

Ex Parte Status Conference
(OTP and Registry only)

(Closed Session)

ICC-01/05-01/08

1 International Criminal Court
2 Trial Chamber III - Courtroom 1
3 Situation: Central African Republic
4 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo - ICC-01/05-01/08
5 Presiding Judge Sylvia Steiner, Judge Joyce Aluoch and Judge Kuniko Ozaki
6 Ex Parte Status Conference (OTP and Registry only)
7 Tuesday, 9 April 2013
8 (The hearing starts in closed session at 3.05 p.m.)
9 THE COURT USHER: All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE STEINER: Good afternoon. We are here to hold a status
13 conference, ex parte Prosecution and Registry only, in order to gather information related
14 to the Prosecution's filing 2548 of 20 March 2013.
15 So, first of all, I would ask first the Prosecution and then the representatives of the
16 Registry to introduce themselves and their teams.
17 MR BADIBANGA: (Interpretation) Good afternoon, your Honours.
18 Present for the OTP are: Mr Alex Whiting, co-ordinator of prosecutions; Eric Iverson,
19 trial attorney; Pascal Turlan, adviser in international co-operation; (Redacted)
20 (Redacted), who are both investigators; Sylvie Vidinha, case manager; and I myself,
21 Jean-Jacques Badibanga, trial attorney. Thank you.
22 PRESIDING JUDGE STEINER: Thank you, Maître Badibanga. Mr Dubuisson?
23 MR DUBUISSON: (Interpretation) Thank you, your Honours.
24 Representing the Registry there is: Vera Wang, legal officer in my office; there is Dahirou
25 Sant-Anna, legal officer in the detention unit; and myself, Marc Dubuisson,

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1 Director of Court Services, representing the Registrar.

2 PRESIDING JUDGE STEINER: As I mentioned before, the Chamber was seized by the

3 Prosecution through the "Notice to the Trial Chamber of Article 70 Investigation and

4 Request for Judicial Assistance to Obtain Evidence," which is filing 2548-Conf-Exp.

5 In its notice, the Prosecution requests the Chamber: (a) to order the Registry to verify

6 whether some telephone numbers that are enumerated here are listed in Registry records

7 and, if so, to whom they belong; (b) to order the Registry to provide to an independent

8 counsel appointed by the Prosecution access to some phone calls described in items 1 and

9 2; (c) to order the Registry to provide to the independent counsel all telephone log

10 information pertaining to calls identified as relevant by independent counsel; (d) should

11 the Chamber apply Regulation 92 of the Regulations, the Prosecution applies under

12 Regulation 92(4) of the Regulations for an order not requiring the disclosure of requested

13 information until such time that disclosure would not prejudice the investigation,

14 (Redacted); and, finally, asking the Chamber (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 Before the Chamber starts to consider the specific requests made by the Prosecution, the

19 Chamber needs to analyse in depth a series of issues - procedural and substantial

20 issues - including, but not limited to, the competence of the Chamber to proceed with such

21 request.

22 Therefore, the Chamber decided proprio motu to convene the present status conference in

23 order to allow Prosecution and Registry to provide the Chamber with further information

24 on the request, and for that purpose the Chamber prepared a suggested agenda and of

25 course leaving to the Prosecution and to the representatives of the Registry the

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1 opportunity to make submissions on any issues they deem necessary and relevant.
2 Therefore, the Chamber is here to listen and will start by listening to the Prosecution.
3 Maître Badibanga, you have the floor.
4 MR BADIBANGA: (Interpretation) Thank you, Madam President.
5 Regarding the facts for which we are here today, the filing that we submitted is quite
6 explicit and reflects the information in the possession of the OTP.
7 I know that generally speaking, your Honour, you do not wish us to repeat what is
8 already submitted in writing, but I will immediately answer the questions that you
9 communicated to us, but before that I would like to tell the Court that what is happening
10 took us by surprise.
11 Obviously we were not prepared for such a situation and we tried to take all precautions
12 necessary before we came to the Chamber. It is up to us to try to conduct this process
13 with the least possible effect on the ongoing trial.
14 The Chamber asked us to answer a question regarding the possible timing of
15 investigations under Article 70 of the Statute. At this stage, we think that there is an
16 amount of cross-checking that needs to be done still.
17 There are two aspects that we identified. The first one is telephone communication, for
18 the simple reason that almost all the sources that are in contact with us spontaneously
19 gave us information and referred to the use of the telephone as an important tool in this
20 scheme. The phone seems to be used both to approach witnesses and it appears to us
21 also to conduct payments to witnesses. That is why we felt that this may relate to the
22 access to privileged information, but it is the best possible way to provide answers to our
23 questions.
24 We have no idea of the volume of work that this would represent. If the Chamber
25 authorised us to listen to those recordings, maybe it will amount to a few days of listening,

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1 or a few weeks. We have no idea.

2 We proposed a certain number of mechanisms to the Chamber, but what is certain is that,
3 if we are granted leave and we begin this monitoring, as soon as we acquire any
4 important or substantive information then we would have something to report back to the
5 Chamber and so it would not be necessary to listen to all the recordings that are in place
6 so far.

