

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 23/03/2015

TRIAL CHAMBER VII

**Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Bertram Schmitt**

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***

Confidential

**Defence Response to the Prosecution's Submission on the Appointment of
Defence Counsel, with Confidential Annex A**

Source: Defence for Mr. Jean-Pierre Bemba Gombo

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

The Office of the Prosecutor

Fatou Bensouda

James Stewart

Kweku Vanderpuye

Counsel for the Defence of Mr Jean-Pierre Bemba Gombo

Melinda Taylor

Counsel for the Defence of Mr Aimé Kilolo Musamba

Paul Djunga

Counsel for the Defence of Jean-Jacques Mangenda Kabongo

Christopher Gosnell

Counsel for the Defence of Fidèle Babala Wandu

Jean-Pierre Kilenda Kakengi Basila

Counsel for the Defence of Mr Narcisse Arido

Goran Sluiter

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

Introduction

1. Code of Conduct obligations exist to protect the best interests of the client, and to ensure the overall administration of justice. Their purpose “can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule”.¹
2. The Prosecution’s ‘Submission on the Appointment of Defence Counsel’, (the Submission)² has failed to provide a cogent explanation as to why Counsel’s withdrawal is required to secure either the best interests of Mr. Bemba, or the administration of justice.
3. The administration of justice would be served by protecting Mr. Bemba’s right to effective legal representation. In order for Mr. Bemba’s Defence to represent him effectively, his Defence must, however, have the ability to devise a coherent strategy that protects his overall best interests, across the two cases in which he is appearing as a defendant.
4. In this regard, the assumptions underpinning the Submission are flawed; the Prosecution has sought to define the best interests of Mr. Bemba in a hermetic manner within the confines of the Article 70 case, and to generate an artificial conflict between his strategy in the Article 70 case and his strategy in the Main case.

¹ Commentary of New York City Bar ethics board, New York Rules of Professional Conduct, p. 2
[http://www.nycbar.org/pdf/FinalNYRPCsWithComments\(April12009\).pdf](http://www.nycbar.org/pdf/FinalNYRPCsWithComments(April12009).pdf)

² ICC-01/05-01/13-819-Conf.

5. Mr. Bemba is, however, one client with one best interest. No conflict, real or apparent, is generated through a strategy, which seeks to harmonise the different interests of the same client in different cases.
6. There is also no impediment to representation as Article 12(3) of the Code of Professional Conduct (the Code) has no applicability to the present case. The Prosecution has failed to demonstrate that there is a substantial probability that Mr. Haynes QC or Ms. Gibson will be called as witnesses in this case, and Mr. Haynes QC and Ms Gibson are also not 'associates' of Ms. Taylor in the Article 70 case.
7. Finally, Mr. Bemba has received independent legal advice in relation to the ramifications and implications of Ms. Taylor's appointment.
8. After having received such advice, Mr. Bemba has instructed Ms. Taylor in writing to continue as Counsel and not to withdraw.
9. This Response has been filed on a confidential basis in order to respect the level of confidentiality of the Submission. The Defence has no objection to this Response being reclassified as public, with a public redacted version of Annex A.

Submissions

No conflict, real or apparent, is generated through Counsel's concurrent representation of Mr. Bemba in both the Main Case and the Article 70 case

10. According to the Prosecution, if Mr. Bemba appoints any member from his Main Case team to represent him concurrently on the Article 70 case, it would generate a conflict of interest.

11. There is, however, no foundation to the Prosecution's claim that such an appointment would generate a real or apparent conflict of interest. Apart from the issue of Article 12(3) of the Code of Conduct, which will be addressed in the next section, the Prosecution has been able to pin point only one hypothetical divergence in interest, which has no actual application to this case.
12. According to the Prosecution, Counsel's appointment in both cases generates a conflict of interest because it restricts her ability to "pursue potentially viable defences; for example, mounting a defence strategy which discredits Bemba's overall representation in the Main Case".³
13. The Prosecution's concept of viable defences appears to either divorce the notion of defence strategy entirely from the instructions of the client, or presume that the client could or should advance a completely schizophrenic strategy in two, related cases.
14. Mr. Bemba has chosen to be represented by Mr. Haynes QC, and Ms. Gibson in the Main Case. Any attack on their credibility, veracity or legal skills would necessarily have implications for Mr. Bemba's Defence in the Main Case, and would therefore affect Mr. Bemba's own interests.
15. It is simply not viable (from a Defence rather than Prosecution perspective) for Mr. Bemba to discredit his Defence in the case where he faces very serious charges, for the purpose of making a point in the Article 70 case, which is at best, peripheral.

