

BRIEFING PAPER

The Trial of Bemba et al. before the International Criminal Court

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After his trial on charges of war crimes and crimes against humanity before the ICC, Jean-Pierre Bemba Gombo now stands accused along with four others of seeking to influence the outcome of the process by bribing witnesses. The former Congolese politician and militia leader faces a second trial on charges of crimes against the administration of justice, together with two senior members of his defense team, a Congolese Member of Parliament, and a defense witness. The trial is the first of its kind at the court.

The Defendants

Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido are accused of offences against the administration of justice in connection with witness testimony in the *Jean-Pierre Bemba Gombo* trial at the International Criminal Court (ICC). Bemba is charged with crimes against humanity and war crimes in a separate trial at the ICC [the “main trial.”]. Kilolo was lead defense counsel for Bemba in that case and Mangenda was the defense case manager. Babala is a member of the Democratic Republic of the Congo (DRC) parliament and Bemba’s former deputy secretary general. Arido was listed as a defense witness in the main trial and also acted as a liaison between potential witnesses and Bemba’s defense team in the main trial.

The Charges

The defendants are charged with offenses against the administration of justice under Article 70 of the Rome Statute. The prosecution alleges that the defendants bribed witnesses to give false testimony in the main trial. The defendants were allegedly part of a network led and coordinated by Bemba and perpetrated the crimes in different ways under Article 25(3) of the Rome Statute, including by committing, soliciting, inducing, aiding, abetting, or otherwise assisting in their commission. They each allegedly played a different role in the evidence tampering. If convicted, the accused could face up to five years in prison, a fine, or both. The charges against each witness are:

Jean-Pierre Bemba Gombo: Bemba allegedly planned and coordinated the witness tampering and the witnesses’ eventual false testimonies. He allegedly gave specific instructions to Kilolo and Babala about the content of testimony and the transfer of funds. He is charged as a co-perpetrator—that is, someone who committed the crime(s) with one or more others according to a common criminal plan—under Article 25(3)(a) for intentionally corruptly influencing witnesses, a crime under Article 70(1)(c), and intentionally presenting false evidence, a crime under Article 70(1)(b). If the trial judges do not find that the evidence is sufficient to convict him as a co-perpetrator, they may find him guilty of alternative charges on the basis of accessory liability under Article 25(3)(b)—which means he allegedly solicited the crime but did not commit it himself. He is also charged as an accessory under Article 25(3)(b) for soliciting false testimony from the witnesses, a crime under Article 70(1)(a).

Aimé Kilolo Musamba: Bemba’s lead counsel, Kilolo allegedly instructed 14 defense witnesses to provide or withhold certain information during their testimony in exchange for money. He is charged as a co-perpetrator under Article 25(3)(a) for intentionally corruptly influencing witnesses, a crime under Article 70(1)(c), and intentionally presenting false evidence, a crime under Article 70(1)(b). He is also charged as an accessory under Article 25(3)(b) for soliciting or inducing false testimony, a crime under Article 70(1)(a).

Jean-Jacques Mangenda Kabongo: A member of Bemba's defense team and the case manager, Mangenda was allegedly aware that Kilolo was illegally influencing witnesses. Mangenda purportedly relayed instructions and messages between Bemba and Kilolo and worked with Kilolo on the logistics and strategy for the testimony and money transfers. He is charged as a co-perpetrator under Article 25(3)(a) for intentionally corruptly influencing witnesses, a crime under Article 70(1)(c), and intentionally presenting false evidence, a crime under Article 70(1)(b). In the alternative, he is charged as an accessory under Article 25(3)(c) for aiding, abetting, or otherwise assisting in the commission of these crimes. Mangenda is also charged with accessory liability under Article 25(3)(c) for aiding, abetting, or otherwise assisting witnesses in giving false testimony, a crime under Article 70(1)(a).

Fidèle Babala Wandu: A member of the Democratic Republic of the Congo (DRC) parliament and deputy secretary general of Bemba's Movement for the Liberation of Congo, Babala allegedly handled the financial aspects of the purported witness corruption by personally transferring money to some of the witnesses as well as to Kilolo, Mangenda, and Arido. He is charged with accessory liability under Article 25(3)(c) for aiding, abetting, or otherwise assisting in corruptly influencing witnesses, a crime under Article 70(1)(c); presenting false evidence, a crime under Article 70(1)(b); and in relation to the witnesses giving false testimony, a crime under Article 70(1)(a).

