

Dissenting Opinion of Judge Anita Ušacka

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

I. RELEVANT LEGAL FRAMEWORK AND APPLICABILITY OF THE BIAS TEST

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



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

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

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

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

² Decision on Disqualification of 12 June 2012, para. 20.



agree, as expressed in my Dissenting Opinion to the “Decision of the plenary of judges on the Defence Application of 20 February 2013 for the Disqualification of Judge Sang-Hyun Song from the case of the *Prosecutor v. Thomas Lubanga Dyilo*”,³ in relation to the disqualification of judges, that the disqualification of the Prosecutor (and/or Deputy Prosecutor) should not be undertaken lightly. For this reason, I would assess whether the specific circumstances of the *Bemba et al.* case give rise to a reasonable appearance of bias. However, it is my view that imposing a mandatory rebuttable presumption of impartiality upon a reasonable observer is “erroneous and effectively undermines the purpose of the appearance of bias test”.⁴ I fully agree with Steven W. Becker’s analysis that “[o]nly parties may be required to rebut a legal presumption; no such requirement attaches to the informed observer under the apprehension of bias standard”, and imposing a “rebuttable presumption of impartiality upon the reasonable observer is erroneous and effectively undermines the purpose of the appearance of bias test”.⁵ In other words, the essence of the appearance of bias test is the perception of a reasonable observer, meaning an ordinary person fully informed of all the relevant facts.⁶

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

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

⁴ Steven W. Becker, “The ‘Presumption of Impartiality’ and other errors in the International Criminal Court’s Plenary Decision concerning Judicial Disqualification of the President of the Court in the *Prosecutor v. Thomas Lubanga Dyilo*”, *The Global Community: Yearbook of International Law and Jurisprudence*, Vol. 2013, pp. 111 *et seq.*, (hereinafter “Becker’s Commentary of the Plenary Decision for the Disqualification of Judge Song”).

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

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

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

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

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

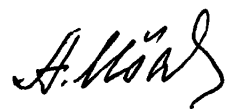
⁷ ICC-01/05-44-Conf-Exp, para. 42.

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

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

⁹ *Supra*, footnote 6.

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



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

III. LEGAL CONSEQUENCES OF THE APPLICATION OF THE BIAS TEST

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

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

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

¹² *Ibid.*

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

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

¹³ Prosecutor's Consolidated Response, para. 20.

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

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

¹⁶ I should note that, if I had been aware of this transcript at the time of the decision of the Plenary on the request for the disqualification of Judge Tarfusser (see "Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Aido*" dated 20 June 2014 and registered on 23 June 2014, ICC-01/05-



11. Furthermore, I recall that several State Parties have incorporated offences under article 70 of the Statute into their domestic laws, thereby making cases of offences against the administration of justice that occur at the Court prosecutable by them domestically. This is in particular the case of the Netherlands,¹⁷ the Host State of the Court and a State Party, and of Belgium,¹⁸ also a State Party and of which Mr Kilolo is a citizen. In that regard, I note that, following an order by the Single Judge of Pre-Trial Chamber II¹⁹ requesting observations from the Netherlands on Mr Kabongo's request that he be prosecuted by the Dutch authorities,²⁰ the Ministry of Foreign Affairs of the Kingdom of The Netherlands indicated that it "sees no reason [...] to prosecute Mr Mangenda Kabongo, under its domestic jurisdiction, for the facts set out in the request".²¹ I note, however, that the Pre-Trial Chamber did not make any decision pursuant to article 70 (4) (b) of the Statute and rule 162 (2) (e)-(f) and (4) of the Rules of Procedure and Evidence.

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

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

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

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

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

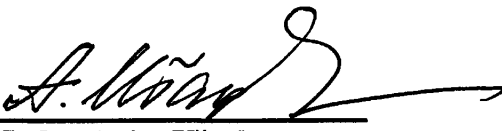
²¹ Letter dated 24 February 2014 and registered on 25 February 2014, ICC-01/05-01/13-223-AnxIV.



IV. CONCLUSION

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

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



Judge Anita Ušacka

Dated this 21st day of October 2014

Date of the original: 22 August 2014

At The Hague, The Netherlands