

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08

Date: 27 January 2010

TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito, Judge
Judge Joyce Aluoch, Judge

SITUATION IN CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Confidential

Observations of the Registrar on invitation by the Chamber dated 19 January 2010,
concerning the request of the "Prosecution's Request to Invalidate the
Appointment of Legal Consultant to the Defence Team" dated 18 January 2010

Source: Registry

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

The Office of the Prosecutor

Luis Moreno Ocampo
Fatou Bensouda

Counsel for the Defence

Richard Nkwebe Liriss
Aimé Kilolo Musamba

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Deputy Registrar

Didier Preira

Defence Support Section

Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

THE REGISTRAR of the International Criminal Court ("the Court"), in conformity with the invitation of the Trial Chamber III dated 19 January 2010¹ is pleased to provide the following observations on the "Prosecution's Request to Invalidate the Appointment of Legal Consultant to the Defence Team"² (OTP Request).

The Registrar, at the outset, notes that the annexes accompanying the OTP Request sufficiently provide a detailed account of the exchange of correspondence between the relevant section of the Registry – Defence Support Section (DSS) – the Counsel concerned, the person to be appointed (Nick Kaufman) and the Office of the Prosecutor. As such, a detailed recounting of each communication, in the humble view of the Registrar, could be redundant. The within observations will, as a substitute, focus on furnishing information and policy considerations to the kind attention of the honorable judges of Trial Chamber III that will be of assistance in their deliberations.

I. Policy and Legal Framework Concerning Conflict of Interests

1. The legal framework existing at the Court concerning the role of the Registrar, and by extension, the Registry as it concerns the treatment of conflict of interest issues that may arise from the appointment of counsel (and their team members) is wholly different than the existing regime at the *ad hoc* tribunals. In the latter cases, the 'institution' at the Registry level has been afforded wider powers and a broader margin of discretion to intervene where conflict of interests arise from an appointment (before the matter becomes *sub judice*). At the Court the preference as expressed in both legal basis and adopted policy has been to place that onus squarely on counsel in conformity with his or her professional ethical obligations, and to allow

¹ Email of Ms. Stephanie Godart, Legal Advisor of Trial Chamber III dated 19 January 2010.

² ICC-01/05-01/08-670-Conf, 18 January 2010.

for the judicial branch of the Court – its Chambers – to act as the ultimate arbitrator over the issue.

2. The Special Tribunal for Lebanon (STL) has instituted a sufficiently similar framework, where the role of the judicial organ of the Tribunal in settling conflict of interest matters is clearly paramount.³ An important difference between the legal regime at the STL and the ICC must however be highlighted. Whereas in the latter it is up to counsel to manage and/or refuse the appointment as appropriate and to raise the matter with the Chamber when faced with a conflict of interest issue, in the former case the Head of the Defence Office has been specifically mandated in the legal texts of the Tribunal to take a more active role in the management of conflict of interests issues that may arise from a contemplated appointment, and to appear before a judge of the Pre-Trial Chamber or Chamber when warranted.
3. The approach adopted at the Court– which has received the backing of the legal profession – has been given legal support in several articles contained in the Code of Professional Conduct for counsel⁴ (Code), in particular its Article 16, where it is stipulated that: “[c]ounsel shall exercise all care to ensure that no conflict of interest arises. Counsel shall put the client’s interests before counsel’s own interests or those of any other person, organization or State, having due regard to the provisions of the Statute, the Rules of Procedure and Evidence, and this Code.”

³ See for instance Article 18(F) of the Special Tribunal for Lebanon’s Directive on the Assignment of Defence Counsel, which provides that: “Where, at any time after the assignment or appointment of counsel, counsel has a conflict of interest or there is the appearance of a conflict of interest, the Head of the Defence Office shall immediately take appropriate steps, which may include: (i) appearing before the Pre-Trial Judge or a Chamber in relation to the conflict; (ii) where appropriate, in consultation with counsel involved, suggesting an alternative resolution of the conflict of interest; (iii) appointing an independent counsel to determine whether a conflict of interest exists, and, if so, whether the counsel can continue to represent the accused; or (iv) referring the matter to the competent body envisaged in the Code of Professional Conduct and act in accordance with Article 34 (B). Article 34(B) of the Directive, in turn, provides that the Head of the Defence Office may, in consultation with the Pre-Trial Judge or Chamber, suspend the assignment of an individual counsel when disciplinary proceedings have been instituted against that person.

