Prosecutor, the Deputy Prosecutor and all Prosecution staff from the investigation and prosecution of the case against them (collectively, the "Requests"). As set out below, the Requests should be dismissed.

2. The Requests primarily allege that the relationship between the proceedings against Bemba (the "Main Case") and the Article 70 proceedings in which Kilolo, Mangenda and Babala are suspects (the "Article 70 Case"), and the Prosecutor's alleged improper motivation in pursuing the Article 70 Case call into question the impartiality of the Office of the Prosecutor (OTP) warranting disqualification from the Article 70 Case.[4]

3. Kilolo further seeks the OTP's disqualification because of the Prosecutor's alleged personal interest in the Article 70 Case and expression of an opinion allegedly demonstrating her lack of impartiality.[5]

4. Mangenda further seeks the OTP's disqualification because it allegedly accessed privileged conversations,[6] allegedly violated Mangenda's immunity,[7] allegedly misled the Pre-Trial Chamber,[8] and allegedly created a "Congolese conspiracy" around Bemba to salvage the Main Case.[9]

[1] ICC-01/05-01/13-233-Conf OA.
[2] ICC-01/05-01/13-250-Conf OA.
[3] ICC-01/05-01/13-250-Corr OA.
[4] Kilolo's Request, paras.18-28. Mangenda's Request, paras.1-10.
[5] Kilolo's Request, paras.29-36.
[6] Mangenda's Request, para.11.
[7] Mangenda's Request, para.12.
[8] Mangenda's Request, para.13.
[9] Mangenda's Request, para.14.

5. Since Babala merely endorses Kilolo's Request and adds no further arguments,[10] the Prosecution does not address his Request separately.

6. Similar to an application recently dismissed by the Appeals Chamber in the Kenya situation, none of the Requests "presents any coherent legal or factual arguments in support of the requests, nor any supporting material underpinning them."[11] As such, they should be dismissed.

II. Confidentiality

7. Pursuant to Regulation 23*bis*(2), the Prosecution files this response confidentially because Kilolo's Request and Mangenda's Request are subject to the same classification.[12] However, the Prosecution does not object to reclassifying this response as public, with redactions as appropriate.

III. Submissions

A. Grounds and standard for disqualification of the Prosecutor and Deputy Prosecutor

8. The Requests are brought on the basis of Article 42(7) and Rule 34, which set out the standard for disqualification of the Prosecutor and Deputy Prosecutor, and illustrate situations which may lead to their disqualification.[13] The relevant portions of these provisions provide as follows:

Article 42(7):

> 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

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[10] Babala's Request, paras.4-10.
[11] ICC-01/09-127-Red OA2, para.12.
[12] Babala's Request is filed publicly, in violation of Regulation 23*bis* (2).
[13] Kilolo's Request, paras.13-17; Mangenda's Request does not identify the legal basis under which it is brought. However, by joining Kilolo's Request it must be assumed that it is brought under the same legal basis.

capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

Rule 34(1):

1. In addition to the grounds set out in article 41, paragraph 2, and article 41, 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;
>
> […]
>
> (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.

9. The primary ground in Article 42(7) for disqualifying the Prosecutor or the Deputy Prosecutor from a case, namely, previous involvement in that case before the Court (or in a related case at the national level) does not apply. Although related, the Article 70 Case and the Main Case are separate and independent.[14] Nor do the situations enumerated in Rule 34(1) envisage a scenario where there may be factual or evidentiary overlap between two separate cases before the Court as grounds for disqualification.

10. As for the standard for disqualification of the Prosecutor and Deputy Prosecutor, the test is one of appearance of impartiality rather than actual impartiality. The

[14] Not all prior involvement in a case will be sufficient to disqualify the Prosecutor or Deputy Prosecutors from carrying out their functions. As John Jones noted in Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1 (Oxford: Oxford University Press, 2002), p. 273, if the first limb of the assessment under Article 42(7) were read literally, it "would mean that the Prosecutor would be barred from being involved in the trial of a case because he took the initial decision to prosecute it. This would disqualify the Prosecutor from every prosecution." This leads the author to conclude, "[t]his cannot be what was intended". Instead, the enumerated grounds set out in the Article and Rule 34 provide guidance as to the degree of conflicting involvement required to disqualify counsel. In this regard, see PCNICC/1999/WGRPE/DP.11 – the original working draft of Articles 41(2) and 42(7) submitted by Spain and Venezuela – which listed disqualifying conduct as, i.e., "having been a defending legal counsel or having exercised the care or tutelage of any of the parties… having been a defending legal counsel or representative of any of the parties, pronounced judgement in a lawsuit or case as an attorney or been involved in such a case as prosecutor, expert or witness… [or] having a pending lawsuit with any of the parties…" According to Cate Steains, "Situations that may affect the Functioning of the Court" in Roy Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers, 2001), pp. 303-304, paragraph 7 of the current Article 42 was intended to "encompass [these] three… concepts contained in the original Spain/Venezuela proposal". Moreover, the scenarios mentioned in Rule 34 further delineate the type of conduct required for disqualification as akin to "[i]nvolvement, in his or her personal capacity, in any legal proceedings… in which the person being investigated or prosecuted was or is an opposing party."