Narcisse Arido: Arido was asked by the Bemba defense team to provide expert testimony about military operations in CAR in the main trial. He allegedly received several money transfers from Kilolo and Babala. He recruited witnesses for the defense team and purportedly instructed them on what to say in their statements to the lead counsel, promising them money in exchange. These witnesses later allegedly falsely testified in the main trial. He is charged with direct perpetration under Article 25(3)(a) for intentionally corrupting four defense witnesses, a crime under Article 70(1)(c). In the alternative, he is charged with aiding, abetting, or otherwise assisting in the commission of that crime. He is also charged with accessory liability for presenting false evidence, a crime under Article 70(1)(b), and in relation to the witnesses giving false testimony, a crime under Article 70(1)(a).

Warrants of Arrest & Release

Pre-Trial Chamber II issued the warrants of arrest on November 20, 2013. Redacted versions were made public on November 28, 2013.

On November 23 and 24, 2013, Belgian authorities arrested Kilolo; Dutch authorities arrested Mangenda; French authorities arrested Arido; and DRC authorities arrested Babala. Babala and Kilolo were transferred to the ICC detention center on November 25, 2013. Mangenda was transferred there on December 4, 2013 and Arido on March 18, 2014.

On October 21, 2014, Pre-Trial Chamber II ordered the release of Kilolo, Mangenda, Arido, and Babala on the condition that they appear for trial or whenever summoned by the court. Although the Appeals Chamber reversed this decision in May 2015, the Appeals Chamber found that it was not in the interests of justice for the accused to be arrested again. On August 17, 2015, Trial Chamber VII ordered their continued release on the condition that they are present in The Hague for the trial.

Background

In May 2008, Pre-Trial Chamber III issued an arrest warrant for Jean-Pierre Bemba Gombo, a former vice president, businessman, and militia leader in the Democratic Republic of Congo (DRC) and in June 2009 decided that there was enough evidence to proceed to trial on three counts of war crimes (murder, rape, and pillaging) and two counts of crimes against humanity (murder and rape). These crimes were allegedly committed during an armed conflict in the Central African Republic (CAR) between October 26, 2002 and March 15, 2003. This trial (“the main trial”) has ended and the judges from Trial Chamber III are currently deliberating their trial judgment.

On November 20, 2013, Cuno Tarfusser, the single judge of Pre-Trial Chamber II, [issued five arrest warrants](#) against Bemba and his four co-accused in the trial to commence on September 29, 2015 (the “Bemba et al. trial”). The prosecution sought arrest warrants based on a court authorized interception of communications (including emails and phone calls) between Bemba and his defense team. Judge Tarfusser found that there were reasonable grounds to believe that the suspects were responsible for the commission of crimes against the administration of justice. The arrest warrants alleged that Bemba and his four co-accused conspired for the purposes of presenting false or forged documents and bribing persons to give false testimony in the case against Bemba.

The witnesses involved are [‘Witness Do4-02,’](#) [‘Witness Do4-03,’](#) [‘Witness Do4-04,’](#) [‘Witness Do4-06,’](#) [‘Witness Do4-13,’](#) [‘Witness Do4-15,’](#) [‘Witness Do4-23,’](#) [‘Witness Do4-25,’](#) [‘Witness Do4-29,’](#) [‘Witness Do4-54,’](#) [‘Witness Do4-55,’](#) [‘Witness Do4-57’](#) and [‘Witness Do4-64.’](#)

Article 70 of the Rome Statute grants the court jurisdiction to investigate and prosecute anyone for offenses against the administration of justice. Crimes within Article 70 include knowingly presenting false or forged evidence, corruptly influencing a witness, and obstructing or interfering with the attendance or testimony of the witness. A person convicted could face up to five years imprisonment, a fine, or both.

In November 2014, Pre-Trial Chamber II confirmed the charges against the five co-accused. PTC II found that there were substantial grounds to believe that Kilolo “regularly” contacted witnesses in advance of and during their testimony and “instructed” them on the content of the answers they should provide, as well as the information they should withhold during their testimonies. The alleged contacts included telephone calls, physical meetings in Douala and Yaoundé, both in Cameroon, and during breaks between courtroom sessions. Kilolo is reported to have made “a series of money transfers of varying amounts to some of the witnesses.”

