

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 3 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

Decision on “Defence Motion on Privileged Communications”

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Jean-Jacques Badibanga

Counsel for the Defence

Mr Peter Haynes

Ms Kate Gibson

Ms Melinda Taylor

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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Defence**

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“ICC” or “Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”) hereby issues the Decision on “Defence Motion on Privileged Communications” (“Decision”).

I. Background

1. On 6 February 2014, the defence for Mr Jean-Pierre Bemba Gombo (“defence”) filed its “Defence Motion on Privileged Communications” (“Defence Motion” or “Motion”) together with a public Annex A.¹
2. In its Motion, the defence brings to the Chamber’s attention a letter it sent to the Prosecutor of the Court, with a number of questions related to the monitoring of defence communications and alleges that while the Office of the Prosecutor (“prosecution”) did reply to the letter, it did not respond to “the questions concerning the ongoing monitoring of the Defence team”.² The defence argues that “[i]t is impossible for members of the current team to continue to represent Mr. Bemba without the ability to take instructions and provide advice in a confidential setting”.³ The defence submits that it has “no clarity” as to “whether privileged communications between members of the current Defence Team and Mr. Bemba are or have been monitored, recorded, or provided to the Prosecution, independent investigators/counsel or other third parties”.⁴

¹ Defence Motion on Privileged Communications, 6 February 2014, ICC-01/05-01/08-2963, with annex ICC-01/05-01/08-2963-AnxA.

² ICC-01/05-01/08-2963, paragraphs 3 and 4.

³ ICC-01/05-01/08-2963, paragraphs 10.

⁴ ICC-01/05-01/08-2963, paragraph 11.

3. In terms of relief, the defence requests that the Chamber:⁵

ORDER that Mr. Bemba should enjoy privileged communications with members of his current Defence team; ("First Request")

ORDER the cessation of any monitoring or recording of communication between Mr. Bemba and his current Defence team, including but not limited to the monitoring or recording of phone conversations, meetings at the [United Nations Detention Centre] or the holding cell at the ICC premises; ("Second Request")

ORDER the cessation of any monitoring of communication devices of members of the current team whether by the Registry, the Prosecution or any national authorities; and ("Third Request")

ORDER the Prosecution to respond to the questions set out in the Letter of 16 January 2014 concerning the monitoring of privileged communications and or communications devices of the members of the current Defence team. ("Fourth Request")

4. On 19 February 2014, the prosecution filed its "Prosecution's Response to the 'Defence Motion on Privileged Communications'" ("Prosecution Response" or "Response"),⁶ in which it requests that the Chamber reject the Defence Motion in its entirety.⁷

5. The prosecution submits that the Defence Motion "rests on the false premise that privileged communications of the current Defence team are monitored or recorded" and that the "relief requested by the Defence is also either superfluous or moot".⁸ The prosecution states that it "had legal grounds to seek and obtain judicial authority to intercept the telecommunications, not of the entire defence team [...] but rather of suspects Kilolo and Mangenda individually" and that it, in consultation

⁵ ICC-01/05-01/08-2963, paragraph 12.

⁶ Prosecution's Response to the "Defence Motion on Privileged Communication", 19 February 2014, ICC-01/05-01/08-2984.

⁷ ICC-01/05-01/08-2984, paragraph 7.

⁸ ICC-01/05-01/08-2984, paragraph 2.

with the Single Judge of Pre-Trial Chamber II, Judge Cuno Tarfusser, in *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu and Narcisse Arido* ("case ICC-01/05-01/13"), "put in place safeguards [...] to ensure that it did not acquire possession or knowledge of legitimately privileged communications".⁹

6. The prosecution submits that the First Request is either unnecessary or, insofar as it relates to communications which the prosecution submits are not privileged, that such communications "do not require, nor deserve, the protection of the Chamber".¹⁰ The prosecution argues that the Second, Third, and Fourth Requests are moot since, "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".¹¹
7. On 19 February 2014, on the Chamber's instruction,¹² the Registry filed its "*Observations du Greffe relatives à l'Ordonnance de la Chambre de première instance III en date du 12 février 2014*" ("Registry's Observations"),¹³ in which it explains the regime for the surveillance of communications with the accused.¹⁴ In addition, the Registry specifies that the transmission to the prosecution of conversations not covered by

⁹ ICC-01/05-01/08-2984, paragraph 3.