³ ICC-01/05-01/13-819-Conf, para. 26.

16. Mr. Bemba has also confirmed he never instructed his former Counsel to pursue such a strategy, and that any submissions raised by former Counsel on this point were included in filings without his knowledge or consent. After receiving independent legal advice, Mr. Bemba has also indicated that he could not envisage any circumstances in which it would be within his interests to raise such a strategy in the Article 70 case.

17. The case law relied upon by the Prosecution to substantiate the existence of a conflict of interest is also inapposite. The present situation is not analogous to the case of a Counsel representing different defendants, who might have different and opposing interests. In both the Main Case and the Article 70 case, Counsel is obliged to act in the best interests of Mr. Bemba (and not any other individual), and, absent proof to the contrary, must be presumed to do so.⁴

18. Moreover, whilst opposing the interests of Mr. Bemba in both cases might serve a prosecutorial divide and rule strategy, it does not serve the best interests of Mr. Bemba; his best interest is to coalesce all of his different interests into one coherent and consistent strategy, across the different cases.

19. This case has been built on privileged and confidential Defence information extracted from the Main Case. The Prosecution has contacted and introduced statements from witnesses, who initially appeared for the Defence in the Main Case. If these witnesses are called in the Article 70 case, there is a possibility that evidence might be elicited from them which touches on the charges in the Main Case.

⁴ ICC-01/05-01/08-769, para 45; The Defence further notes that the Prosecutor appears to apply a uniform presumption of good faith to its own staff (see Annex A – Correspondence between Defence and the Prosecution concerning potential conflicts of interest regarding Prosecution staff); there is no basis for refusing to apply the same to the Defence.

20. The opposite also holds true; namely, that it must also be anticipated that there will be continuing litigation in the Main Case on issues that will affect the rights of Mr. Bemba in the Article 70 case.
21. The administration of justice should be built on procedural fairness and equality of arms. These notions would be perverted if the Prosecution, as one organ, could enjoy full procedural standing in both cases, and exploit the factual overlaps between them, whilst at the same time, Mr. Bemba is denied the right to instruct a Defence team, which is capable of protecting him from the adverse consequences that could stem from these factual overlaps.
22. In this regard, the establishment of two entirely distinct and separate defence teams has already proved to be deleterious to Mr. Bemba's interests, and would continue to prejudice his interests, if maintained.
23. A clear example is set out in the correspondence in Annex A; when Mr. Haynes QC attempted to raise issues concerning an apparent failure by Mr. Badibanga (the Senior Trial Attorney in the Main Case), to disclose his prior relationship with the Independent Counsel tasked with reviewing privileged information in the Main Case, he was informed by the Prosecution that as he was "not counsel of record in the Article 70 case (ICC-01/05-01/13), [the Prosecution] was not prepared to discuss matters related to that case" with him.⁵
24. A further example arose when the Main Case Defence attempted to intervene in relation to specific procedural developments in the Article 70 case in order to protect Mr. Bemba's rights as concerns privileged material pertaining to the Main Case.

⁵ Letter of 2 June 2014, p. 12, Annex A.

25. In response to a submission, which had been filed with Mr. Bemba's express authorisation,⁶ the Prosecution averred that only the Article 70 Defence Counsel had standing in this case, even if the litigation in question concerned matters pertaining to the Main Case.⁷ The Prosecution even went so far as to suggest that Article 28 of the Code of Conduct prevents the Defence in the Main Case from discussing issues concerning the Article 70 case with Mr. Bemba.⁸

26. In deciding the issue of standing, the Single Judge confirmed that the Defence in the Main Case had no standing in the Article 70 case. The Single Judge nonetheless appeared to suggest that this Gordian knot of standing could be cut if Mr. Bemba changed the composition of his defence in the Article 70 case.⁹

27. That is exactly what Mr. Bemba has done. He has appointed a Counsel from his Main Case team in order to ensure that this Counsel can provide legal advice to him in the Article 70 case, which takes into consideration his rights and interests in both cases.