7 There is a second aspect in our procedure; that is to (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 So, generally speaking, the time that we would require to prepare that operation and the
18 time to listen to the recordings can fall within a period of I can say two months; that is
19 from one to two months. We believe we should be able to deploy the necessary
20 resources and gather the necessary information to report back to you and consolidate our
21 case.

22 That is what I can say about timing, and this timing will start to run only as from the
23 moment that we receive leave from the Chamber to begin our operations.

24 I believe you wish me to answer all the questions, or just one after the other?

25 PRESIDING JUDGE STEINER: No, just one clarification. In terms of interference of the

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1 Chamber - this Chamber, or any other Chamber - what the Prosecution would request
2 more specifically is the authorisation for the tapping telephone and for (Redacted)
3 (Redacted), because apparently the other kind of investigation the Prosecution has already
4 proceeded without the need of judicial authorisation; is that correct? Are these the two
5 measures that the Prosecution is seeking from the Chamber?
6 MR BADIBANGA: (Interpretation) Madam President, what happened is that at one
7 point we received information that we needed to cross-check. At that time we did a few
8 things that enabled us to verify that information and we believe that was our prerogative
9 under Article 70, which provides that the Prosecution can carry out such an investigation.
10 We told you that we obtained information from Western Union. We requested
11 information from Western Union in Vienna, Austria. We asked for authorisation from an
12 Austrian Judge and that is how we came about this information.
13 Our request to the Chamber is that there shouldn't be any further monitoring, but that
14 there is already a system in place in the Detention Centre which records communication.
15 The Detention Centre can also clarify whether, when a detained person contacts their
16 counsel, there is passive recording. So our request is to be allowed to listen to these
17 recordings and try to find out whether there is any information there that would allow us
18 to confirm our suspicions.
19 Now, there is a question that arises: Can the Prosecutor have access to privileged
20 information? That is why we proposed that there should be an independent third party
21 that carries out that exercise and report back, and this person will not reveal to the
22 Prosecution any privileged information.
23 So our request today is (1) to be allowed to listen to those recordings, which already exists
24 as far as we know.
25 The second request is that, following the Chamber's statement, we understood that we

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1 cannot directly (Redacted), so that is why we are requesting authorization
2 to (Redacted). In this particular case, if the Defence was aware of that
3 request it is possible that they may (Redacted)
4 (Redacted), so our request is that we be granted leave to
5 (Redacted) and that
6 we should have that authorisation (Redacted) without having to inform the Defence.
7 Those are our requests at this time.

8 PRESIDING JUDGE STEINER: And in the case of (Redacted), how
9 the Prosecution envisages that (Redacted) is not reported to the Defence?

10 MR BADIBANGA: (Interpretation) In all frankness, we had long discussions on this
11 matter to come out with a practical solution. It is clear that (Redacted)

12 (Redacted)

13 (Redacted)

14 Our idea here is that that (Redacted) will be the last thing that we do in this process. For
15 example, if this week the Chamber allows us to continue with our activities, we will spend
16 the first two/three days listening to the recordings and trying to identify the precise
17 information required to confirm what we have. That is the first two to three weeks.

18 And regarding (Redacted)

19 (Redacted). With the information that we have, we plan to enter into contact with the
20 authorities of those countries to be able to act in their territories. (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 Obviously the Defence would be informed at that time, because the information will not
7 remain secret. So immediately after (Redacted)

8 (Redacted)

9 Our idea is to limit information leaks in the various locations, to the extent possible, and
10 as soon as the relevant information is obtained we would be able to confirm the scheme.

11 PRESIDING JUDGE STEINER: And the Prosecution envisages (Redacted)

12 (Redacted) - already mentioned - or the Prosecution is

13 seeking a carte blanche in order to (Redacted)

14 (Redacted)?

15 MR BADIBANGA: (Interpretation) The way we understood things at this point is that
16 we will work with the existing information, the initial evidence, so that would be
17 applicable to the individuals involved in the scheme and who are named in the annex and
18 who received payments.

19 We are asking for your authorisation to (Redacted)

20 (Redacted)

21 (Redacted)

22 You would have realised that the basis for our work is documentary; that is payments
23 through Western Union. It is possible that payments - other payments - (Redacted)

24 (Redacted)

25 (Redacted). We are relying on information

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1 that seems to us to be reliable at this point in time.

2 JUDGE ALUOCH: Mr Badibanga, did I hear you to say that most of them would be

3 (Redacted); that's correct? Because I'm

4 looking -- I'm thinking of a situation where you probably (Redacted)

5 (Redacted) and the Defence immediately lodges a complaint.

6 That's the scenario I'm thinking of. Maybe I shouldn't think that way, but I'm thinking of

7 a scenario such as that. Then how would you deal with that?

8 MR BADIBANGA: (Interpretation) On the list that we submitted, (Redacted)

9 (Redacted)

10 (Redacted)

11 As you are aware, there was at least (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted). That is a major concern to us.

15 PRESIDING JUDGE STEINER: Maître Badibanga, in the annex to the Prosecution's filing,

16 we can -- on the second item, the Prosecution enumerates a series of money transfers

17 made to counsel, Maître Kilolo, or to the Defence case manager, Mr Mangenda, and at the

18 same time by persons that are not witnesses or not involved in any way in this case. So

19 has the Prosecution also is -- also envisages investigating these money transfers by its own,

20 without involving the Chamber in such investigation?