Appeals Chamber in the *Gaddafi and Al-Senussi* case held that the phrase "'might reasonably be doubted' in article 42(7) […] indicates that it is not necessary to establish an actual lack of impartiality on the part of the Prosecutor. Rather, the question […] is whether it reasonably appears that the Prosecutor lacks impartiality. [The determination] whether there is such an appearance of partiality […] should be based on the perspective of a reasonable observer, properly informed."[15] According to the ICTY's Appeals Chamber, in the context of addressing allegations of bias against judges, this means that "the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement)" would reasonably doubt the impartiality of a judge.[16] It further specified that "[s]uch circumstances within the knowledge of the fair-minded observer would include the traditions of integrity and impartiality which a judge undertakes to uphold."[17]

11. In this Court, the same standard for disqualification also applies in relation to Judges.[18] Articles 41(2)(a) and 42(7) use identical language to articulate standards for assessing when a Judge, the Prosecutor or the Deputy Prosecutor must be disqualified from a case, when his or her "impartiality might reasonably be doubted on any ground". Rule 34 also refers to the same scenarios that could lead to disqualify judges on the one hand, and the Prosecutor and Deputy Prosecutor on the other.[19]

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[15] ICC-01/11-01/11-175 OA3, para.20. See also ICC-02/05-01/09-76-Anx2, p.6; ICC-02/05-03/09-344-Anx, para.11; *Prosecutor v. Anto Furundzija*, IT-95-17/1-A, Appeals Chamber Judgment of 21 July 2000, para.189; *Prosecutor v. Stanislav Galic*, IT-98-29-A, Appeals Chamber Judgment of 30 November 2006, paras.39-40.
[16] *Prosecutor v. Delalic et al.*, IT-96-21-A, Judgement, 20 February 2001, para.683.
[17] *Prosecutor v. Delalic et al.*, IT-96-21-A, Judgement, 20 February 2001, para.683.
[18] ICC-02/05-03/09-344-Anx, para.13.
[19] Rules 33-35 set out the same procedure to be followed for all such officials. *See also* Cate Steains "Situations that may affect the Functioning of the Court" in Roy Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers, 2001), pp. 302-303: The author notes that merging the rules governing judges and the Prosecutor and Deputy Prosecutors was done "in the interests of a concise, non-repetitive text". See also John Jones' article in Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1 (Oxford: Oxford University Press, 2002), p. 271. He notes the similarities between the rules relating to the independence of judges and those for the Prosecutor and Deputy Prosecutor, implying that "that the Prosecutor and Deputy Prosecutors are considered to be judicial officers, possessing the same qualities and conduct as that of judges".

12. As a result, the jurisprudence developed by the Plenary of Judges in the context of requests to disqualify judges should guide the Appeals Chamber in the interpretation of the standard for disqualifying the Prosecutor or Deputy Prosecutor under Article 42(7). The Plenary of Judges has observed that the disqualification of a judge is "not a step to be undertaken lightly, noting that a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice. When assessing the appearance of bias in the eyes of the reasonable observer, unless rebutted, it is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case."[20]

13. Likewise, for the Prosecutor and Deputy Prosecutor a high threshold must be satisfied for them to be disqualified on grounds of impartiality. Like Judges, they are elected officials of the Court who must be presumed to possess high integrity and professionalism.[21]

B. Response to the arguments advanced in the Requests

(a) *General observations*

14. The Requests are primarily based on the relationship between the Main Case and the Article 70 Case and allege the Prosecutor pursued the Article 70 Case for an improper reason, namely to improve her prospects of success in the Main Case. These arguments patently misconstrue the functions and duties of the Prosecutor under the Statute, and the object and purpose of Article 70 proceedings and should be dismissed.

[20] ICC-02/05-03/09-344-Anx, para.14 and authorities referred to in footnotes 21 and 22 of that same decision.
[21] See Article 36(3)(a) for Judges and Article 42(3) for the Prosecutor and Deputy Prosecutor.

15. The Prosecutor's core function under the Statute is to investigate and prosecute persons suspected to be responsible for the most serious crimes of concern to the international community as a whole.[22] In doing so, she is mandated "to establish the truth"[23] and must act objectively by "investigat[ing] incriminating and exonerating circumstances equally."[24] Contrary to Kilolo's and Mangenda's submissions,[25] the Prosecutor does not aim to convict an accused at all costs. The allegation that she is pursuing the Article 70 Case to buttress the Main Case against Bemba is baseless.