¹⁰ ICC-01/05-01/08-2984, paragraph 4.

¹¹ ICC-01/05-01/08-2984, paragraphs 5 and 6.

¹² Order requesting observations on 'Defence Motion on Privileged Communications', 12 February 2014, ICC-01/05-01/08-2969, paragraph 4.

¹³ *Observations du Greffe relatives à l'Ordonnance de la Chambre de première instance III en date du 12 février 2014*, 19 February 2014, ICC-01/05-01/08-2987.

¹⁴ ICC-01/05-01/08-2987, paragraphs 1 to 10.

professional privilege, within the context of the Article 70 investigation related to case ICC-01/05-01/13, did not include communications occurring after the arrests made at the end of 2013.¹⁵ The Registry also makes submissions as to its understanding of which members of the defence team are entitled to privileged communication with the accused.¹⁶

8. On 3 March 2014, with leave of the Chamber,¹⁷ the defence filed its “Defence Reply to the ‘Prosecution’s Response to the ‘Defence Motion on Privileged Communications’” (“Defence Reply”).¹⁸ The defence submits that the Prosecution Response is “equivocal, and potentially disingenuous” and that it leaves open the possibility that the prosecution may have requested the Registry or States to monitor (i) “[p]rivileged communications which the Prosecution deems to be ‘illegitimate’”; (ii) “[c]ommunications of Defence team members, whom either the Prosecution or the Registrar consider to fall outside the scope of legal professional privilege”; and (iii) “communication devices of persons who communicate with the Defence”.¹⁹ The defence also submits that the prosecution’s “use of the current tense – ‘monitoring’ – does not exclude the possibility that the Prosecution could have requested States or entities to monitor the communications or devices of the current members of the Defence team at some point in the past”.²⁰

¹⁵ ICC-01/05-01/08-2987, paragraph 10.

¹⁶ ICC-01/05-01/08-2987, paragraphs 11 to 19.

¹⁷ Decision on “Defence Request for Leave to Reply to the ‘Prosecution’s Response to the ‘Defence Motion on Privileged Communications’””, 26 February 2014, ICC-01/05-01/08-2996, paragraph 6.

¹⁸ Defence Reply to the “Prosecution’s Response to the ‘Defence Motion on Privileged Communications’”, 3 March 2014, ICC-01/05-01/08-3004.

¹⁹ ICC-01/05-01/08-3004, paragraphs 5, 6, 16, and 21 to 24.

²⁰ ICC-01/05-01/08-3004, paragraph 7.

9. The defence presents further arguments on the scope of privilege, relating both to the prosecution's use of the term "legitimate" and the question of which members of the defence team are entitled to privileged communication, and submits that the "definition and scope of legal privilege" should be determined by the Chamber.²¹

10. The Defence Reply asserts that the accused will be deprived of effective legal assistance if the defence has no clarity as to whether and when their communications with their client may be monitored or if legal privilege continues to be defined such that any information relevant to case ICC-01/05-01/13 falls outside the scope of Rule 73(1).²²

11. Regarding the prosecution's submission that the Second and Third Requests are moot, the defence argues that the Prosecution Response fails to address the entirety of its Second and Third Requests since (i) the Response is limited to "members of the Defence team entitled to legal privilege"; (ii) the prosecution is not in a position to know whether national authorities are currently monitoring the defence team; and (iii) the Response does not bear on the question of whether the "physical communication devices" of members of the current defence team are being tapped or intercepted by national authorities.²³

12. Finally, the defence submits that the prosecution's broad statement that "[t]he fourth request is moot since, as far as the Prosecution is aware, no

²¹ ICC-01/05-01/08-3004, paragraphs 8 to 13.