21 MR BADIBANGA: (Interpretation) Our entire investigation and our actions to date

22 relate to the payment of money to witnesses. The reason for which Maître Kilolo and

23 Jean-Jacques Mangenda's names are involved -- are included on this table, the reason is

24 that, as you have said, significant amounts of money have been transferred to them, and

25 those amounts of money come from persons who also transfer money to other people.

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1 When you contact Western Union, this is what you get. For example, at page 3, it would
2 appear that you ask for information about transfers from Mr Fidele Babala, covering the
3 period (Redacted). Now, what Western Union does is that they would
4 provide you with details regarding all the transfers involving Mr Fidele Babala and, from
5 that information, you can see that Mr Babala transferred significant amounts of money to
6 Mr Kilolo.
7 The significance of this for us is that it is this very Mr Babala who transferred money to
8 witnesses, so we do not know whether this is according to some agreement or not.
9 Secondly, we also note that Mr Kilolo makes transfers to witnesses. Now, we don't know
10 whether it is based on the amounts received from Mr Babala or from his own resources.
11 It is therefore important for us to note that this transaction is important in relation to the
12 amounts of money paid to witnesses.
13 We are not investigating the mode of payment by Mr Kilolo and the interests that he may
14 have in these matters as counsel. That falls with the Registry.
15 The accused person has already declared himself to be indigent and therefore deserving
16 legal aid. That's established. But what we are looking at is a set network which appears
17 to involve witnesses.
18 To our minds, therefore, it would have been incomplete to not have had to share this
19 information with the Chamber relating to these pieces of information. You would note
20 that our filing does not claim that Mr Mangenda paid any money to any witnesses.
21 Maybe things happened differently. We didn't find any evidence of that. But we also
22 noticed that the same people were -- the same person was forwarding significant amounts
23 of money to him. We don't know for what purpose and for what goal.
24 Madam President, adding up all the amounts of money in this annex gives a total of more
25 than €100,000, and that's what we are dealing with; quite significant.

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1 PRESIDING JUDGE STEINER: Thank you for these preliminary remarks. I think we
2 could now have the views of Maître Dubuisson on behalf of the Registry.

3 MR DUBUISSON: (Interpretation) Thank you, Madam President. This is a very
4 delicate topic, particularly at this stage in our proceedings. We are not dealing here with
5 investigations; we are in the middle of a trial which may end up on appeal and these
6 witnesses may be called back, or they might be called back during this trial phase. So
7 this is a very delicate approach that we need to deal with very carefully, particularly given
8 that these seats next to me are empty.

9 Now, the Prosecutor's question now relates to Rule 174 of the Rules of the Registry and
10 deals with recordings at the detention facility. What we do not record is
11 communications with counsel, with the Red Cross and with consular and diplomatic
12 representatives, as well as representatives of the Court.

13 Therefore, unfortunately, there is no recording of privileged communication.

14 Any other type of communication, except those involving the persons I have just
15 mentioned under Rule 174, we do have a recording of all such other communications.

16 We have done this before in the past, and this is what is referred to as "active monitoring,"
17 which can be in two formats: Listening to real-time communications or could also be
18 retro- active. This has already been done in the past; namely, we have listened to
19 communications and, in any event, it is extremely important for us to have a clear
20 indication of the exact period during which that communication has to be listened to.

21 We need to know the telephone numbers, because in -- you may want to know that some
22 of our detainees spend most of their day on the telephone, so it is very, very important to
23 have that specific information; otherwise, you would be on a fishing expedition.

24 You see, in cases of active listening, you need to have a legal justification for it. In the
25 past we have used Rule 175 of the Registry -- the Rules of the Registry, which deal with

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1 the measures that the Chief of the Detention Unit can take in relation to this type of
2 listening. Under Rule 101, or rather, Regulation 101, the OTP can also apply for active
3 listening. Now, what we have before us here is a different scenario, if I understand
4 properly. We are acting under Article 70 of the Rome Statute.

5 PRESIDING JUDGE STEINER: Mr Dubuisson, I'm sorry if I interrupt you. Just because
6 maybe I misunderstood, when you are talking about active monitoring, and here it's said
7 that it's listening to real-time communications or could also be retro-active, how can it be
8 retro-active and active? Yes, I did not understand.

9 MR DUBUISSON: (Interpretation) Maybe I didn't express myself clearly. You may
10 listen during the telephone conversation proper, and we have to be very specific. This
11 has already been done in the past, in which case we have to ask the interested party to
12 speak in the same language, in one language, the working language, and the conditions
13 are very clear to enable us to correctly monitor the communication but, because we have
14 the recordings in a database, all the recordings pertaining to that accused person, all we
15 need is a key and so we can use the key of the Registry or a request from the OTP or a
16 decision from the Chamber requesting that we listen to all the communications.
17 In such instances we collect the DVD and then listen to the recordings.

18 Now, let me clarify and give you an idea of what actually happens. (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 Now, there might be cases where coded language is used; we have had that experience
5 before.