16. The Statute also provides the Court, including the Prosecutor, with tools to ensure the integrity of the proceedings. In particular, Article 70 empowers the Prosecutor to investigate and prosecute conduct which potentially constitutes an offence against the administration of justice. Article 70 proceedings aim to deter and punish acts that potentially threaten the administration of justice in proceedings for core crimes, as spelled out in Article 5. As such, Article 70 investigations and prosecutions will almost always relate to Article 5 proceedings being conducted before the Court. Very often they will stem from a specific Article 5 case being investigated or prosecuted by the Prosecution.

17. The mere fact that the Prosecutor, the Deputy Prosecutor and their staff conduct both the core proceedings and a related Article 70 investigation and prosecution does not automatically call into question their impartiality. In fact, Rules 162(c) and 165(4) allow for the possibility of a joinder of charges under Article 70 with charges under Articles 5 to 8. As noted by Otto Triffterer, the criterion of "prior involvement" in the case referred to in Article 42(7) "does not refer to any previous action which the Office of the Prosecutor has taken pursuant to the

[22] Rome Statute, Preamble, paragraphs 4-5.
[23] Article 54(1)(a).
[24] Article 54(1)(a).
[25] Kilolo's Request, para.20; Mangenda's Request, para.8.

Statute".[26] In the ICC, as in other international courts and tribunals, cases may have a degree of factual or evidentiary overlap between them. However, this does not automatically give rise to a situation of conflict of interest.[27] The ICTY's and ICTR's Office(s?) of the Prosecutor have prosecuted cases where the alleged contempt has arisen from one of its cases being prosecuted. They have even prosecuted cases of contempt against accused who had been members of a Defence team in the main case.[28]

18. Moreover, simply because these Article 70 proceedings may help preserve the integrity of the Main Case does not show that the Prosecutor acted improperly in opening those proceedings.[29] To the contrary, her decision to commence the proceedings flowed from the proper exercise of her duties under the Statute and obligation to prevent the perversion of the course of justice before the Court.

19. Pursuant to its duty under Article 54(1)(a), the Prosecution investigated the credibility of Defence witnesses in the Main Case upon credible and reliable information providing reasonable grounds to believe they may have been suborned to commit perjury and that documents tendered by the Defence may have been fabricated. The Prosecution was obliged to use all legal means at its disposal to establish the truth in the Main Case, and to open Article 70 proceedings.[30]

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[26] Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed. (Oxford: Hart Publishing, 2008), p. 978.
[27] *Contra*: Mangenda's Request, para.9.
[28] See *Prosecutor v. Rasic*, IT-98-32/1-R77.2, Written Reasons for Oral Sentencing Judgement, 6 March 2012; *Leonidas Nshogoza v. Prosecutor*, ICTR-2007-91-A, Judgment, 15 March 2010. *See also Prosecutor v. Haraqija et al.*, IT-04-84-R77.4, Judgement on Allegations of Contempt, 17 December 2008. Judges before the ICC are similarly not reasonably "conflicted" by hearing cases with a degree of factual or evidentiary overlap: The Judges of Pre-Trial Chamber II who confirmed the charges in *Ruto et al*. also confirmed the charges in *Kenyatta et al*. Judge Tarfusser, who was a member of Pre-Trial Chamber II which confirmed the charges against *Ruto et al*., issued the warrant of arrest against Barasa in Article 70 proceedings that arose from *Ruto et al. (*ICC-01/09-01/13-1-Red2).
[29] *Contra*: Kilolo's Request, paras.20, 24, 33; Mangenda's Request, para.14.
[30] See also Rule 165(1).

20. If accepted, the Defence's position would paralyse the Court's ability to conduct Article 70 proceedings, or at least render its ability to pursue them less effective. According to Article 70(2), offences against the administration of justice must be prosecuted by the Prosecutor,[31] unless the Court requests a State Party to submit a case to its competent authorities.[32] Disqualifying the Prosecutor and Deputy Prosecutor from pursuing Article 70 cases arising from cases the OTP is already investigating or prosecuting,[33] leaves to States Parties exclusively the obligation to manage such Article 70 cases.[34] Not only does this contravene the Rules, but it artificially carves out a lacuna in the Court's ability to deal with such cases.

(b) <u>Response to the specific submissions made in the Requests</u>

21. The Requests raise nine grounds challenging the Prosecutor's impartiality under Article 42(7) and Rule 34(1).[35] None of these grounds is factually supported or establishes a basis for disqualifying the Prosecutor, the Deputy Prosecutor or the staff of the OTP.

(i) No conflict of interest arises from the OTP conducting both the Main Case and the Article 70 Case

22. The Prosecution is not conflicted from conducting both the Main Case and the Article 70 Case.[36] In particular, the Prosecutor's involvement in both cases does not compromise her objectivity in breach of Article 54(1)(a).[37] Nor does the Prosecution strive for a conviction in the Main Case at all costs.[38] Rather, the Prosecution appropriately seeks to establish the truth in the Main Case.