²² ICC-01/05-01/08-3004, paragraphs 17 to 20.

²³ ICC-01/05-01/08-3004, paragraphs 25 to 28.

entity is monitoring privileged communications or the communication devices of the members of the current Defence team” does not answer the “vast majority” of the questions set out in the defence’s letter of 16 January 2014, noting in particular that the prosecution’s statement is limited to current “monitoring” and therefore does not answer any questions relating to previous monitoring.²⁴

II. Submissions and analysis

13. For the purpose of the present Decision and in accordance with Article 21(1) of the Rome Statute (“Statute”) the Chamber has considered Articles 67(1)(b) of the Statute, Rules 22(1) and 73 of the Rules of Procedure and Evidence (“Rules”), Regulations 68, 97(2), and 101 of the Regulations of the Court (“Regulations”), Regulations 124 to 127, 174, 175, 178(2), 182, 183, and 184 of the Regulations of the Registry and Article 8 of the Code of Professional Conduct for counsel.

First Request

14. In its First Request, the defence urges the Chamber to order that Mr Bemba enjoy privileged communications with members of his current defence team.²⁵ Although not evident from its original Motion, the Defence Reply clarifies that the defence in fact argues that *all* members of the defence team, including “Case Managers and Legal Consultants”, should enjoy privileged communication, and requests that the Chamber

²⁴ ICC-01/05-01/08-3004, paragraph 29.

²⁵ ICC-01/05-01/08-2963, paragraph 12.

issue an order to this effect.²⁶ The defence bases its argument on international jurisprudence and Articles 67(1)(b) and 69(5) of the Statute and Rule 73(1) of the Rules, arguing that the protection afforded “must be interpreted in a manner which is effective and not illusory”.²⁷

15. The Prosecution Response asserts that “no further order of the Chamber is required to protect the legitimately privileged communications between the Accused and his counsel” as protection of privileged communication is already provided for in Article 67(1)(b) of the Statute and Rule 73 of the Rules, and that communications falling outside these provisions are not privileged and therefore “do not require, nor deserve, the protection of the Chamber”.²⁸

16. The Registry submits that Regulations 68 and 97(2) of the Regulations, and Regulation 124 of the Regulations of the Registry, only afford privileged communication to counsel, co-counsel, and legal assistants.²⁹ The Registry also explains the surveillance regime it applies to communications with accused persons at the United Nations Detention Unit (“UNDU”).³⁰ Specifically, the Registry states that, in accordance with Regulation 174 of the Regulations of the Registry, all telephone conversations are passively monitored – i.e. recorded but not simultaneously listened to – except those with “counsel [and] assistants

²⁶ ICC-01/05-01/08-3004, paragraphs 6(b), 8, 10, 15, 23, and 24.

²⁷ ICC-01/05-01/08-2963, paragraphs 6 to 9 and ICC-01/05-01/08-3004, paragraph 8.

²⁸ ICC-01/05-01/08-2984, paragraph 4.

²⁹ ICC-01/05-01/08-2987, paragraphs 11 to 19.

³⁰ ICC-01/05-01/08-2987, paragraphs 1 to 10.

to counsel entitled to legal privilege”,³¹ which are not recorded or listened to by the Registry.³² The Registry also explains how conversations may be actively monitored – i.e. listened to, either *post factum*, or in real-time – pursuant to Regulations 175 and 184 of the Regulations of the Registry or Regulation 101 of the Regulations.³³

17. Turning to the applicable legal provisions, Article 67(1) of the Statute provides that the accused has the right “to communicate freely with counsel of [his] choosing in confidence”. This right is given further detail by Rule 73(1) of the Rules, which provides that “communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged”.

