

The first case on witness tampering at the International Criminal Court: conviction for Bemba and four of his associates

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On 19 October 2016, Trial Chamber VII of the International Criminal Court (ICC) condemned Jean-Pierre Bemba Gombo and four of his associates (Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido) for the crime of witness tampering in connection with Bemba's trial.

1. Case Background

In March 2016, Trial Chamber III of the ICC had already found Bemba, former Vice President of the Democratic Republic of the Congo (DRC), guilty of war crimes and crimes against humanity in connection with the murder, rape, and pillaging that took place in the Central African Republic between October 2002 and March 2003. He was sentenced to a total of 18 years imprisonment. While this trial (hereinafter, 'main case') was still underway, in November 2014 the ICC started an investigation against Bemba, Kilolo (Bemba's lead counsel in the main case at the time of the arrest), Mangenda (case manager of Bemba's defense team), Babala (one of Bemba's political allies in the DRC) and Arido (a defense in the main case who eventually did not testify) to determine whether they were illicitly interfering with defence witnesses, who would provide evidence in favour of Bemba.

After a meticulous reconstruction of the facts, the ICC concluded that Mr Bemba, who was detained in the Scheveningen prison at that time, gave directives on the content and the modalities of witnesses' testimonies. He was helped by Kilolo, who implemented Bemba's instructions. He illicitly coached and prepared defence witnesses in consultation with Mangenda, who liaised between Mr Bemba and Mr Kilolo. Almost all the fourteen defence witnesses received either money, other valuable goods or non-monetary promises as a 'gift' or a 'token' shortly before their testimonies before the ICC in the main case. In exchange for those 'gifts', witnesses were supposed to provide false testimony declaring that Bemba's Movement for the Liberation of Congo military was not responsible for the alleged crimes and that the Congolese army was under the command of Central African generals. In addition to that, Kilolo distributed new telephones to defence witnesses to stay in contact with them violating the Victims and Witness Unit's orders. Thirdly, Kilolo and Mangenda agreed to destroy the physical evidence, which could demonstrate that they bribed some witnesses. For this reason, the Office of the Prosecutor used different type of evidence, such as intercepted telephone conversations between the accused and

witnesses, recordings of the conversation on non-privileged telephone line, call data records and emails. Finally, Arido, who recruited four defence witnesses, and Babala, who was Bemba's financier, completed the picture of the situation. Following these findings, Trial Chamber VII condemned Bemba, Kilolo and Mangenda, as co-perpetrators, for corruptly influencing fourteen witnesses, giving false testimony and presenting evidence that they knew was false. Moreover, Bemba was found guilty of soliciting fourteen witnesses to provide false testimony, Kilolo was convicted for inducing those witnesses to give false testimony and Mangenda was found responsible of aiding and abetting the giving of false testimony by, respectively, two and seven defence witnesses. Mangenda was found not guilty of having aided, abetted or otherwise assisted Bemba and Kilolo in convincing the other five witnesses to provide false testimony. Finally, Babala was found guilty for aiding the other defendants for corrupting two of the fourteen defence witnesses. Finally, Arido was convicted of corruptly influencing four defence witnesses.

2. Legal analysis of the decision

Witness tampering is an offence against the administration of justice under Article 70 of the Rome Statute, the ICC's founding treaty. More specifically, this Article condemns six conducts for which the ICC can impose either a fine, a prison term of up to five years, or both. These are:

- a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
- b) Presenting evidence that the party knows is false or forged;
- c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
- d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
- e) Retaliating against an official of the Court on account of duties performed by that or another official;
- f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

Bemba and its associates were only found guilty on the first three counts of the six enumerated conducts. Trial Chamber VII qualified for the first time the conducts of Article 70. It clarified that Article 70(1)(a) addresses the offence of giving false testimony when the witness is under an oath to tell the truth according to Article 69(1) of the Statute. Trial Chamber VII interpreted broadly such offence, according to the plain wording of Article 70(1)(a) and its teleological meaning and argued that Article 70(1)(a) of the Statute encompasses both positive actions and omissions that are taken into account by a Chamber when assessing the evidence as a whole (para. 21).

Secondly, Article 70(1)(b) of the Statute, on presenting evidence that the party knows is false, protects the integrity of the proceedings and reliability of the evidence. Trial Chamber VII clarified that the physical perpetrator of this offence should be someone who is considered a ‘party’ to the proceedings, even though such term only appears in the English and Arabic and not in the other four authentic versions of the Statute. Trial Chamber VII found that the term ‘party’ covers all members of the Defence team that are charged with the accused’s representation and also the accused, who is still entitled to present evidence him- or herself (paras. 32-35). Furthermore, Article 70(1)(b) of the Statute requires a cognitive element, i.e. that the party ‘knows’ that the evidence is false or forged (para. 42).

Thirdly, Article 70(1)(c), which proscribes any conduct that may have an impact or influence on the testimony to be given by a witness, protects the reliability of testimonial evidence before the ICC and the integrity of its proceedings. This Article is deliberately an open-ended provision, which does not prescribe any specific form through which witnesses should be influenced. Trial Chamber VII clarified that in order to commit such offence, the perpetrator does not need to be a ‘party’ to the proceedings.

In this perspective, Bemba’s conviction for witness tampering represents a landmark decision because the ICC had the possibility to qualify for the first time the conducts of Article 70. However, this decision has broader implication for the ICC.

3. Broader implications for the ICC

For the first time in its history, the ICC condemned some individuals for attempting to pervert the course of justice. With this decision, the ICC sends a clear message to those who try to interfere with its administration of justice that these offences will not go unpunished. In fact, as the ICC presiding judge, Bertram Schmitt, said “[n]o legal system in the world can accept the bribing of witnesses, the inducement of witnesses to lie or the illicit coaching of witnesses [...]. Today’s judgment sends the clear message that the court is not willing to allow its proceedings to be hampered or destroyed.”

Witness tampering have plagued the ICC’s proceedings for a long time. For instance, in the Kenyan investigations, the ICC dropped the charges against all six suspected (Francis Muthaura, cabinet secretary; Henry Kosgey, cabinet minister; Mohammed Hussein Ali, police chief; Joshua Arap Sang, manager of a local radio; Ururu Kenyatta, Kenya’s president, and William Ruto, his vice president) because of witness bribing, threats and tampering. The most emblematic cases were the cases against Kenyatta and Ruto, where the Prosecutor, Fatou Besouda, was not able to prove that the two suspected committed the alleged crimes against humanity and she was forced to withdraw the charges against both accused. This happened following that the Kenyan government actively obstructed the investigations creating a general atmosphere of fear around those who wanted to testify before the ICC. In fact, not only some witnesses recanted their testimony, but some potential witnesses, who

were supposed to testify, were too afraid to do so. However, the ICC did not set up a further investigation upon witness intimidation in Kenya.

Furthermore, the ICC tried to protect the function of the international criminal justice system. For instance, in August 2016, the Single Judge ordered the former Ugandan rebel commander, Dominic Ongwen, to disclose all the payments made to potential witnesses and to cease direct payments to persons identified as potential witnesses within two days of the ruling. Furthermore, the ICC restricted Ongwen's telephone communications on the basis of information which led to the finding of a reasonable suspicion that that Ongwen wanted to influence some witnesses.

Despite all these efforts, there is still a long way to protecting witnesses from tampering. In fact, the ICC should take prompt action to prosecute offences under Article 70 of the Rome Statute.