PTC Judges said evidence appeared to indicate that throughout the period of the charges, Mangenda was “fully aware” of Kilolo’s conduct and the possible legal consequences of his actions. As case manager for the defense, Mangenda allegedly acted as a “liaison” between Kilolo and Bemba about money transfers and the content of testimonies.

Mangenda is also alleged to have “actively” advised Kilolo on the best way to deceive Bemba into believing that they needed more money for “neglected” witnesses, as a strategy to enrich themselves. The judges determined that the two lawyers kept other members of the defense team unaware of their actions and that their main concern was “to please Mr. Bemba and to implement his instructions, making sure that he was and remained satisfied with their work.”

The PTC judges found that as the “financier,” Babala transferred “considerable” amounts of money to witnesses and to the two defense lawyers. Prosecution recordings of intercepted phone calls from Bemba’s privileged line—permitted by the judges for this investigation—showed that the Congolese parliamentarian conversed with Bemba on a regular basis, sometimes more than once a day. The two used “codes” to refer to money transfers.

Arido allegedly recruited prospective defense witnesses by “exploiting” their personal situations and leading them to falsely testify “under the illusion” that it would result in a better future for them. He introduced four witnesses to Kilolo, after instructing them to lie to him about having served in the CAR military. During 2012, Arido allegedly received over US\$7,000 in money transfers from Kilolo and Babala.

Pre-trial judges noted that while by virtue of his detention Bemba did not directly pay or coach the witnesses, “he was at the origin of many of the acts committed by the other suspects and was systematically informed of the status of those acts and of their results.” Notably, in three instances, the accused spoke to three witnesses on phone under the guise of privileged communications.

The defense has argued that legitimate reasons exist for payments to witnesses, such as reimbursement for travel expenses, and that such payments are an [accepted practice](#) within the court.

The Prosecution

Prosecutors have indicated that [they would call 11 witnesses](#), including three expert witnesses. However, Presiding Judge Chile Eboe-Osuji suggested this number of witnesses was high.

Central to the trial are interceptions of emails and telephone conversations between the accused individuals, which prosecutors claim show they bribed and coached witnesses to provide false testimony. Among evidence to be tendered by the prosecution will be money transfer receipts from Western Union, telephone call records, email transcripts, text messages, and summaries of recorded communications.

Prosecution evidence shows that the alleged “strategy” to corrupt evidence was conducted in up to seven countries and affected 14 witnesses who testified for Bemba in his trial for war crimes and crimes against humanity.

On November 29, 2013, Prosecutor Fatou Bensouda asked judges in the main trial for permission to submit the evidence of witness coaching and bribery. However, in [an April 2, 2014 order](#), judges Sylvia Steiner, Joyce Aluoch, and Kuniko Ozaki said the evidence, including an audio recording, a report, and a financial chart, were part of material in a separate case brought before the ICC.

“The chamber does not consider it in the interest of justice for matters which may be central to the charges before the pre-trial chamber to be litigated in parallel before the trial chamber,” the judges ruled. They added that lengthy delays could arise in such circumstances and this would hinder the fair and expeditious conduct of proceedings against Bemba in the main trial. Furthermore, the judges noted that the material in question was related to the credibility of defense witnesses, “each of whom the prosecution had the opportunity to question at the time they testified.”

The Defense

The defense for the five witnesses all contend that the transfers made by Kilolo to the defense witnesses in the main trial were merely reimbursements of expenses for traveling to give statements and testimony, and that such payments are an [accepted practice](#) within the court.

Mr. Kilolo's lawyers argued that his conduct, which had been characterized as corruptly influencing witnesses, was actually "non-illicit refreshing" of the witnesses' memories by reading to them, or having them read, their prior statements. Such conduct did not comprise corruptly influencing witnesses insofar as their testimonies reflected their prior statements to the Bemba defense, they argued.

In the main trial, the defense argued that the prosecution's investigation for witness tampering had "destroyed" the possibility of a fair trial for Bemba. Specifically, the defense argued, the prosecution had requested states to perform actions that violated the privileges and immunities of the defense, including requests for transmission of financial records and information, content of email accounts, and records of telephone communications, "all concerning the defense team members, protected witnesses or persons related to them." In addition, the defense argued that prosecutors received privileged information concerning defense strategy and instructions from Bemba, internal work product, and *ex parte* information. Furthermore, the defense accused the prosecution of employing "sharp trial tactics" by failing to disclose information concerning the credibility of defense witnesses. Lastly, the defense argued that the confidentiality of its information was compromised and witnesses and sources potentially exposed to risk.