18. In terms of who may assist counsel, Rule 22(1) of the Rules states that “Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise”. Regulation 68 of the Regulations states that “[p]ersons assisting counsel as described in rule 22, sub-rule 1, may include persons who can assist counsel in the presentation of the case before a Chamber” and that “[t]he criteria to be met by these persons shall be determined in the Regulations of the Registry.” The relevant Regulations of the Registry, namely Regulations 124 to 127, require assistants to counsel to (i) have either five years of relevant experience in criminal proceedings or specific competence in

³¹ The full list reads as follows: “counsel, assistants to counsel entitled to legal privilege, diplomatic or consular representatives, representatives of the independent inspecting authority, or representatives of the Registry, a Chamber or the Presidency”.

³² ICC-01/05-01/08-2987, paragraphs 1 and 2.

³³ ICC-01/05-01/08-2987, paragraphs 3 to 7.

international or criminal law and procedure,³⁴ and (ii) be included on a list of persons who may assist counsel created and maintained by the Registry.³⁵ Persons seeking inclusion on the list of persons who may assist counsel must complete a standard form and supply relevant information.³⁶ Admission to the list is decided by the Registrar with the possibility to apply for review by the Presidency.³⁷ Regulation 97(2) of the Regulations stipulates that “[a]ll communication between a detained person and his or her defence counsel *or assistants to his or her defence counsel as referred to in regulation 68* [...] shall be conducted within the sight but not the hearing, either direct or indirect, of the staff of the detention centre”.

19. The Chamber considers that a plain reading of the above provisions makes it clear that privilege is afforded 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. Nothing in the legal framework of the Court extends legal privilege to an accused’s communication with persons who do not meet these requirements, regardless of whether they “assist” counsel in the broad sense of the word.

20. The Chamber notes the defence’s submission that the applicable law must be interpreted in a manner which renders the protection afforded

³⁴ Regulation 124, Regulations of the Registry.

³⁵ Regulations 124, 125, and 127, Regulations of the Registry.

³⁶ Regulation 125(2) and (3), Regulations of the Registry.

³⁷ Regulation 125(4) to (6), Regulations of the Registry

by privilege “effective and not illusory”.³⁸ The Chamber also notes the defence’s argument that under the current circumstances “[i]t is impossible for members of the current team to continue to represent Mr. Bemba without the ability to take instructions and provide advice in a confidential setting”.³⁹ The Chamber is not convinced by the defence’s implication that the legal framework as discussed above does not provide the defence with the opportunity to take instructions and provide advice in a confidential setting. The relevant legal provisions clearly provide counsel and legal assistants with the opportunity to communicate with the accused in a confidential setting, thereby safeguarding his rights pursuant to Article 67(1)(b).

21. While counsel is free to employ staff of different qualifications to work under his or her direction, the fact that counsel opts to be assisted by persons other than legal assistants who meet the criteria set out in Regulations 124 to 127 does not entitle him or her to an extension of the scope of privileged communication beyond what is provided for in the Court’s legal framework. Article 67(1)(b) of the Statute only grants the accused the right to communicate freely “with counsel”; it does not entitle every person working in the defence team to privileged communication with the accused. This limitation is also in accordance with the obligations incumbent on counsel to respect professional secrecy and confidentiality pursuant to Article 8 of the Code of Professional Conduct for Counsel. In particular, Article 8(3) obliges counsel to exercise caution when revealing protected information to co-

³⁸ ICC-01/05-01/08-3004, paragraph 8.

³⁹ ICC-01/05-01/08-2963, paragraph 10.

counsel, assistants, and other staff, and allows counsel to reveal only such information as is necessary to “enable the exercise of [their] functions”.

22. Moreover, the defence has neither provided legal authority nor any convincing factual basis for the request to extend the scope of legal privilege in this case. The Chamber considers that the current framework fully and adequately gives effect to the accused’s rights under Article 67(1)(b) of the Statute. With respect to communications between the accused and any other person, no expectation of privilege or privacy arises,⁴⁰ nor does the Chamber consider it necessary in order to fully uphold the rights of the accused under Article 67(1)(b) of the Statute.