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[31] See also Article 42(1) and Part V of the Statute.
[32] Article 70(4)(b).
[33] See also Kilolo's Request, para.36; Mangenda's Request, para.8.
[34] Contrary to the UN *ad hoc* Tribunals, the Office of the Prosecutor cannot delegate Article 70 proceedings to an *amicus curiae:* compare Article 70(2) of the Statute with Rule 77 of the Rules of Procedure and Evidence of the UN *ad hoc* Tribunals.
[35] Kilolo's Request, paras.20-34, relying on Article 42(7) and Rules 34(1)(a) and (d); Mangenda's Request, paras.5-14 (implicitly relying on Article 42(7).
[36] *Contra* Kilolo's Request, paras. 20-25
[37] Kilolo's Request, paras.20-21 ; Mangenda's Request, paras.7-8.
[38] *Contra*, Mangenda's Request, para.8.

23. After deciding there was a reasonable basis to proceed, the Prosecutor initiated the investigation of the Article 70 Case in relation to the facts relevant to Article 70 offences allegedly committed by the five suspects, including two members of the Bemba Defence team and Bemba himself. These facts indicated that there was an existing criminal scheme aimed at eroding the integrity of the judicial proceedings in the Main Case. By including Article 70 offences within the jurisdiction of the Court, and by providing the Prosecutor with the power to investigate and prosecute such offences, the Statute enables the Prosecutor to take action in response to a scenario like the present one.[39]

24. A conflict of interest is not demonstrated merely because the Article 70 Case may impact the Defence evidence in the Main Case.[40] The Article 70 Case was brought as a result of information which came to light in the Main Case which, upon investigation, revealed evidence of conduct amounting to Article 70 offences.[41] The Prosecutor took these appropriate steps to preserve the integrity of the proceedings in the Main Case. Further, both Trial Chamber III in the Main Case and Pre-Trial Chamber II in the Article 70 Case will assess the evidence independently in light of the record before them; there is no need to wait for the outcome of one proceeding before taking a decision in the other to ensure the objectivity of either Chamber or the Prosecution.[42]

25. Kilolo's and Mangenda's submissions that the Prosecutor has a conflict of interest based on her alleged failure to exercise her functions under the Statute objectively and in accordance with her duties under Article 54(1)(a)[43] are unsupported. First, the Prosecutor did not *rush* her investigations in the Article

[39] See Article 70(2).
[40] *Contra*: Kilolo's Request, paras.20-22; Mangenda's Request, paras.7-9. The Prosecution notes that Trial Chamber III has recently rejected the Prosecution's application to admit as evidence in the Main Case some information gathered by the Prosecution in its Article 70 investigation: ICC-01/05-01/08-3029.
[41] See section on General observations above. See also Rule 165(1).
[42] Contra Mangenda's Request, para.9.
[43] Kilolo's Request, para.21; Mangenda's Request, para.8

70 Case.[44] Rather, [REDACTED], the Prosecutor proceeded to conduct a thorough investigation.[45] Once satisfied that the OTP had collected sufficient information to establish reasonable grounds to believe that the suspects committed the crimes alleged against them, in mid-November 2013 the Prosecutor asked the Single Judge to issue warrants of arrest.[46] When issuing these warrants, the Single Judge emphasised that "the record contains at this stage a considerable and indeed quite remarkable quantity of items of evidence which furnish objective and incriminating information and details pertaining directly and specifically to the Prosecutor's factual allegations."[47] This defeats any suggestion that the Prosecution did not fully comply with its duty under Article 54(1)(a) to investigate thoroughly to establish the truth.

26. Second, Kilolo's and Mangenda's suggestion that the Prosecutor's inability to act impartially in this case is illustrated by the alleged speed and vigour with which she pursued the present case, as opposed to her alleged "inaction" in the *Lubanga* case is factually incorrect and irrelevant.[48]

27. The assertion of the Prosecutor's inaction concerning *Lubanga* is the result of the Defence's unawareness of relevant steps taken by the Prosecution. Following the *Lubanga* Trial Judgement in which the Trial Chamber informed the Prosecution that there was a "risk that intermediaries P-0143, P-316 and P-321 persuaded, encouraged, or assisted witnesses to give false evidence,"[49] the Prosecutor instructed an independent consultant with extensive prosecutorial experience to examine information in the OTP's possession and to advise the Prosecutor whether any further investigations and/or prosecutions pursuant to Article 70 were warranted. Based on this report and her own assessment the Prosecutor did

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[44] Kilolo's Request, para.22.
[45] ICC-01/05-01/13-19-Conf, para.92, ICC-01/05-01/13-1-Red2-tENG, paras.1-5, 12.
[46] ICC-01/05-01/13-19-Conf.
[47] ICC-01/05-01/13-1-Red2-tENG, para.12.
[48] Kilolo's Request, paras.23-24; Mangenda's Request, para.6.
[49] ICC-01/04-01/06-2842, para.483.

not open an investigation. However, even if, *arguendo*, the Prosecutor had taken no steps to examine the issue in the *Lubanga* case, this would not show that she was acting in a partial manner in the present case.