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 It is therefore very important to have specific dates, specific areas in order to be able to
13 deal with this clearly. That is why we need the telephone numbers, the references, and
14 we believe that the Defence also has to be informed when we are dealing with active
15 listening. But the Prosecutor claims that we are here dealing with Article 70 of the
16 Statute, but under Rule 165, the Prosecutor can also conduct their investigation proprio
17 motu, but this is not just any kind of investigation; it is an investigation of counsel. But,
18 you know, we have a discipline board which can conduct investigations on counsel. So
19 we need to get clarification from the Prosecutor. Are we looking here at fact-finding that
20 would compile a file for the disciplinary board, for the commissioner? Or are we looking
21 at the OTP conducting an investigation outside the scope of the code of conduct?
22 In those circumstances, wouldn't it be preferable to designate not necessarily an
23 independent personality, but maybe a representative of a Bar association? We don't have
24 a Bar association at the Court here. We have the OPCD, and using all creativity, we may
25 come up with a situation where the rights of the Defence are also respected.

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1 Madam President, stop me if I am not answering your specific question, but what I'm
2 saying is this is the background against which we must understand these things. We
3 need to know the legal basis on which Registry can be able to assist the Chamber in the
4 quest for the truth and in these investigations, were this to be the case.
5 For this reason, therefore, we request specificity. So far, we have never provided
6 information at the request of the Prosecutor. In fact, it is not within the mandate of the
7 Registry to seek evidence for any party in the proceedings, regardless. That is why we
8 need to receive very specific instructions that define the legal scope within which we can
9 proceed. That would be my answer to your first question relating to the recording.
10 Secondly, I also used an approach whereby I monitored one telephone number over a
11 five-year period. You see, individuals like yourself and myself, we do change our
12 telephone numbers for various reasons. I noticed that some telephone numbers changed.
13 Several changed in 2009. The rules in (Redacted) changed I believe in 2010 or 2011,
14 introducing a requirement for providing one's name, and in that context some people
15 changed their telephone numbers as well. So we need to know what phone number is
16 being investigated, for what period and for how long that number may have been used.
17 I'll stop there for now, Madam President.

18 PRESIDING JUDGE STEINER: Mr Dubuisson, if I well understood, in principle you
19 have maybe thousands of CDs with conversations between the detainee and other people,
20 except conversations with counsel? So you have already thousands, but none that was
21 recorded a conversation with counsel; is that correct?

22 MR DUBUISSON: (Interpretation) Yes, that is correct. The people -- as recommended
23 by the Section for Counsel, it is that section which informs us of the people who over a
24 specific period are entitled to privileged communication with the concerned person.

25 So there is some communication within the Defence team, of course, but we need to bear

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1 in mind who has the benefit of privileged communication. (Redacted)

2 (Redacted).

3 However, what we have is a log-book also of all communications with the Detention

4 Centre. We know, for example, that today at this time Mr Bemba called X and then we

5 can specify that at this time Mr Bemba called his counsel. (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 PRESIDING JUDGE STEINER: So, just in order to clarify the Chamber as a whole, how

10 these phone calls are made by the detainee? He can call whoever he wants, or only

11 certain numbers that are given in advance to the authorities at the Detention Centre?

12 How in practice does that work?

13 MR DUBUISSON: (Interpretation) (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted). For

23 telephone calls you need to call a number, there is a form that has to be filled out and

24 there are certain criteria that are used. We don't have the necessary resources within the

25 Court, but we do assess the persons who are being called and we determine whether these

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1 are not frivolous calls.

2 I don't want to be pejorative in whatever I am saying, but from a list and a number of
3 telephones we are able to authorise whoever is at the Detention Centre is able to call that
4 number that has already been approved by the Registry. And so once that approval has
5 been given the detained person is free to call that person as often as possible and, beyond
6 the 200 minutes that the Registry makes available to the accused person, he will pay the
7 extra.

8 So there are forms that are filled out, approved by the Registry, for visits in the same
9 manner as for telephone conversations. The authorisations are valid up to a certain date,
10 and within that period those who have been so authorised are free to visit the detained
11 person at the Detention Centre.

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 MR DUBUISSON: (Interpretation) Yes, your Honour, you have raised a security issue
24 there. Someone may call, but this is the procedure. They have to call the guard, and the
25 guard filters the call and it is the Detention Centre itself that dials the number that is

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1 provided by the detained person. The detained person therefore must contact a guard,
2 who filters the outgoing and incoming calls, because the guard will then call to determine
3 whether it is the right number that is being dealt with.

4 PRESIDING JUDGE STEINER: And from a technological perspective, is it possible to
5 find out whether the person that was called by the detainee is opening the phone for a
6 conference call, or redirecting the phone call to third persons? Is there a way to find out
7 in that respect?

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 PRESIDING JUDGE STEINER: So if, for instance, Mr Bemba wants to call Counsel,

25 Maître Kilolo, so the guard will make the phone call and after that the guard is out and

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1 the conversation will be privileged. How can we know that that phone call was made to
2 Maître Kilolo; it was Maître Kilolo on the other side of the line? How is it possible?
3 MR DUBUISSON: (Interpretation) Now, regarding Maître Kilolo it is easy. After
4 three-and-a-half years, we all know him. We can recognise his voice. Now, I think
5 that's quite easy.