23. The Chamber further notes that the surveillance regime applied by the Registry, which is in accordance with the scope of legal privilege set out in the relevant legal provisions and discussed above, has been applied throughout the present case and every other case before the Court. The Chamber notes the proper recourse for the accused to challenge a decision by the Registrar would have been through an application to the Presidency for review of the Registrar’s decision, pursuant to Regulations 220*bis* and 221 of the Regulations of the Registry.

⁴⁰ In this regard, the Chamber notes that active monitoring of the accused’s non-privileged communication was ordered at the pre-trial stage. *See* First decision on the Prosecutor’s request for redactions, 31 August 2008, ICC-01/05-01/08-85 and *Décision sur la surveillance des communications non privilégiées de Jean-Pierre Bemba Gombo*, 22 September 2008, ICC-01/05-01/08-118 (an English translation was filed on the same day).

24. Consequently, for the purposes of the First Request, Second Request and Third Request, the Chamber will interpret the 'defence team' (or 'current team', as applicable) as including only those persons falling within the scope of professional legal privilege as provided for in the statutory framework, and outlined above.

25. Proceeding on that understanding, with respect to the request that the Chamber order that Mr Bemba should enjoy privileged communications with his defence team, the Chamber finds that any such order could only be duplicative with the statutory framework, including in particular Article 67(1)(b) of the Statute and Rule 73(1) of the Rules. These provisions, and the regime applied by the Registry in implementation thereof,⁴¹ clearly provide for and enable privileged communications. The Chamber considers the regime provided for under the Court's legal framework, which includes a limited number of recognised exceptions to privilege,⁴² to be sufficient. There is no basis for any enhanced degree of legal privilege, beyond that applicable to all Defence counsel before the Court, to be applied in this case. Consequently, the Chamber does not consider it appropriate to issue an order in the terms sought. Moreover, given that the Chamber sees no reason to expand the scope of applicable privilege, the Chamber similarly finds that it would not be appropriate to issue an order which would merely duplicate the system under the existing legal framework.

26. For the above reasons, the Chamber rejects the First Request.

⁴¹ See e.g. Regulation 97 of the Regulations and Regulations 174-175, 178 and 182-183 of the Regulations of the Registry.

⁴² See e.g. Rule 73(1) of the Rules.

Second Request

27. In its Second Request, the defence seeks an order for “the cessation of any monitoring or recording of communication between Mr. Bemba and his current Defence team, including but not limited to the monitoring or recording of phone conversations, meetings at UNDU or the holding cell at the ICC premises”.⁴³

28. As a preliminary matter, the Chamber recalls its findings above regarding persons for whom an expectation of legal privilege and confidentiality in relation to their communications with the accused may arise and will confine its consideration accordingly.⁴⁴ The monitoring regime applied by the Registry to the communications of accused detained at the UNDU respects this distinction between communications which are presumed to be privileged and non-privileged communications. As detailed in the Registry’s Observations, telephone calls between counsel, co-counsel, or legal assistants and an accused are not monitored or listened to, whereas calls between all other persons and an accused are passively monitored pursuant to Regulation 174 of the Regulations of the Registry, and only actively monitored subject to the requirements of Regulation 175 of the Regulations of the Registry.⁴⁵

⁴³ ICC-01/05-01/08-2963, paragraph 12.

⁴⁴ See paragraphs 22 to 24.

⁴⁵ ICC-01/05-01/08-2987, paragraphs 2 and 3.

29. Regarding meetings at the UNDU, the Chamber notes the Registry's explanation that such communication is treated similarly to telephone communication.⁴⁶ Visits of those members of the defence team entitled to legal privilege take place within the "sight but not the hearing, either direct or indirect, of the staff of the detention centre".⁴⁷ Visits to the accused of persons not covered by legal privilege take place in the presence of guards who must be able to hear the conversation.⁴⁸

30. The Chamber considers that the Registry's practice, in relation to both telephone communications and meetings at the UNDU, is in accordance with the relevant legal provisions and appropriate to ensure the accused's rights pursuant to Article 67(1)(b) of the Statute.

