

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/05-01/08
Date: 31 January 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**

Confidential Document

**Corrected Version of Response to "Request for Access to the Confidential Record
of Case ICC-01/05-01/08", 30 January 2014, ICC-01/05-01/08-2953-Conf**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Jean-Jacques Badibanga

Counsel for the Defence of Jean-Pierre

Bemba Gombo

Mr Peter Haynes

Ms Kate Gibson

Legal Representatives of Victims

Ms. Marie-Edith Douzima-Lawson

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for the
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. Introduction

1. Mr Kaufman, Defence Counsel for Mr Jean-Pierre Bemba Gombo in the case ICC-01/05-01/13, requests access to the entire confidential record of this case. As it currently stands, the request cannot be granted.

2. The Office of the Prosecutor ("Prosecution") recognizes that parts of the confidential record may be relevant to the case in which Mr Kaufman is intervening as counsel. It cannot, however, support a blanket and unsubstantiated request for access. The Prosecution will carefully consider any request for confined variations of protective measures filed by Mr Kaufman, and will support it if it considers that Mr Kaufman has demonstrated a legitimate forensic purpose.

II. Request for Confidentiality

3. The Prosecution requests that the Trial Chamber III ("Chamber") receive this response as a confidential document since it contains references to confidential filings.

III. Procedural History

4. On 22 January 2014, Mr Kaufman, Defence Counsel for Mr Jean-Pierre Bemba Gombo in the case ICC-01/05-01/13 requested access to the confidential record of the case "in order to ensure effective representation of the Accused" and "better substantiate his defence strategy and arguments".¹ His request was transmitted to the parties by the Registrar on 23 January 2014.²

¹ ICC-01/05-01/08-2944-Anx 1, Annex 1 to Transmission of a submission from Mr Nick Kaufman dated 22 January 2014, 23 January 2014, paras. 6 and 7.

² ICC-01/05-01/08-2944, Transmission of a submission from Mr Nick Kaufman dated 22 January 2014, 23 January 2014.

5. On 27 January 2014, the Defence responded stating, *inter alia*, that it “has no instructions to oppose Mr Kaufman being granted access to confidential materials...”.³

6. On 28 January 2014, the Registrar filed his observations in relation to Mr Kaufman’s request noting, *inter alia*, that Mr Kaufman is not a member of the Defence Team in the case ICC-01/05-01/08 and as such does not have access to the confidential records of this case.⁴

IV. Submissions

7. From the outset, the Prosecution notes that Mr Kaufman’s request is made in a wholesale fashion. He requests access to the entirety of the confidential records of a case in which he is not a Defence counsel. No attempt has been made to refine the access parameters to specific portions of the confidential record. Further, Mr Kaufman fails to identify with precision the purpose of the requested access. These failures are fatal to the request, which effectively constitutes a “fishing expedition” into confidential records of a case in relation to which Mr Kaufman has no access rights.

8. The Prosecution notes that it has been this Court’s practice to reject wholesale or blanket requests for access or disclosure that fail to identify the precise purpose justifying access or disclosure. Requests without any such foundation have been deemed to constitute a “fishing expedition”.⁵ Likewise, the *ad hoc* Tribunals have

³ ICC-01/05-01/08-2947-Conf, Defence response to “Request for access to the confidential record of case ICC-01/05-01/08”, 27 January 2014.

⁴ ICC-01/05-01/08-2949 + Conf Annexes I, II and III, Observations du Greffier relatives au document ICC-01/05-01/08-2944-Anx1, daté du 22 janvier 2014, 28 January 2014.

⁵ See for instance, ICC-01/05-01/08-632, Decision on the defence application for additional disclosure relating to a challenge on admissibility, 2 December 2009, para. 26; ICC-01/04-01/06-103, pp.3-4. A contrario, see also ICC-01/11-01/11-392, para.40 (where the PTC found that the Defence request did not constitute a fishing

also indicated that requests for access to or disclosure of confidential information must identify the precise legitimate forensic purpose that would justify such access or disclosure.⁶

9. In addition, and as confirmed by the Registrar, Mr Kaufman is not a member of the Defence of Mr Jean-Pierre Bemba Gombo in this case.⁷ In his latest observation the Registrar notes that:

‘6. Le Greffe est d’avis que, n’étant pas membre de l’équipe de la Défense dans l’Affaire, Me Kaufman n’a pas qualité à avoir accès à des informations pour lesquelles la distribution est limitée en raison de leur classification (confidentielles, confidentielles ex parte, sous scellés) dans ladite Affaire. Pour cette même raison, il ne peut pas avoir accès au dossier de l’Affaire.