6 In any event, there is a list with a number of telephone numbers and if Maître Kilolo calls
7 he will say, "I am Maître Kilolo," and the interested party will call back to make sure that
8 he is actually calling Maître Kilolo's telephone number and that's how they become
9 connected.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted). That's the way it has been.

14 Now, if the guard does not recognise the voice, then he or she would say, "This is not
15 Maître Kilolo." They all know - all the guards at the Detention Centre know - the counsel.
16 They know counsel because they come to the Detention Centre and because they talk to
17 them, they talk with them, on a regular basis.

18 However, there might be cases of people who are unscrupulous.

19 PRESIDING JUDGE STEINER: In the beginning I remember when we started here we
20 didn't have a single - a single - guard in the Detention Centre that was able to speak
21 French, so I presume that now we have sufficient guards who are francophones because
22 most of our detainees are francophones?

23 MR DUBUISSON: (Interpretation) To be frank with you, Madam President, our
24 detainees all speak English very well. I think that this issue is sorted quite naturally by
25 the fact that our detainees tend to speak English after some time.

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1 PRESIDING JUDGE STEINER: It was just a side comment, of course.

2 So I think Maître Badibanga could put some more questions, or clarify some more points,
3 in relation to what was informed by Mr Dubuisson?

4 MR BADIBANGA: (Interpretation) Thank you, your Honour. Mr Dubuisson, from the
5 outset, mentioned the issue of the legal basis, and we are relying on Article 70 of the Rome
6 Statute. Based on the information in our possession, it seems to us that this corresponds
7 to the definition of Article 70, so this might be offences against the administration of
8 justice.

9 Mr Dubuisson raised the issue of designating someone who would be able to ensure the
10 safeguard of the rights of the Defence, if they are being investigated.

11 We are not investigating the Defence; we are investigating a scheme. Obviously, there
12 are names of certain members of the Defence, not only limited to Mr Kilolo, but there is
13 also Mr Mangenda, but we are not carrying out an investigation of them. We are simply
14 investigating payments of money, and we do not think that there is the slightest prejudice
15 to their rights.

16 We were very concerned not to undermine the rights of the accused or the Defence, and
17 that is why we decided to propose that if we were listening to the recordings ourselves,
18 then we may stumble on information that we do not have a right to have access to. This
19 is privileged information between an accused person and his Counsel. That is why we
20 proposed a third party. I listened to Mr Dubuisson, who spoke at length about active
21 monitoring, and if I can summarise what he said, it means that so far there are no
22 recordings of conversations between an accused and his counsel. Maybe this is a fault on
23 our part, but we really tried to find out how this functions.

24 At one point we were talking about passive monitoring. This would refer to recordings
25 made as a precautionary measure and stored and, if the need arises, they could be listened

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1 to. Maybe I misunderstood and this is an opportunity for us, for the Registry, to clarify,
2 but Mr Dubuisson spoke a lot about active monitoring, and I do not know what passive
3 monitoring refers to.

4 Also, based on his explanation, when a detained person receives a call, the call comes to
5 the Detention Centre. The guard recalls that person and then sends the call to the
6 detained person, but there is another point.

7 If the telephone is in the room of the detainee, can he himself pick up the telephone and
8 call somebody directly? That was not very clear to me, and maybe he should clarify.

9 The Presiding Judge asked about the case of Mr Kilolo, and Mr Dubuisson said that
10 Mr Kilolo is well-known at the Detention Centre, but if we had to set Mr Kilolo aside,
11 (Redacted)

12 (Redacted)

13 (Redacted)

14 My question is: Do the guards know the voices of all the seven to ten people that
15 Mr Bemba included in his list? Is Mr Babala registered on that list as a member of the
16 Defence, which means that his communications would be privileged?

17 Now, in this particular case, the call transfers are done at the level of (Redacted), based on
18 what the witness told us. Mr Babala calls from (Redacted). I do not know whether he
19 calls as a member of the Defence or an acquaintance or a friend or member of the family.
20 (Redacted)

21 territory. So, in that case, is that strictly privileged communication or is there more
22 information that the Registry can communicate to us which would help us to better focus
23 our request and clarify it? That is what I wanted to say.

24 PRESIDING JUDGE STEINER: I think it is a very good opportunity for Mr Dubuisson to
25 clarify such points. For instance, these phone calls to Mr Babala, in principle, if he's not

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1 in the List of Counsel, probably there are records of these conversations with Mr Babala;
2 am I correct?

3 MR DUBUISSON: (Interpretation) Your Honour, yes, I will answer the three different
4 questions that have been asked.

5 To begin with your question, yes, that's correct. I do not believe that Mr Babala is a
6 member of the Defence team, but if he's on the list of Mr Bemba's contacts, we have all
7 recordings of correspondences or communication with him, and that is what we refer to
8 as passive monitoring. This means that we record all telephone calls from the detained
9 person to the outside world and from the outside world to the detained person, but it is
10 passive because we do not have the key to open those recordings.

11 I have mentioned to you the three keys that we have, and if we have that key, then we can
12 listen to those recordings.