31. With respect to the request that the Chamber order the cessation of monitoring or recording of communication between the defence team and Mr Bemba in the holding cell at the ICC premises, the Chamber considers it sufficient to note the Registry's statement that meetings taking place in the rooms adjacent to the courtroom are neither recorded nor listened to.⁴⁹

32. The Chamber notes that the Second Request also contemplates that such monitoring, in particular, may have occurred or might be occurring within the context of case ICC-01/05-01/13 and the related Article 70

⁴⁶ ICC-01/05-01/08-2987, paragraph 5.

⁴⁷ Regulation 97(2) of the Regulations.

⁴⁸ ICC-01/05-01/08-2987, paragraph 6.

⁴⁹ ICC-01/05-01/08-2987, paragraph 9.

investigation.⁵⁰ In its Motion, the defence makes the general statement that it has “no clarity” whether such monitoring is occurring or has occurred,⁵¹ and in its Reply notes that the prosecution is “not in a position to know whether national authorities are still monitoring the Defence team communications, as has been previously authorised”.⁵²

33. The Chamber considers this submission to be speculative and misleading. The Chamber recalls that Article 67(1)(b) of the Statute provides the right for an accused to “communicate freely with counsel of the accused’s choosing in confidence”. The Chamber notes that this provision, which is directed towards securing the fair trial rights of an accused by ensuring meaningful access to legal advice, is a fundamental protection. However, the defence presents nothing to suggest that the communications of the current defence team have, at any time, been monitored. In fact, the only support it cites is a judicial decision that was limited in scope to the communications of Mr Kilolo and Mr Mangenda⁵³ neither of whom are members of the current defence team.

34. Moreover, the Chamber notes the prosecution’s submission that “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” and that “no such

⁵⁰ See, for example, ICC-01/05-01/08-2963, paragraphs 5 and 11, and ICC-01/05-01/08-3004, paragraphs 17 to 19, 26, and 29.

⁵¹ ICC-01/05-01/08-2963, paragraph 11.

⁵² ICC-01/05-01/08-3004, paragraph 26.

⁵³ Decision on the Prosecutor’s “Request for judicial order to obtain evidence for investigation under Article 70”, 3 February 2014, ICC-01/05-52-Red2, pages 7 and 8.

monitoring has been requested by the prosecution”.⁵⁴ The Chamber does not agree with the defence’s assertion that these statements leave open the possibility that communications of members of the defence team (as defined in paragraph 24 above) with the accused which may be considered “illegitimate” are currently being recorded. In the Chamber’s understanding, the prosecution’s reference to “entitled to legal privilege” in this context refers to persons who may benefit from a presumption of privilege in respect of their communications with the accused. Therefore, the Chamber interprets the prosecution’s submission to simply mean that, to the prosecution’s knowledge, no communications of the defence team (as defined in paragraph 24 above) are currently being monitored. In light of the representation made, and considering that the defence has raised no basis to indicate that such monitoring is occurring, the Chamber does not consider that granting of an order in the terms requested is warranted.

35. The Chamber additionally finds it appropriate to note that it is the Single Judge of Pre-Trial Chamber II, Judge Cuno Tarfusser, who has competence over case ICC-01/05-01/13 and the related investigation, and recalls its position that it lacks competence in relation to matters arising in the context of that case.⁵⁵

36. For the reasons indicated above the Second Request is rejected.

⁵⁴ ICC-01/05-01/08-2984, paragraph 5.

⁵⁵ See Decision on the prosecution’s request relating to Article 70 investigation, 26 April 2013, ICC-01/05-01/08-2606-Red, paragraph 21; and Decision on the Defence Request for Interim Relief, 2 May 2014, ICC-01/05-01/08-3059, paragraphs 15 to 18.