28. In addition, the Defence arguments assume a false identity between the two circumstances. Each case must be assessed on its own facts. Kilolo's and Mangenda's comparison to another case does not show that the Prosecutor's assessment in this case was influenced by personal or other improper motives.[50] Their speculative argument should be rejected.

29. Finally, the fact that two former members of the Defence team in the Main Case are now the subject of the Article 70 case does not violate the principle of equality of arms or affect the independence of the Defence in the Main Case.[51] The Prosecution did not use its Article 70 power to "threaten" members of the Defence team or hold them "at its mercy".[52] Rather, the Prosecution appropriately brought the Article 70 case as to address conduct directed against the administration of justice in the Main Case.

(ii) The Prosecutor's lack of impartiality is not established by her appointment of allegedly conflicted staff to the Article 70 Case

30. Kilolo does not support his assertion that Prosecution lawyers working on the Main Case could not act impartially in the Article 70 Case.[53] As a result, his allegation that the Prosecutor's impartiality might reasonably be doubted because she appointed such staff members[54] must fail.

31. Lawyers prosecuting the Main Case had a duty under Article 54(1)(a) to investigate the credibility of witnesses testifying in that case, including witnesses

[50] *Contra* Kilolo's Request, paras.20, 24, 33; Mangenda's Request, para.6.
[51] *Contra*, Mangenda's Request, paras.8-10.
[52] *Contra*, Mangenda's Request, para.9.
[53] Kilolo's Request, paras.26, 28.
[54] Kilolo's Request, paras.26, 28.

called by the Defence. The work done by lawyers and other staff members working on the Main Case, to investigate the Article 70 case through the issuance of the arrest warrant, was a practical and logical use of lawyers and staff within the Office of the Prosecutor and creates no conflict of interest for them. Trial Chamber I's suggestion to the Prosecution in the *Lubanga* case to avoid any risk of conflict *vis-à-vis* possible investigations against the intermediaries is inapplicable to this case.[55] There, the issue of conflict of interest was raised because any Article 70 investigations against Prosecution intermediaries could have potentially implicated Prosecution staff who handled those same intermediaries.

32. During the investigations which led to the Article 70 Case, the Prosecution took all necessary precautions to avoid real conflicts, which could have arisen if Prosecution staff had been exposed to information that may be privileged pursuant to Rule 73(1).[56] Moreover, even in the absence of a conflict of interest, for merely practical reasons, the Prosecutor assigned different lawyers and staff members within the OTP to conduct the Article 70 Case once arrest warrants were issued and she prevented lawyers working on the Main Case from accessing some of the information that it obtained in the Article 70 investigation.[57]

(iii) The Prosecutor's lack of impartiality is not established by the appointment of staff members accused by witnesses in the Main Case to the Article 70 Case

33. [REDACTED] — the Prosecution lawyer who examined two Defence witnesses in the Main Case (D-18 and D-19) — did not pressure those witnesses or

[55] Kilolo's Request, para.27 relying on ICC-01/04-01/06-T-350-Red2-FRA, p.16, lns.9-13; see also ICC-01/04-01/06-2842, para.483; see also Mangenda's Request, para.8.
[56] *Contra:* Kilolo's Request, para.27.
[57] See para.43 below.

influence their testimony by leaking confidential information about it to their superior.[58]

34. First, Witness D-19 did not make any accusation against [REDACTED] or indeed any member of the Prosecution.[59] [REDACTED], [REDACTED].[60]

35. Second, although Witness D-18 accused [REDACTED], this accusation is baseless.[61] [REDACTED].[62] [REDACTED], [REDACTED].[63] [REDACTED], [REDACTED], [REDACTED]."[64]

36. Since Kilolo's submission that [REDACTED] sought to influence the testimony of Defence witnesses D-18 and D-19 lacks support, Kilolo's argument that the Prosecutor violated Article 31 of the OTP Code of Conduct and her impartiality is reasonably in doubt by her appointment of [REDACTED] to the Article 70 investigations,[65] must fail.