13 PRESIDING JUDGE STEINER: Sorry to interrupt. Why you should have to inform the
14 Defence in case you have --

15 MR DUBUISSON: (Interpretation) Those are the rules. What we have tried to do, you
16 are aware that we are presently reviewing the Rules of the Registry. In light of all the
17 problems that we have come across in the past, including witness protection, we have
18 tried to amend the Regulations of the Registry to have the possibility of listening to or
19 re-listening to some calls involving certain people. So in that case passive
20 communication would be less passive, because we would have the possibility of carrying
21 out random monitoring. It will not be targeting one specific person. That would be
22 random monitoring. That is what we have proposed in the amended Rules of the
23 Registry.

24 Regarding Mr Babala specifically, if he is someone that we need to listen to, then for that
25 specific person we would need to have the exact numbers used, the period during which

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1 those numbers were used, the period involved or relevant to those suspicions so that we
2 should be able to limit our -- the listening, because if you go to six, seven months, that
3 would be much, and there we are talking about one number only.

4 Now, the person involved that we are talking about has a list of numbers of people that he
5 can contact, and it is a long list. It is fortunate that he's not very prolific when it comes to
6 contacting all those people, but it is a very long list of phone numbers. So we need to
7 know who has to have access to that list, so the Chamber can ask us to provide that list.
8 Regarding calling from the cell, no, it is simply a phone set that you can speak from. You
9 don't even have numbers. There's not even a dial there. So it is impossible for any
10 detained person to initiate a phone call from his cell, to call directly.

11 PRESIDING JUDGE STEINER: Are there controls on the possibility of detainees to have
12 mobile phones?

13 MR DUBUISSON: (Interpretation) It is strictly forbidden to have a cellphone in the
14 Detention Centre. (Redacted) Detention Centre

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 Now, regarding passive monitoring, in answer to the Prosecutor's question, yes, I agree
21 with you. I'm sure that the guards do not know the 250 to 300 people who can call the
22 Detention Centre, given the number of detainees that we have.

23 Obviously, they know Mr Kilolo very well but they absolutely do not know all the 250,
24 260 people outside who can call someone in detention. That is what I can say.

25 PRESIDING JUDGE STEINER: But you said you have a log-book in which all these

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1 phone calls --

2 MR DUBUISSON: (Interpretation) Yes.

3 PRESIDING JUDGE STEINER: -- the ones received and the ones made are registered?

4 At least the numbers are registered?

5 MR DUBUISSON: (Interpretation) Yes. This means that we have a list of the names
6 of the people and the various numbers, and we know the lists of -- when the detained
7 person called Mr Kilolo, or any other person. The same thing applies for visits.

8 PRESIDING JUDGE STEINER: Maître Badibanga?

9 MR BADIBANGA: (Interpretation) At this point, your Honour, I can already say that we
10 fully understand the difficulty involved, as well as the measures that were put in place to
11 protect privileged communication between the accused and his counsel, but our request
12 seems to us to be still valid, particularly since it concerns an issue that we have clearly
13 defined, and the individual in this case, Mr Babala. So our request would be to have, to
14 the extent possible, the privileged calls that are recorded, recordings, and if we listened
15 to -- or rather, the unprivileged communications, and we will listen to them, and
16 obviously we can provide the specific periods, which would probably include the periods
17 during which there were several transfers of money, and this is what we have raised
18 under Article 70.

19 Now, you asked us a question on the impact on the case. In our introduction we tried, to
20 the extent possible, to provide precise information to the Chamber, and regarding the
21 people involved, at this point we believe that the Prosecutor's case is not affected. The
22 case was concluded in March 2012, with 40 witnesses, and none of that is affected. It is
23 difficult to see how this will affect the Defence case, but we think that in the worst case
24 scenario the entire Defence the team would be involved, one way or the other, and the
25 accused might like to apply to the Chamber to suspend the proceedings, to allow him to

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1 make decisions and decide on a new strategy.

2 That would be the worst case scenario, but before that, there are other possibilities that

3 may arise, but it would be speculating to make definite proposals. Will certain witness

4 testimonies be excluded? How will all this be reorganised? But there are several

5 possibilities, but we thought that the worst case scenario would be that the Defence would

6 not be able to manage a situation, and that a few months would be necessary, that is the

7 case would be suspended for a few months, would be stayed for a few months, so that the

8 Defence should be reorganised.

9 Then there was the issue of (Redacted) and the fact that the Defence

10 team might be informed. We already spoke about that possibility. So I believe I have

11 covered the questions that were included in the agenda sent to us by the Chamber.

12 Maybe my colleagues have some further information? I will consult them.

13 Yes, there is one further point, your Honour, just to avoid any possible misunderstanding.

14 We were not asking the Registry to carry out a random listening exercise which would be

15 a fishing expedition. We have a clear idea of what we are looking for, and where to look

16 for that information. What we are requesting is that those recordings be made available.

17 We will specify the periods. We know precisely what we are looking for. We do not

18 think that will require six or eight months. It is sufficient for me to hear Mr Bemba

19 telling Mr Babala "Have you given the \$1,000 to Mr X who is coming to testify next week?"

20 If I have just that information then I can come back to you and tell you "This is a recording

21 that confirms the payment of money by -- through Western Union and which in turn

22 confirms what a witness told us."