28. At the same time, the same Counsel can ensure that the strategy and litigation in the Main Case does not adversely affect his interests in the Article 70 case.

29. Rather than creating a conflict, this approach eliminates the possibility of conflict arising between the strategies employed in both cases.

⁶ ICC-01/05-01/13-428-Anx2.

⁷ ICC-01/05-01/13-447-Red, para. 6.

⁸ ICC-01/05-01/13-447-Red, footnote 9.

⁹ ICC-01/05-01/13-456, p. 4.

Article 12(3) of the Code does not apply

30. Article 12(3) only applies if there is a substantial probability that Counsel or an associate of Counsel will be called to testify as a witness.
31. In this particular case, the Prosecution has failed to demonstrate that there is a substantial probability that Mr. Haynes QC or Ms. Gibson will be called to testify as witnesses by any of the parties in this case.
32. The Prosecution is required to have completed most, if not all of its investigations by this point.¹⁰ It is therefore significant that the Prosecution has not referred to any actual (as opposed to purely speculative or hypothetical) information that could form the basis for calling Mr. Haynes QC or Ms. Gibson as witnesses.¹¹
33. Moreover, if the Prosecution had any basis to believe that Mr. Haynes QC or Ms. Gibson had information that could be relevant to the Article 70 case (whether it be incriminating or exculpatory), then the Prosecution should have taken measures to obtain such information in a diligent and timely manner.
34. However, although the case commenced in November 2013, the Prosecution has never written to Mr. Haynes QC or Ms. Gibson to request to interview them in relation to their putative knowledge of issues concerning the Article 70 case.

¹⁰ ICC-01/04-01/10-514, para. 44.

¹¹ See Submission, para. 28. The Pre-Trial Chamber's findings concerning the charges against the different defendants were also predicated on their factual conclusion that Mr. Haynes Q.C. and Ms. Gibson were unaware of the alleged actions of the defendants in this case, and were not otherwise involved: ICC-01/05-01/13-749, paras. 67-68.

35. The charges were also confirmed after a lengthy and litigious process, and the factual parameters will not change (unless the Prosecution applies to amend the charges). The Prosecution should therefore be in a position to confirm whether it will or will not call Mr. Haynes QC or Ms Gibson as witnesses. It is therefore patently inadequate for the Prosecution to merely intimate that it cannot “exclude the possibility” of calling them at a later stage.¹²

36. Although criminal trials are organic, the Prosecution does not possess an unfettered right to call witnesses at a ‘later stage’ of the proceedings. Apart from the question as to whether rebuttal evidence can be called at the ICC, or within the limited framework of an Article 70 case, one of the criteria for calling such evidence is that the relevance of such was not foreseen during the initial Prosecution case.¹³

37. In order to call either Mr. Haynes QC or Ms. Gibson at a later stage (i.e. as rebuttal witnesses), the Prosecution would need to demonstrate that it was not possible to anticipate at the present juncture that they should have been called as witnesses. However, if the relevance of their testimony is in fact impossible to ascertain at this juncture, then it is equally impossible to conclude that there is a substantial probability that Mr. Haynes QC and Ms. Gibson will be called as witnesses.

38. It is also telling that whilst the Prosecution intimates that other Defence teams could call Mr. Haynes Q.C and Ms. Gibson, its submission was initially filed *ex parte* to such Defence teams.

39. None of the Defence teams have gone on the record to indicate an intention to call Mr. Haynes QC or Ms. Gibson. It is also the understanding of the

¹² Submission, para. 21.

¹³ ICC-01/04-01/06-2727-Red, para. 37 et seq.

Defence that at present, none of the Defence teams have an intention to call Mr. Haynes QC or Ms. Gibson as witnesses.