(iv) The Prosecutor does not have a personal interest in the Article 70 Case

37. Kilolo's and Mangenda's argument that the Prosecutor has a personal interest in the Article 70 case which should disqualify her pursuant to Rule 34(1)(a) should be dismissed. It is premised on the wholly baseless submission that [REDACTED] demonstrates that the Prosecutor, instead of investigating her own staff for the wrongdoing alleged by the witness, improperly opened proceedings in the Article 70 Case to "protect" herself against any allegations of wrongdoing by the Prosecution.[66]

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[58] *Contra*: Kilolo's Request, paras.29-32.
[59] *Contra* Kilolo's Request, paras.29-30.
[60] See in particular ICC-01/05-01/08-T-287-CONF-ENG, p.53, lns.9-10. See also references to the transcript of the evidence of Witness D-19 at Request, footnote 18.
[61] ICC-01/05-01/08-T-319-CONF-ENG, p.3, ln.4 – p.4, ln.24.
[62] ICC-01/05-01/08-T-319-CONF-ENG, p.32, lns.8-12
[63] ICC-01/05-01/08-T-319-CONF-ENG, p.4, lns.20-23: "[REDACTED]."
[64] ICC-01/05-01/08-T-319-CONF-ENG, p.31, lns.13-15.
[65] Kilolo's Request, paras.29-32.
[66] Kilolo's Request, para.33 and Annex 1. Kilolo refers in particular to item 9 of Annex 1 at p.2. See also Mangenda's Request, para.5.

38. First, no Prosecution staff member ever engaged in any improper conduct relating to this witness[67] and the Prosecutor took no action with respect to [REDACTED], apart from disclosing it to the Defence. Second, Kilolo's speculation about the Prosecution's alleged improper motive for opening this Article 70 investigation is as spurious as it is unsupported. None of these submissions demonstrate that the Prosecutor acted in such a way as to suggest any *personal* interest in this case, thereby creating a ground for disqualification under Rule 34(1)(a).

(v) The Prosecutor's public statement does not demonstrate lack of impartiality

39. Kilolo's claim that the Prosecutor's lack of impartiality pursuant to Rule 34(1)(d) is demonstrated by her reference in a public statement to Kilolo as "the accused" as opposed to "the suspect" is unsupported.[68]

40. Once again the claim is factually incorrect. In the OTP press release on 24 November 2013, which was originally issued in English, the Prosecutor is quoted as saying the following: "It is particularly disturbing that a member of the legal profession *is alleged* to have intentionally and systematically participated in criminal activities aimed at undermining the administration of justice" (emphasis added).[69] The French version of the press release states that *"[i]l est particulièrement inquiétant qu'une personne exerçant une profession juridique soit accusée d'avoir intentionnellement et systématiquement participé à des activités délictueuses visant à entraver l'administration of [SIC] justice."*[70] While the two versions are not exactly the same, it is clear from both that the Prosecutor did not

[67] The 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.
[68] Kilolo's Request, para.34.
[69] 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
[70] 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

suggest that Mr Kilolo's charges had already been confirmed. In addition to her words "is alleged," she specifically described Kilolo and the other suspects as the "individuals arrested pursuant to [a] warrant of arrest".[71] Kilolo's Request omits these details.

41. Moreover, the Prosecutor acted correctly by mentioning the existence of her allegations against Kilolo and the other suspects. By that stage, the Single Judge of Pre-Trial Chamber II had already found that there were reasonable grounds to believe these allegations and issued the arrest warrants.[72] The Prosecutor did not express any opinion that would objectively and reasonably jeopardise her impartiality. Nor would a reasonable observer understand her expressions as such.

(vi) The Prosecutor did not access privileged conversations

42. Mangenda does not support his submission that the entire Office of the Prosecutor should be disqualified because it accessed privileged conversations between Bemba and members of his Defence team that had been audio recorded by the Registry.[73]

43. First, members of the Prosecution team working on the Main Case have no access to this information. Initially, the Prosecution requested that any communications involving Mangenda that had been audio recorded by the Registry should be screened for privilege by an independent counsel before being made available to the Prosecution.[74] Although the Single Judge rejected the Prosecution's request,[75]

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[71] "*Les personnes arrêtées en exécution du mandat d'arrêt*".
[72] ICC-01/05-01/13-1-Red2-tENG.
[73] Mangenda's Request, para.11. The Prosecution understands Mangenda's argument to be limited to conversations audio recorded by the Registry in the UNDU that were made available to the Prosecution pursuant to the Single Judge's decision of 8 May 2013 (ICC-01/05-46). It does not understand his argument to extend to conversations that were intercepted by Dutch or Belgian authorities and for which a different approach was taken to ensure that the Accused's right to legitimate privilege over his conversations with his legal team was protected (see ICC-01/05-01/08-2965-Red, para.13; ICC-01/05-01/08-2984, para.3).
[74] ICC-01/05-01/13-33-Conf, para.13.
[75] ICC-01/05-01/13-48, paras.4-6.

the Prosecution has nevertheless ensured that the Prosecutor, the Deputy Prosecutor and staff members working on the Main Case do not access the Mangenda's conversations audio recorded by the Registry. It will also, out of an abundance of caution, take steps to ensure that any information that could conceivably be construed as privileged be set aside and sealed so it cannot be used.