Third Request

37. In the Third Request, the defence seeks an order for “the cessation of any monitoring of communication devices of members of the current team whether by the Registry, the Prosecution or any national authorities”.⁵⁶

38. At the outset, the Chamber again recalls its finding above regarding persons for whom an expectation of legal privilege and confidentiality regarding their communications with the accused may arise and will confine its consideration accordingly.

39. In light of the analysis with respect to the Second Request above, with which there is a significant degree of overlap, the Chamber finds the Third Request to be similarly speculative. Firstly, there is no indication that the Registry, in the normal course of its operations and in line with the applicable legal framework, monitors the communication devices of defence team members. Secondly, the Chamber considers that the defence fails to provide any evidence indicating that the communication devices of members of the current defence team are being monitored by the prosecution or national authorities. The defence relies only on the decision relating to the communications of Mr Aimé Kilolo and Mr Jean-Jacques Mangenda, neither of whom are part of the current defence team.⁵⁷ Thirdly, the prosecution expressly represents that “as far as the Prosecution is aware [...] no entity is monitoring privileged

⁵⁶ ICC-01/05-01/08-2963, paragraph 12.

⁵⁷ ICC-01/05-01/08-2963, paragraph 5. *See* ICC-01/05-52-Red2.

communications or the communication devices of the members of the current Defence team”.⁵⁸ In addition, the prosecution submits that it only “had legal grounds to seek and obtain judicial authority to intercept the telecommunications, [...] of suspects Kilolo and Mangenda individually”.⁵⁹ The Chamber considers that these representations adequately address any uncertainty in respect of this matter which the defence alleges may impede its ability to represent the accused.

40. Moreover, the Chamber considers the relief sought to be impermissibly broad. The responsibility, and indeed competence, of this Chamber is confined to ensuring the fairness and expeditiousness of the proceedings in the *Bemba* case.⁶⁰ It is within that context, that a Chamber concerns itself with the confidentiality and privilege of communications between an accused and his or her counsel. The protections afforded in this regard are to an accused and not to members of a defence team, save to the limited extent that it may be necessary to upholding the rights of an accused. The Chamber would neither have the authority, nor would it be appropriately informed or positioned, to make a blanket order for relief in the terms requested.

41. Finally, the Chamber reiterates its position regarding its lack of competence with respect to investigative steps which may have occurred or be occurring within the context of case ICC-01/05-01/13 and the related Article 70 investigation.⁶¹

⁵⁸ ICC-01/05-01/08-2984, paragraph 6 (emphasis added).

⁵⁹ ICC-01/05-01/08-2984, paragraph 3.

⁶⁰ Article 64(2) of the Statute.

⁶¹ See ICC-01/05-01/08-2606-Red, paragraph 21; and ICC-01/05-01/08-3059, paragraphs 15 to 18.

42. The defence also argues generally that it suffers from a lack of clarity and foreseeability as to whether and when its communications with the accused may be monitored and then disclosed to the prosecution by virtue of their potentially holding relevance to the charges in case ICC-01/05-01/13.⁶² However, the Chamber considers that the Court's applicable law provides adequate guidance on the question of confidentiality of communications between an accused and counsel and on the scope of legal privilege. It is a framework which applies equally to the work of all defence counsel before the Court and there is no reason why the communications of the current defence counsel in the *Bemba* case would be subject to any differing regime. Moreover, it is not appropriate to raise the question of legal privilege relating to material which may emanate from the Article 70 investigations relating to case ICC-01/05-01/13, or its potential use or admissibility in this case. No such matter is before the Chamber at this time.⁶³

43. In view of the above, the Chamber finds that the Third Request is unsubstantiated and may also partially fall outside the competence of the present Chamber to entertain.

⁶² ICC-01/05-01/08-3004, paragraphs 17 and 18.

