

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **13 June 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

**Prosecution's Response to the Defence Request for Leave to Appeal the "Decision
on 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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I. Introduction

1. The Defence seeks leave to appeal¹ the “Decision on Defence Motion on Privileged Communications”² on the issue of “whether the Trial Chamber erred by restricting legal privilege to Counsel and Legal Assistants” (“the Issue”).³
2. The Application should be rejected. The Issue is a merely hypothetical concern and not an appealable issue under Article 82(1)(d). In addition, it does not meet the criteria for leave to appeal.

II. Submissions

3. The Defence discusses at length the merits of the Issue.⁴ However, the correctness of a decision is irrelevant in assessing an application for leave to appeal under Article 82(1)(d), and the sole question is whether the issue meets the criteria set out in the provision.⁵ Therefore, the Prosecution will not address the Defence’s arguments on the merits of the Issue, but will limit its response to the Defence’s submissions concerning the criteria for leave to appeal under Article 82(1)(d).
4. In seeking leave, the Defence must establish that the application concerns a real issue (rather than a hypothetical concern), which would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and, concerning which, an immediate resolution may materially advance the proceedings. The Application fails to meet this threshold.

¹ ICC-01/05-01/08-3084 (“Application”).

² ICC-01/05-01/08-3080 (“Decision”).

³ Application, para.8, page 14.

⁴ Application, paras.9-35.

⁵ ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to Decision no. ICC-02/04-01/05-52.

a) The Issue is merely a hypothetical concern

5. The Issue is not an appealable issue within the meaning of Article 82(1)(d), but rather “an abstract question or a hypothetical concern.”⁶ This is because none of the communications referred to in the Application are being monitored and provided to the Prosecution.

6. The Application rests on the incorrect premise that communications between the Accused and members of his current Defence team other than counsel, co-counsel and the legal assistant,⁷ are being monitored without the Defence’s knowledge and their contents disclosed to the Prosecution.⁸

7. As the Chamber and the Defence are aware, the Prosecution is investigating and prosecuting offences against the administration of justice that have allegedly occurred in the course of these proceedings. During the investigation of these offences, legal grounds arose upon which to seek and obtain judicial authority to intercept relevant telecommunications.⁹ However, the Prosecution did not seek authorisation for the interception of communications of the entire original Defence team nor did it seek authorisation for the interception of the communications of current members of the Defence team. Rather, it sought and received such authorisation only concerning the suspects Kilolo and Mangenda specifically.¹⁰

8. The Prosecution has already provided the Defence with sufficient information to indicate that none of the current members of the Defence team are subject to its investigations. To the extent that the Prosecution’s letter to the Defence of 22 January

⁶ ICC-01/05-01/08-532, para.17; ICC-01/05-01/08-75, para.11; ICC-02/04-01/05-367, para.22; ICC-01/09-01/11-301, para.34; ICC-01/09-02/11-406, paras.50, 61.

⁷ The Decision recognises the legal privilege (and thus the protection of their conversations with the Accused) applies to “(i) counsel, whether lead counsel or co-counsel, and (ii) assistants to counsel, as referred to in Regulation 68 of the Regulations, who satisfy the requirements of Regulations 124 to 127 of the Regulations of the Registry” (para.19).

⁸ Application, paras.26, 27, 33, 48, 52.

⁹ ICC-01/05-52-Red2, para.3.

¹⁰ ICC-01/05-51-Red, para.32.

2014¹¹ or its submissions of 19 February 2014¹² leave any doubt, it wishes to clarify as follows.

9. As far as the Prosecution is aware, beyond the scope of Regulations 174 and 175 of the Regulations of the Court, no entity is currently monitoring or recording the communications between the Accused and any current member of the Defence team (including those to whom legal privilege does not apply), or the communications between or among members of the Defence team. More specifically, the Prosecution has not requested any monitoring of this sort.

10. Moreover, the Prosecution does not have access to the content of the routine monitoring of the Accused's telephone conversations currently conducted by the Registry pursuant to Regulations 174 and 175 of the Regulations of the Court. The Prosecution's access is limited to conversations that were collected by the Registry prior to 24 November 2013. The Prosecution has not sought access to the content of any conversations between the Accused and current members of his Defence team subsequent to that date.

11. Consequently, the question of whether legal privilege should be extended to the case manager, consultants or junior lawyers who are members of the Defence team is not "an identifiable subject or topic requiring a decision for its resolution" or "a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination".¹³ In other words, this question is not an issue within the meaning of Article 82(1)(d) arising from the Decision.

¹¹ ICC-01/05-01/08-2963, para.4.

¹² ICC-01/05-01/08-2984, paras.3-5.

¹³ ICC-01/04-168 OA3, para. 9; ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that "[a] decision "involves" an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made."

b) The Issue does not meet the criteria for leave to appeal under Article 82(1)(d)

12. The Defence's arguments that the Issue impacts on the fair and expeditious conduct of the proceedings are predicated on the erroneous assumption that (1) current members of the Defence team who enjoy legal privilege cannot communicate freely with other current members of the team, and (2) there is a risk that the content of any such communications might be disclosed to the Prosecution.¹⁴ As these concerns are unjustified, the Defence's arguments should be rejected.

13. For the same reason, immediate resolution of the Issue by the Appeals Chamber does not materially advance the proceedings.¹⁵ Since the Issue is a merely abstract one and does not impact the current Defence team's practical operations, there is nothing for the Appeals Chamber to resolve. Rather, its role would be relegated to that of an advisory body, something the Appeals Chamber has repeatedly considered as being beyond the scope of its authority.¹⁶

¹⁴ Application, paras.36-48.

¹⁵ Application, paras.49-54.

¹⁶ ICC-01/04-503 OA4 OA5 OA6, para.30; ICC-01/04-01/07-3132 OA12, para.7; ICC-01/04-01/06-3026 A4, A5, A6, para.4.

III. Conclusion

14. For the above reasons, the Application should be rejected.



Fatou Bensouda, Prosecutor

Dated this 13th Day of June 2014

At The Hague, The Netherlands