

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/05-01/08
Date: 19 February 2014

TRIAL CHAMBER III

Before: Judge Sylvia Steiner, Presiding Judge
Judge Joyce Aluoch
Judge Kuniko Ozaki

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC
*IN THE CASE OF
THE PROSECUTOR
V. JEAN-PIERRE BEMBA GOMBO***

Public Document

Prosecution's Response to the "Defence Motion on Privileged Communications"

Source: The Office of the Prosecutor

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

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1. The Office of the Prosecutor (“Prosecution”) files this response to the Defence Motion on Privileged Communications (“Defence Motion”) pursuant to the 12 February 2014 order of Trial Chamber III (“Chamber”).¹

2. The Chamber should deny the Defence Motion. Since it rests on the false premise that privileged communications of the current Defence team are monitored or recorded. The relief requested by the Defence is also either superfluous or moot.

3. As the Chamber and Defence are well aware, the Prosecution is investigating and prosecuting offences against the administration of justice that have allegedly occurred in these proceedings. During its investigation into alleged offences against the administration of justice, the Prosecution had legal grounds² to seek and obtain judicial authority to intercept the telecommunications, not of the entire Defence team, as falsely asserted in the Defence Motion,³ but rather of suspects Kilolo and Mangenda individually.⁴ The Prosecution, in consultation with the Single Judge of Pre-Trial Chamber II (“Single Judge”), deliberately put in place safeguards in the collection of intercepted communications to ensure that it did not acquire possession or knowledge of legitimately privileged communications. Through the filters of a judicially-appointed independent counsel, the Single Judge and an Investigating Judge of The Netherlands, the Prosecution obtained only intercepted communications which contained evidence of crimes or fraud and none that contained legitimately privileged material. The Defence’s conflation of “Defence team” with the individually named suspects above – who no longer form part of the Defence team - is fatal to its requested relief.

¹ ICC-01/05-01/08-2969, Order requesting observations on “Defence Motion on Privileged Communications”, 12 February 2014.

² ICC-01/05-52-Red2, Decision on the Prosecutor’s “Request for judicial order to obtain evidence for investigation under Article 70”, 3 February 2014 (ICC-01/05-52-Conf-Exp, 29 July 2013), para. 3.

³ ICC-01/05-01/08-2963, Defence Motion on Privileged Communications, 7 February 2014, para. 5.

⁴ ICC-01/05-51-Red, Public Redacted version of “Request for Judicial Order to Obtain Evidence for Investigation under Article 70”, 12 February 2014 (ICC-01/05-51-Conf-Exp, 19 July 2013), para. 32.

4. The Defence requests four orders from the Chamber. First, the Defence requests the Chamber to order that “[the Accused] should enjoy privileged communications...”. However, the protection of privileged communications is already provided for under Article 67(1)(b) of the Rome Statute and Rule 73 of the Rules of Procedure and Evidence (“Rules”), which provides that an Accused’s “communications made in the context of the professional relationship [with] counsel shall be regarded as privileged.”⁵ The Prosecution submits that no further order of the Chamber is required to protect the legitimately privileged communications between the Accused and his counsel and thus the order sought is superfluous. Conversely, if the relevant communications do not fall within the scope of the protection provided by Rule 73 of the Rules, they are not in fact “privileged”. Thus, such communications do not require, nor deserve, the protection of the Chamber.

5. The second and third requests are moot. The Defence requests the cessation of monitoring or recording of its communications. As far as the Prosecution is aware, no entity is currently monitoring or recording the communications between the Accused and members of the Defence team entitled to legal privilege. Certainly no such monitoring has been requested by the Prosecution. The Prosecution understands that the Registry may only conduct routine monitoring of a detained person’s calls under the Regulations of the Registry, which specifically prohibit the monitoring of calls between a detained person and counsel or assistants to counsel entitled to legal privilege.⁶

6. Lastly, the Defence requests the Chamber to “[o]rder the Prosecution to respond to the questions set out in its Letter of 16 January 2014 concerning the monitoring of privileged communications and or [sic] communications devices of the members of the current Defence team.” Such an order is also moot since, as far as the Prosecution

⁵ Rule 73(1), Rules of Procedure and Evidence.

⁶ Regulations of the Registry, Regulations 174 and 175.

is aware and as previously stated, no entity is monitoring privileged communications or the communication devices of the members of the current Defence team.

7. For the reasons set out above, the Prosecution respectfully requests the Chamber to reject the Defence Motion in its entirety.



Fatou Bensouda, Prosecutor

Dated this 19th Day of February 2014

At The Hague, The Netherlands