Why This Case is Important

Witness tampering is a problem that is being seen across several cases at the ICC. It is a very serious offense and can obstruct fair ICC trials and genuine access to justice for the victims of the crimes under the ICC's jurisdiction. This is the first of three cases involving offenses against the administration of justice. [Two others](#) are currently underway involving witnesses in the Kenya cases.

This case is also important because it demonstrates the complexity of litigating parallel cases before the ICC. The evidence in this case against Bemba *et al.* may have implications for the credibility of witnesses in the main Bemba trial. However, judges in the main trial did not allow evidence from this case into the record, citing potential fair trial issues and ongoing litigation in the Bemba *et al.* trial.

Timeline

October 3, 2001: The Central African Republic (CAR) ratifies the Rome Statute.

December 21, 2004: The CAR government refers crimes under the Rome Statute to the ICC.

June 2005: The CAR government provides documents to the ICC Office of the Prosecutor regarding alleged crimes on its territory during 2002-2003. The prosecutor begins an analysis of the situation.

May 10, 2007: The prosecutor informs the CAR government, the Pre-Trial Chamber, and the ICC president that he is opening of a full investigation of the CAR situation.

May 23, 2008: Pre-Trial Chamber III issues a warrant of arrest and a request to the government of Belgium to arrest Bemba. Both documents are under seal.

May 24, 2008: Belgian police arrest Bemba near Brussels. The Pre-Trial Chamber unseals the arrest warrant.

June 10, 2008: Pre-Trial Chamber III issues a new warrant of arrest to replace the warrant of May 23, 2008. The chamber adds two counts of murder, one as a war crime, and the other as a crime against humanity. The chamber also issues a request to Belgium for the surrender of Bemba to the ICC.

July 3, 2008: Belgium transfers and surrenders Bemba to the ICC.

July 4, 2008: Bemba makes his first appearance in court. Pre-Trial Chamber III explains the charges against him.

January 12-15, 2009: Pre-Trial Chamber III holds hearings to determine whether the prosecutor has sufficient evidence against Bemba to proceed to trial.

June 15, 2009: Pre-Trial Chamber III decides that there is enough evidence to proceed to trial on three counts of war crimes (murder, rape, and pillaging) and two counts of crimes against humanity (murder and rape). The chamber rejects the prosecution request for three other counts.

November 22, 2010: Bemba's case officially opens before Trial Chamber III of the ICC.

July 29, 2013: Trial Chamber III authorizes the prosecutor to collect logs and recordings of telephone calls placed or received by Kilolo and Mangenda and appoint an independent counsel to review the call logs and listen to recordings of the calls with respect to allegations of offenses against the administration of justice.

August 14, 2012: The defense in the main *Bemba* trial begins its case.

November 20, 2013: Single Judge Cuno Tarfusser issues arrest warrants for the five suspects.

November 23-24, 2013: Bemba's lead counsel, Aimé Kilolo-Musamba; case manager Jean-Jacques Mangenda Kabongo; a defense witness; and a former aide to Bemba are arrested for allegedly forging evidence and bribing witness.

November 25, 2013: Babala and Kilolo are transferred to the ICC detention center. Together with Bemba, they make their first court appearance on November 27, 2013.

December 4, 2013: Mangenda is transferred to the ICC detention center. He makes his initial court appearance the next day.

March 18, 2014: Arido is transferred to the ICC detention center. He makes his initial court appearance on March 20, 2014.

July 30, 2014: The parties submit their written submissions in lieu of pre-trial hearings.

October 21, 2014: Pre-Trial Chamber II ordered the release of Kilolo, Mangenda, Arido, and Babala on the condition that they appear for trial or whenever summoned by the court.

November 11, 2014: Pre-Trial Chamber II confirms some charges against the five co-accused, and rejects charges of intentionally submitting forged or false documents.

November 12-13, 2014: Closing arguments in the main case are held at the ICC before Trial Chamber III.

May 29, 2015: Appeals Chamber reverses the decision to release the suspects, but decides that it is not in the interests of justice to have them arrested again.

August 17, 2015: Trial Chamber VII orders the continued release of the accused on the condition that they are present in The Hague for the trial.

September 29, 2015: Opening statements are scheduled to begin at the ICC.

CONTACT:

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