7. Le Greffe souligne également que l’article 8 du Code de conduite des conseils rend Me Haynes responsable du respect de la confidentialité des informations notifiées à l’équipe de défense qu’il dirige. Le paragraphe 3 de cet article limite la divulgation des documents confidentiels de l’affaire aux confrères, assistants et autres personnels « intervenant dans l’affaire à laquelle ont trait les informations et seulement pour pouvoir exercer ses fonctions en relation avec ladite affaire » (soulignés rajoutés). Le fait que Me Kaufman soit conseil de M. Bemba dans l’affaire ICC-01/05-01/13 ne lui confère donc aucun titre à recevoir des documents confidentiels dans l’affaire ICC-01/05-01/08, qui demeurent sous la responsabilité de Me Haynes.’⁸

expedition): “The Chamber indeed observes that the Defence request in relation to [REDACTED] is specific enough both in terms of what is sought by the Defence and the reasons why disclosure of the relevant material appears necessary.”

⁶ See, ICTY: Prosecutor v. Tolimir, IT-05-88/2-T, Decision on Defence Request for Access to Confidential Materials in the Prosecutor v. Tolimir Case, 2 June 2010; Prosecutor v. Dragomir Milosevic., IT-98-29/I-A, Decision on Radovan Karadzic’s Motion for Access to Confidential Material in the Dragomir Milosevic case, 19 May 2009, para. 7; Prosecutor v. Milan Martić, IT-95-11-A, Decision on Motion by Jovica Stanisic for Access to Confidential Testimony and Exhibits in the Martić Case Pursuant to Rule 75(G)(i), 22 February 2008, para. 9; Prosecutor v. Krajisnik, IT-00-39-A, Decision on “Motion by Mico Stanisic for Access to All Confidential Materials in the Krajisnik Case”, 21 February 2007, p. 4. Prosecutor v. Karadzic, IT-95-5/18-PT, Decision on Jovica Stanisic’s Motion for Access to Confidential Materials in the Karadzic case, 20 May 2009, para. 4; Prosecutor v. Stanisic and Zupljanin, IT-08-91-PT, Decision on Stojan Zupljanin’s Access to Confidential Material in the Krajisnik, Mrda, Stakic and Brdanin Cases, 24 April 2009, para. 11; Prosecutor v. Brdjanin, IT-99-36-T, Decision on Motion by Momcilo Gruban for Access to Confidential Materials in the Brdjanin and Talic Case, 1 April 2003; Prosecutor v. Kordic and Cerkez, IT-95-14/2-A, Decision on Motion by Pasko Ljubicic for Removal of Redactions (Appeals Chamber), 1 May 2003. ICTR: Ferdinand Nahimana Jean-Bosco Barayagwiza Hassan Ngeze (Appellants) v. The Prosecutor (Respondent), ICTR-99-52-A, Decision on “Joseph Nzirorera’s Motion for Access to Appeal Briefs”, 27 October 2005; Prosecutor v. Bagosora et al., ICTR-98-41-T, Decision on Disclosure of Confidential Material Requested by Defence for Ntahobali, 24 September 2004, Para.7. SCSL: Prosecutor v. Taylor, SCSL-03-1-T, Decision On Ex Parte And Confidential Prosecution Motion For An Order To Provide To The Prosecution Non-Privileged Documents Recently Obtained From The Accused’s Personal Archive, 5 November 2007, paras.11-14.

⁷ *Ibid* 2, page 3.

⁸ ICC-01/05-01/08-2949, paras. 6 and 7.

10. The Prosecution endorses the Registrar's determination that the request constitutes, in fact, a request for variation of the protective measures ordered by Chamber pursuant to Regulation 42 of the Regulations of the Court.⁹

11. In principle, the Prosecution does not oppose a request for variance of protective measures enforced by Chamber. However, any such requests should be limited in scope and narrowly tailored to a specific identified purpose (and not a blanket or wholesale request), and must demonstrate the necessity of the requested variance of protective measures. As it currently stands, Mr Kaufman's request fails to meet these requirements. The Prosecution submits that in order for any future request to succeed, Mr Kaufman should not only identify, in specific terms, the evidence in relation to which he requests variation of protective measures, but also explain why that evidence is of relevance in other proceedings before this Court, as well as the reason why the variation sought is appropriate and necessary.

V. Relief Sought

12. For the reasons explained above, the Prosecution submits that Mr Kaufman's request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 31st Day of January 2014
At The Hague, The Netherlands

⁹ ICC-01/05-01/08-2949, para. 8.