40. Again, in the absence of concrete indicia that Mr. Haynes QC or Ms. Gibson possess information that could be relevant to their possible defence strategies, the mere hypothetical possibility that other Defence teams could do so fails to meet the requisite 'substantial probability' threshold.
41. The test of 'substantial probability' should also not be diluted to a mere possibility standard. There is a hypothetical possibility in every case before the ICC that one of the parties or participants might wish to obtain information in the possession of Defence counsel. This, in itself, cannot and should not be used as a tool for restricting the defendant's choice of counsel.
42. Otherwise, there would be an obvious incentive to designate Counsel as a potential witness, irrespective as to whether any of the parties have an actual or genuine wish to elicit the Counsel's testimony, or a genuine possibility of actually calling the Counsel as a witness.
43. In this regard, neither Mr. Haynes QC nor Ms. Gibson have indicated that they would consent to testify as witnesses in this case. Most importantly, Rule 73(1) prohibits them from doing so, absent the consent of Mr. Bemba. Mr. Bemba has never provided such consent. After receiving independent legal advice, Mr. Bemba has also indicated that he does not envisage any circumstance in which he would either wish to either call Mr. Haynes QC or Ms. Gibson as witnesses, or waive privilege in order to allow them to testify for another party to the proceedings.
44. The Prosecution has also not set out any reasons to suggest that Rule 73(1) would not apply in full force to information, which has come within Mr.

Haynes QC's or Ms. Gibson's knowledge during the course of their representation of Mr. Bemba.

45. It is impossible to find that the 'substantial probability' threshold has been met in connection with persons who cannot be compelled to testify. At the very least, this threshold question should be determined before resorting to such a disproportionate measure as replacing Mr Bemba's Defence team in the Article 70 case.

46. The Prosecution has also failed to establish that Article 12(3) applies to Counsel in this case. As acknowledged by the Prosecution, Article 2(2) defines an "associate" as "lawyers who practise in the same law firm as counsel". Neither Mr. Haynes QC nor Ms. Gibson "practise in the same law firm" as Counsel.

47. Presumably, the extension of the prohibition to lawyers in the same law firm is predicated on the fact that law firms have firstly, common objectives and financial incentives that are separate from the interests of the client, and secondly, hierarchical levels of supervision, which apply to all cases represented by that law firm.

48. The law firm prohibition cannot be applied by analogy to the present circumstances for the following reasons. Firstly, Counsel in both the Main case and the Article 70 case are required to act in Mr. Bemba's best interests and no other. Unlike a law firm, there is no other common interest between Counsel that would undermine or compete with their shared duty to protect Mr. Bemba's best interests.

49. Secondly, neither Mr. Haynes QC nor Ms. Gibson provide instructions to Counsel in relation to the Article 70 case. In this regard, contrary to the

position asserted by the Prosecution,¹⁴ Ms. Taylor, Ms. Gibson and Mr. Haynes QC cannot comprise “a singular defence team” in the Article 70 case because neither Ms. Gibson nor Mr. Haynes QC are appointed to the Article 70 case.

50. Moreover, if the drafters had wanted Article 12(3) to be interpreted in the manner proposed by the Prosecution, then they would have used the term ‘defence team’, which is a term employed elsewhere in the Code.¹⁵ It was therefore a deliberate choice to limit the prohibition to this specific genre of persons working together in a law firm.

51. Any change in the meaning and scope of the term ‘associate’ would also have significant implications as concerns the implementation of both Article 12(1) and Article 12(3) of the Code.

52. For example, pursuant to Article 12(1)(a), counsel cannot represent a client in a case:

if 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 [...].

53. If an ‘associate’ is interpreted to encompass all persons working on the same team, then Article 12(1)(a) would render it impossible for international lawyers, who work together on one case, to work on opposing cases in the future. This would constitute a completely unreasonable restriction on the right to practice before international courts and tribunals, and the right to freely choose counsel.

¹⁴ ICC-01/05-01/13-819-Conf-Exp, footnote 11.

¹⁵ The Code defines defence team as counsel and all persons working under his oversight.