44. Second, the Single Judge has already determined that the relevant audio recordings are not privileged within the meaning of Rule 73(1).[76] A request to disqualify the Prosecutor is procedurally not an appropriate means to express disagreement with, or to appeal, that decision.[77]

45. Third, Mangenda's Request is based on an erroneous interpretation of legal professional privilege. Irrespective of whether an exception to privilege applies because of the criminal nature of the communications of Mangenda,[78] the privilege under Rule 73(1) concerns communications 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.[79] The fact that Mangenda is a member of the Kinshasa-Matete bar is irrelevant since in the Main Case he was a case manager appointed to support the Defence team.[80] Nor does Rule 73(1) protect conversations between a legal counsel and a

[76] ICC-01/05-01/13-48, paras.4-6.
[77] The Appeals Chamber has repeatedly held that "[t]he decisions that are subject to appeal are enumerated in articles 81 and 82 of the Statute. There is nothing in Part 8 [of the Statute] to suggest that a right to appeal arises except as provided thereunder." ICC-01/04-168 OA3, para.35; ICC-01/04-01/06-2799 OA19, para.7; ICC-01/04-01/06-2823 OA20, para.14; ICC-01/04-01/07-3424 OA14, para.28.
[78] The qualifier, "in the context of the professional relationship" under Rule 73(1), narrows the scope of communications that can be legitimately protected as privileged. This phrase must be interpreted as referring to lawful communications inherent in the professional functions of counsel and does not include the commission of crimes. See, Leeds Magistrates' Court, *ex parte* Dumbleton [1993] Crim LR 866, in which a warrant was issued to search for and seize documents held by a solicitor and allegedly forged by him and another. It was held that the documents were not covered by S.10(1) because the phrase "made in connection with ... Legal proceedings" meant lawfully made, and did not extend to forged documents or copies thereof. As the Single Judge of Pre-Trial Chamber II found in this case, "[criminal] behaviour is to be regarded as an abuse of the statutory right and entails that neither the accused nor the lawyer are any longer entitled to the confidentiality which otherwise pertains to lawyer-client communications as a matter of course." ICC-01/05-52-Red2, para.3; see also para.6.
[79] ICC-01/05-01/13-48, paras.4-6. See also [REDACTED]: ICC-01/05-01/08-2987-conf, paras.11-19.
[80] Mangenda's Request, para.11.

case manager, but rather only conversations an accused personally has with his legal counsel. The fact that the Single Judge appointed an independent counsel to screen, among others, Mangenda's telephone calls that had been intercepted by the Dutch and Belgian authorities,[81] does not demonstrate that the Single Judge re-considered his decision that Mangenda's conversations are not privileged.[82]

(vii) The Prosecutor did not violate Mangenda's immunity

46. Mangenda does not support his contention that the Prosecutor's impartiality might reasonably be doubted because she allegedly violated Mangenda's immunity by taking investigative steps in the Article 70 Case before requesting the lifting of any immunity he may hold.[83]

47. As stipulated in the Agreement on the Privileges and Immunities of the International Criminal Court[84] and the Headquarters Agreement,[85] immunities are granted to counsel and persons assisting counsel only "to the extent necessary for the performance of their functions". The legitimate functions to be performed by counsel and persons assisting them do not extend to conduct encapsulated by Article 70. As the Presidency held, "the relevant purposes of such immunities are the good administration of justice, the proper functioning of the Court and the independent performance of counsel's functions. The purposes for which immunity is granted do not include the commission of offences against the administration of justice".[86]

48. Furthermore, Article 27 precludes the assertion of any immunity as a bar to the Court's exercise of jurisdiction.[87] This necessarily encompasses investigations

[81] ICC-01/05-52-Red2, p.7.
[82] Mangenda's Request, para.11; see also Decision of Single Judge: ICC-01/05-01/13-48, paras.4-6.
[83] Mangenda's Request, para.12.
[84] ICC-ASP/1/3, para.18(1).
[85] ICC-BD/04-01-08, para.25(1).
[86] ICC-01/05-01/08-3001, para.13.
[87] See Art. 27(2).

initiated and carried pursuant to the provisions of the Statute. Insofar as Mangenda's claim is contrary to the Statute itself, it must fail.

49. The Prosecution was not obliged to seek a waiver of immunity to investigate[88] Mangenda and the other suspects in the Article 70 Case, given that there were "grounds to suspect"[89] that they had committed offences against the administration of justice. Plainly, no immunity can be asserted to thwart the investigation of Mangenda for crimes and offences under the jurisdiction of the Court.

50. Finally, the question whether Mangenda or Kilolo are immune from being investigated for Article 70 offences has already been decided. The Presidency of the Court found that the scope of immunities does not extend to the performance of acts by Mangenda and Kilolo which fall under Article 70.[90] Mangenda's Request expresses a mere disagreement with this finding and is not a proper means to challenge the Presidency's decision. As a result of the above, Mangenda's claim that the Prosecution's investigative steps in the Article 70 Case before requesting the lifting of any immunity demonstrates the Prosecutor's lack of impartiality is without merit and must be dismissed.