⁴ Resolution ICC-ASP/4/Res.1.

4. Of equal relevance to this legal framework are Articles 12 and 13 of the Code. Article 12.1 (a) of the Code stipulates that counsel shall not represent a client: “[i]f the case is the same as or substantially related to another case in which counsel or his or her associates represents or formerly represented another client and the interests of the client are incompatible with the interests of the former client, unless the client and the former client consent after consultation.” Article 12.1 (b) further requires of counsel not to represent a client where he or she “was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear.” The Code places the onus on counsel to seek the authorization of the Chambers of the Court to lift such impediment to representation if it is in the “interests of justice” to do so. Article 13.2(a) of the Code, in turn, requires counsel to refuse an appointment or representation agreement if there exists a conflict of interest or one that may arise from the appointment. The Code contains numerous other provisions highlighting the obligations of counsel to avoid conflict of interests, and adopt corrective or remedial measures as necessary. Should counsel violate his or her obligations under the Code as it concerns the avoidance and management of conflict of interest issues, the disciplinary regime of Chapter 4 of the Code is a venue that can be pursued to correct and respond to any such violation. Counsel is also ‘vicariously’ liable for the conduct of his or her team members.⁵
5. The Registry of the Court in its neutral role can only act within the limits set by the legal framework outlined above. In practical terms, when a request is made by the defence for the appointment of counsel or any other team member, which in the view of the Registry may *prima facie* involve conflict of interest issues – e.g. the appointment of a former OTP staff to a defence team – the Registry notifies the parties concerned and facilitates communication between them, furnishing explanations on the Code, obligations arising thereof and the role of the Registry in

⁵ Articles 7.4; 31 and 32 of the Code.

this process. The Registry, through DSS, in essence mainly acts as a channel of communication between parties with opposed views in respect to an appointment until such time that counsel re-affirms his or her stance on the issue having been fully appraised of his obligations under the Code, the facts at hand and the objections of the opposing party; after which, the Registry is obliged to formalize the appointment. In this case, as the supporting documentation annexed to the OTP Request and to this filing demonstrate, a lengthy process of deliberation was facilitated by the Registry between the OTP and the Counsel of record in charge of the defence of the accused, Mr. Jean-Pierre Bemba Gombo.

6. Beyond this facilitation role, the Registry cannot *proprio motu* bar or act as an impediment to the appointment of counsel or a team member if counsel with carriage over the matter, and who has the sole authority to make such appointments, insists on the appointment. It bears repeating that the onus to refuse and to properly manage a conflict of interest issue is a requirement that rests with counsel in accordance with his or her Code obligations, with the Chamber acting as the ultimate arbiter.
7. For the Registry to adopt an alternative approach against the above defined legal background in which it must operate would not only be to ask of it to act in contravention of the Court's legal texts but also to cast doubt on its neutral character.

II. Supplementary Information

8. The Registry brings the following non-exhaustive selection of documents to the attention of the Chamber as a supplement to those already annexed to the OTP Request:
 - i. Request of Counsel of record over the case for the appointment of Mr. Nick Kaufman dated 9 November 2009 (Annex 1);
 - ii. Email of Chief of DSS dated 23 November 2009 (Annex 2);

- iii. Email of Chief of DSS dated 15 December 2009 (Annex 3),
 - iv. Email of Counsel of record dated 28 December 2009 (Annex 4),
and
 - v. Email of ALO of DSS dated 6 January 2010 (Annex 5).
9. The Registrar remains at the disposal of the Trial Chamber should further elaborations be required;
10. Done in both English and French, the English version being authoritative.



Silvana Arbia

Registrar

Dated this 27 January 2010

At The Hague (Netherlands)