23 Of course we need to have sufficient information for the Chamber, but our intention is not

24 to revisit the last three years of the trial, or the five years, ever since the arrest of

25 Mr Bemba, to listen to all the phone conversations. So it would be a targeted exercise.

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1 If you look at the table on the payments, there are certain periods during which there was
2 many payments, many money transfers made, so we will focus on those periods and we
3 believe that after a certain amount of time we can come back to the Chamber with the
4 information uncovered, and we would ask probably for a broader mandate, but with what
5 we are requesting, we can carry out targeted research, and come back with the relevant
6 information to the Chamber.

7 Thank you.

8 PRESIDING JUDGE STEINER: Maître Badibanga, for instance, would be a good start for
9 the Prosecution investigation just to check the log-book that Detention Centre's -- nodding
10 does not help. I need your answer.

11 MR BADIBANGA: (Interpretation) Yes, your Honour, that is a very welcome suggestion
12 from you. We noted several possibilities when Mr Dubuisson was speaking and that's a
13 possibility that would be very useful to us.

14 PRESIDING JUDGE STEINER: Would -- what do you have to add in relation to this?

15 MR DUBUISSON: (Interpretation) To begin with, I will say that we have already
16 carried out active monitoring of Mr Bemba's calls, and that did not yield anything, and
17 that was done. We had to inform the Defence. (Redacted)

18 (Redacted)

19 (Redacted).

20 Now we are talking about a list which is part of the detention file of the accused. It is not
21 accessible to the OTP. It is not accessible to anyone except the Registry so we are in the
22 hands of the Chamber. So from the moment that you touch on the detention file it has an
23 effect on the rights of the accused, so we will respect of course the instructions of the
24 Chamber, but right now we have to express reservations because this is indeed the
25 detention file.

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1 PRESIDING JUDGE STEINER: I was calling this log-book is what you were calling
2 dossier de détention?

3 MR DUBUISSON: (Interpretation) It is part of the detention file, just like other files.
4 You have a medical file, which is completely confidential, and not accessible, not even to
5 me, so it is part of the detention file.

6 PRESIDING JUDGE STEINER: So the list with the 250 names of persons that are
7 authorised to call Mr Bemba, or to be called by Mr Bemba, is part of this dossier secret?

8 MR DUBUISSON: (Interpretation) I believe it is a small misunderstanding. The 250
9 people who can call the Detention Centre is for all detainees in the Detention Centre, not
10 only Mr Bemba. (Redacted)

11 (Redacted)

12 (Redacted). That is part of confidentiality also.

13 PRESIDING JUDGE STEINER: Interesting. I suppose the Registry's basing its -- this
14 request or this obligation of keeping it confidential on the Regulations of the Registry, 175,
15 mainly (3) and (10); am I correct?

16 MR DUBUISSON: (Interpretation) Yes, specifically Regulation 92 of the Regulations of
17 the Court, and also those that you have mentioned.

18 I will be very honest with the Chamber and I am always honest, there might be
19 exceptional circumstances but it is up to the Chamber to decide.

20 PRESIDING JUDGE STEINER: For sure. We have no doubt that it will be for the
21 Chamber at the end to decide even because the Regulations of the Registry, they can
22 regulate the activities within Registry and not limit the activities of the Chamber for sure,
23 and -- but it's important for the Chamber to receive from the Registry and that's the main
24 reason for this status conference, the views of the Registry, in relation to the many
25 different aspects of any possible line of action to be taken. Please, would you like to add

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1 something?

2 MR DUBUISSON: (Interpretation) Thank you.

3 PRESIDING JUDGE STEINER: Maître Badibanga, is there anything else that you would
4 like to address?

5 MR BADIBANGA: (Interpretation) Madam President, we discussed at length within the
6 OTP before contacting the Chamber, and we took quite some time to ensure that we
7 approached the Chamber with valid information. We are not making a general request
8 here; our request, our application is very specific, and it is based on information that
9 seems to us to be quite probative.

10 We mentioned €100,000 involved here. We had exchanges with the Registry because we
11 have even discovered on the internet that the accused person can call a location where
12 there are 30 people, or so, and even talk to all those people.

13 The rights of the accused must be of course safeguarded but the integrity of the
14 proceedings must also be respected because I feel personally that if I were ever detained
15 in The Hague I would find it very easy to give instructions to any of my collaborators, to
16 do what I want.

17 But in this case it is a very specific case. Some witnesses received large sums of money,
18 and some of them, when they were asked here in a neutral manner, "Did you accept the
19 least amount of money?" And you will recall, Madam President, all those witnesses
20 stated that they never received any money from the Defence, even in repayment for travel
21 costs, but in this annex we have six pages of money transfers to those witnesses. So if
22 those transfers were innocent, the witness would have said, "Look, I was given €20 to pay
23 for my bus fare and to have a drink" but this is not the case. For certain witnesses we are
24 talking about 8,000, 10,000, €12,000. I believe that this is very serious and that is the basis
25 for our application. That is why we felt it was important to bring this to the attention of

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1 the Chamber.

2 Thank you.

3 PRESIDING JUDGE STEINER: Maître Badibanga, just a very quick look, but it appears
4 that the Prosecution preliminary investigation covers a period that ended in October 2012;
5 is that correct?