(viii) The Prosecutor did not mislead the Pre-Trial Chamber

51. Mangenda further erroneously submits that the Prosecutor misled the Pre-Trial Chamber in her application for an arrest warrant by failing to submit certain evidence which Mangenda believes to be exculpatory.[91]

52. In its application for an arrest warrant against Mangenda, the Prosecution submitted that, between February 2011 and April 2013, Mangenda received at least USD 30,774.66 from Babala, Caroline Bemba (Bemba's sister), and Bemba's

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[88] ICC-01/05-01/08-3001, para.10.
[89] ICC-01/05-52-Red2, para.3.
[90] ICC-01/05-01/08-3001, paras.10, 13.
[91] Mangenda's Request, para.13.

close associates Roger Nginamau and Jean-Pierre Singo.[92] It stated that the evidence shows that these payments coincided with the dates of testimony of several Defence witnesses.[93] Although Mangenda apparently concedes that he received this money, he contends that he transferred it to Bemba's account in the Detention Centre and did not use it to pay witnesses, as demonstrated by evidence referred to in his Request.[94]

53. First, this is an evidentiary matter for determination in the confirmation proceedings. Mangenda's Request to disqualify the Prosecutor is not the proper forum to challenge factual allegations in the Prosecution's request for a warrant of arrest. Second, the evidence complained of (ICC Detention Centre account information) comprises part of Bemba's confidential detention record which, at the time of the application for the arrest warrant, the Prosecution did not have, nor had any evidential basis to demand. Mangenda's contentions amount to mere disagreement over the relevance and weight of any given item of evidence cannot constitute a basis upon which to doubt the impartiality of the Prosecutor.

54. In his recent decision pursuant to Article 60(2), the Single Judge of Pre-Trial Chamber II addressed the question of Mangenda's transfer of money to Bemba in the Detention Centre, dismissing it as having no impact on the warrant of arrest. In particular, the Single Judge found that "[t]he fact that Mr Mangenda might have forwarded funds to Jean-Pierre Bemba, even if ascertained as true, is not suitable to weaken the fact that, in light of the material submitted by both the Prosecutor and Independent Counsel, Jean-Jacques Mangenda appears as the author (or the intermediary) of money transfers to the benefit of witnesses in

[92] ICC-01/05-67-Conf, paras.5, 59.
[93] ICC-01/05-67-Conf, para.59.
[94] Mangenda's Request, para.13

connection with their appearance in the Main Case."[95] As a result, Mangenda's argument that the Prosecutor should be disqualified on this ground must fail.

(ix) The Prosecutor did not create a "Congolese conspiracy" to salvage the Main Case

55. Mangenda's argument that the Prosecution artificially created a "Congolese conspiracy" around Bemba to salvage the Main Case[96] is baseless and ignores the scope of Article 70 proceedings and the mandate of the Prosecution under the Statute to establish the truth and to ensure the integrity of the proceedings.[97]

56. The Prosecution did not exclusively seek the arrest of Congolese members of the Defence team. Indeed, Kilolo's emphatic assertion of his Belgian nationality and denial of any citizenship of The Democratic Republic of the Congo belies Mangenda's fantastical claim.[98]

57. Finally, Mangenda does not support his argument that because the Defence filings in the Main Case concerning the authenticity of evidence were drafted in English, it would be inconceivable that Defence evidence could have been forged without the knowledge of the English speaking members of the team.[99] This too is an evidentiary matter for determination in the confirmation proceedings. Mangenda's Request to disqualify the Prosecutor is not the proper forum to raise challenges to the merits of the Article 70 Case and it must be dismissed.

(c) The allegations against the Deputy Prosecutor and staff of the Office of the Prosecutor are likewise baseless

58. Because none of the grounds to disqualify the Prosecutor raised in the Requests has any merit, and because the requests to disqualify the Deputy Prosecutor and

[95] ICC-01/05-01/13-261, para.17.
[96] Mangenda's Request, para.14.
[97] See section on General Observations above.
[98] ICC-01/05-01/13-42, para.25; ICC-01/05-01/13-42-Conf-Anx6.
[99] Mangenda's Request, para.14.

all Prosecution staff from the Article 70 Case are dependent on the same grounds,[100] these requests also fail.

IV. Conclusion

59. None of the grounds to disqualify the Prosecutor, the Deputy Prosecutor or the Prosecution staff has any merit. Accordingly, the Prosecution asks that the three Requests be rejected.

Fatou Bensouda, Prosecutor

Dated this 29th Day of August 2014
At The Hague, The Netherlands

[100] Kilolo's Request, paras.35-36; Mangenda's Request, p.13.