⁶³ See Decision on "Prosecution's Application to Submit Additional Evidence", 2 April 2014, ICC-01/05-01/08-3029. In this decision, the Chamber rejected the prosecution's application to disclose and submit a portion of material obtained in the context of the prosecution's investigations on alleged Article 70 offences which has resulted in the charges brought in case ICC-01/05-01/13.

Fourth Request

44. In its Fourth Request, the defence urges the Chamber to order “the Prosecution to respond to the questions set out in the Letter of 16 January 2014 concerning the monitoring of the privileged communications and or communications devices of the members of the current Defence team”.⁶⁴

45. The prosecution argues that the Fourth Request is moot since, “as far as the Prosecution is aware and as previously stated, no entity is monitoring privileged communications or the communication devices of the members of the current Defence team”.⁶⁵ In its Reply, the defence argues that the Prosecution Response leaves “the vast majority” of the defence’s questions unanswered, noting “in particular, that the Prosecution’s Response is limited only to the present (‘is monitoring’), thereby avoiding all questions [...] concerning any previous monitoring of members of the current Defence team”.⁶⁶

46. At the outset, the Chamber considers it pertinent to note that a number of the questions raised in the Fourth Request concern actions which the defence hypothesises may have been taken in the context of case ICC-01/05-01/13 or the Article 70 investigation related to it.⁶⁷ With respect to

⁶⁴ ICC-01/05-01/08-2963, paragraph 12.

⁶⁵ ICC-01/05-01/08-2984, paragraph 6.

⁶⁶ ICC-01/05-01/08-3004, paragraph 29.

⁶⁷ This is the case with respect to some questions related to the “Monitoring of Mr Bemba’s telephone calls from the UNDU”, as well as questions related to the “Monitoring of Other Communications” and questions 33 and 34.

such issues, the Chamber again recalls its lack of competence,⁶⁸ but also notes the Pre-Trial Chamber's decision that the accused is at liberty to share any material or information disclosed to him in case ICC-01/05-01/13 with his counsel in the *Bemba* case.⁶⁹

47. The Chamber also notes that the majority of the questions under the heading "Monitoring of Mr Bemba's telephone calls from the UNDU" appear to have been answered subsequently by the Registry's Observations on the Defence Motion.⁷⁰

48. In addition to the above, the Chamber considers the Fourth Request fails to clearly state the reason for its filing and the legal and factual issues which the defence believes require the Chamber's intervention.⁷¹ The Defence Motion fails to specify in what way the prosecution's *inter partes* response failed to provide sufficient information, only asserting that the defence was left with "no clarity on this point",⁷² and the Defence Reply only raises one broad category of its questions, i.e. questions relating to past monitoring, which it alleges the prosecution has failed to answer.⁷³

49. For the above reasons, the Chamber finds the Fourth Request to be partially moot, partially outside this Chamber's competence, and also insufficiently focused.

⁶⁸ See ICC-01/05-01/08-2606-Red, paragraph 21; and ICC-01/05-01/08-3059, paragraphs 15 to 18.

⁶⁹ See Decision on the "Defence Request for access to confidential transcripts and filings" dated 1 April 2014 submitted by the Defence for Jean-Pierre Bemba Gombo in case ICC-01/05-01/08, 15 April 2014, ICC-01/05-01/13-338.

⁷⁰ ICC-01/05-01/08-2987, paragraphs 1 to 10.

⁷¹ See Regulation 23 of the Regulations of the Court.

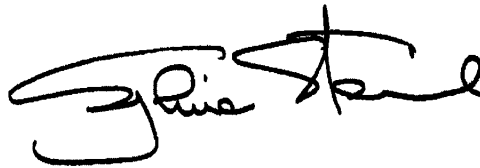
⁷² ICC-01/05-01/08-2963, paragraph 11.

⁷³ ICC-01/05-01/08-3004, paragraph 29.

III. Conclusions

50. In view of the foregoing the Chamber REJECTS the First, Second, Third, and Fourth Requests.

Done in both English and French, the English version being authoritative.



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 3 June 2014

At The Hague, the Netherlands