6 MR BADIBANGA: (Interpretation) Regarding the transfers, yes, this is a purely practical
7 matter. The initial information we received was in June. The process was quite slow
8 because the first source that provided the information to us was very cautious, and we
9 had to be also very, very cautious to ensure that there was no leak at all in this case, but as
10 from October we were able to make our request to Western Union, and that is how come
11 they answered us, and we also said that they should update us if there are any further
12 developments. So this is ongoing. We have the possibility of coming back regularly to
13 find out if further transfers have been made.

14 We have also similarly asked another money transfer enterprise, which is MoneyGram,
15 which is also very popular, but so far we have not received any response from them.
16 So it dates from that period but the process is ongoing, and we felt that as soon as that
17 information was received, and this was received early this year, we would be able to
18 contact the Chamber.

19 PRESIDING JUDGE STEINER: I put my question in order to have the complete picture,
20 as we mentioned in our first item of the agenda, whether the Prosecution foresees
21 investigation including (Redacted) not mentioned in the Prosecution's notice.
22 That's why I'm asking if, after October 2012, the Prosecution continues to monitor these
23 alleged money transfers?

24 MR BADIBANGA: (Interpretation) Yes, indeed. To be clear on this matter, yes, we are
25 continuing to follow up, and I will be very cautious here. These are suspicions that one

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1 can have, if you're involved in such a procedure, and if information is provided. We
2 believe that some information was very easily accessible because these were international
3 transfers, but (Redacted). That is why the
4 telephone calls are important to us. If you meet somebody in (Redacted)
5 (Redacted). So if there is any
6 further information, it would be our duty to inform the Judges.
7 PRESIDING JUDGE STEINER: Thank you, Maître Badibanga. Mr Dubuisson, anything
8 to add?
9 MR DUBUISSON: (Interpretation) I will be very brief, your Honour. I would like to
10 first of all point out that I am not counsel for the Defence, and I would like to remind my
11 friend also that if you are detained, it does not mean that you should not have a defence.
12 So people can initiate actions against Court proceedings.
13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Redacted)
17 (Redacted)
18 (Redacted)
19 (Redacted)
20 (Redacted)
21 (Redacted)
22 (Redacted). These are issues which are quite delicate. We are fully aware of that. So
23 you really have to look into the situation on the basis of certain parameters. I am sure
24 the OTP does that and that all the parties do it.
25 Thank you.

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1 PRESIDING JUDGE STEINER: Thank you. Maître Badibanga.

2 MR BADIBANGA: (Interpretation) Yes, your Honour. I am not going into an argument
3 here, but I think it is important for the record for us to fully understand what we are
4 talking about.

5 One of the things that we did is, you will recall that at one point last year we asked for a
6 statement of the payments to witnesses from the Registry. So we were concerned
7 whether they simply gave them an advanced amount; whether they paid for a flight, and
8 so on. We couldn't make any such judgment. It was simply a request.

9 We verified and excluded all payments that could be related to the Court, taking care of
10 the witness, and specifically VWU, so this is not money that the Defence paid for which it
11 was reimbursed. It is not money to pay the tickets of the witnesses or for their stay in a
12 hotel. It is not that at all. It is something that we cross-checked.

13 Regarding experts, it is one expert on the list, that is Witness 59, who is the fifth on the list.
14 The other experts are not mentioned. That expert received money from VWU, so
15 payments were paid to him by -- were made to him by VWU.

16 You have said that the payments were made as from October. I think we were fortunate
17 to communicate this to you now because if advances had been paid, maybe
18 reimbursements would have been effected, so we asked for clarification from VWU. So
19 this information was carefully cross-checked, and we are very careful when we advance
20 information that may be considered as accusations.

21 We were very careful about that, and the last point is that the amounts are relative, but
22 given that we managed many witnesses, I have managed many witnesses in Congo and
23 elsewhere, I can tell you that €8,000 for someone living in a neighbourhood of Kinshasa or
24 Bangui, that is enormous. I believe that is taken into account within those circumstances.
25 When you are talking about the Court, you are talking of millions of dollars in budget, but

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- 1 for these witnesses, €3,000, €5,000, that is a huge amount and it can be motivation for a
- 2 witness not to tell the truth. That is the basis.
- 3 Thank you.
- 4 PRESIDING JUDGE STEINER: Thank you, Maître Badibanga.
- 5 So the Chamber heard Prosecution, the representatives of the Registry, and of course the
- 6 Chamber will deliberate and issue a decision on the Prosecution's notice - request - as
- 7 soon as possible, taking into Court the urgency of the matter.
- 8 I thank very much the Prosecution team, representatives of the Registrar.
- 9 This status conference is adjourned.
- 10 Thank you our interpreters, sorry.
- 11 THE COURT USHER: All rise.
- 12 (The hearing ends in closed session at 4.38 p.m.)
- 13 Reclassification report
- 14 Pursuant to Trial Chamber III's Decision ICC-01/05-01/08-3057, dated 1st of May 2014,
- 15 this transcript with its redactions is reclassified as public
- 16 Second reclassification report
- 17 Pursuant to Trial Chamber III's Decision ICC-01/05-01/08-3057, dated 1st of May 2014,
- 18 additional redactions have been applied to this transcript.
- 19