54. A broad definition of 'associates' in Article 12(3) is also not consistent with the practice of the ICC, and would significantly impede the administration of justice.
55. If, as is suggested by the Prosecution, an 'associate' is defined to include all members of a defence team, it would necessarily include investigators, case managers, consultants, legal assistants, and interpreters.
56. This would mean that if any such persons testified in the case, Counsel would be disqualified from acting in the case (even if Counsel was the calling party). This would plainly be unreasonable, and contrary to the practice of the Court. For example, in the Katanga case, the Defence called its investigator as a witness, and no issues under Article 12(3) were raised.¹⁶
57. Alternatively, if 'associate' is defined in a broad manner, then this would also trigger a broad definition of 'case' in Article 12(3)(b); the Prosecution cannot cherry pick the words and components that it wishes to expand.
58. If Counsel can be considered to be associated to Mr. Haynes QC and Ms. Gibson due to their relationship in the Main Case, then it follows that the possibility that the testimony relates to the nature of legal services in the Main Case must also provide an exception.
59. The applicability of such an exception cannot be determined due to the dearth of information concerning the possible topics of their putative testimony. This is not, however, grounds for dismissing the exception, but rather grounds for finding that Article 12(3) does not apply in the first place.

¹⁶ ICC-01/04-01/07-2919.

After having received independent legal advice, Mr. Bemba has provided written consent for Ms. Taylor to continue as Counsel

60. Mr. Bemba appointed Mr. Iain Edwards to provide independent legal advice in relation to the issue of conflicts of interest, and the potential ramifications of Ms. Taylor's concurrent appointment in both the Main Case and the Article 70 case.
61. After having received such advice, Mr. Bemba has instructed Counsel, in writing, not to withdraw from either case.
62. Irrespective as to whether is an actual or apparent conflict of interest in this particular case, Article 16 permits Mr. Bemba to consent to Counsel's continued appointment.
63. Contrary to the position advanced by the Prosecution, Article 16 of the Code of Conduct applies to Article 12(3), by virtue of Article 12(4), which provides that "[t]his article is without prejudice to article 16 of this Code". This necessarily includes the waiver procedure in Article 16(3) of the Code.
64. The fact that Article 12(1) includes a specific waiver procedure whereas Article 12(3) does not is irrelevant. Article 16 is the *lex generalis* which governs all conflicts. In contrast, Article 12(1) includes a specific waiver regime in order to address the specific scenarios set out therein.
65. The position that Counsel providing testimony triggers a non-waivable conflict is also not consistent with the practice of the ICC. For example, Counsel were required in the *Ruto et al.*, case to submit signed undertakings

on issues of fact, without triggering either Counsel's disqualification, or that of their team members.¹⁷

66. Apart from the fact that the Code does not envisage a possibility for the Chamber to disturb the appointment of Counsel if the client has given informed consent to the continuation of Counsel's representation, it would not be in the interests of justice to do so in this case.

67. The withdrawal of Counsel would have significant implications as concerns the protection of Mr. Bemba's rights in the Main Case and *vice versa*.

68. Counsel is not a fungible who can be replaced with no impact on the case or Mr. Bemba's rights; Mr. Bemba appointed Counsel because of her specific knowledge and insight into the strategy in the Main Case. The appointment of a new Counsel in the Article 70 case would necessarily compromise Mr. Bemba's right to an expeditious trial, as any such Counsel would first need to review the Defence materials in both cases. It would also be unrealistic to either expect or require a Counsel, who has no insight into the strategy in the Main Case, to possess the ability to react to issues arising spontaneously during Article 70 trial hearings, in a manner that protects Mr. Bemba's rights in the Main Case.

69. Mr. Bemba is also responsible for either paying or reimbursing the costs of his Defence. It would be inefficient and financially punitive to require him to fund two separate Defence teams to review substantially the same facts and evidence.

¹⁷ ICC-01/09-01/11-1312, para. 2.

70. Rather than being preserved, the interests of justice would be undermined by the diminished level of protection afforded to Mr. Bemba, and the unnecessary, expensive, and time consuming duplication engendered by having two entirely separate Defence teams.

Relief Sought

71. For the reason set out above, the Defence for Mr. Bemba respectfully requests the Trial Chamber to reject the Submission.



Melinda Taylor
Counsel of Mr. Jean-Pierre Bemba Gombo

Dated this 23rd day of March, 2015

At The Hague, The Netherlands