

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 13 February 2014

TRIAL CHAMBER III

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

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

Public

**Decision on “Transmission of a submission from Mr. Nick Kaufman dated
22 January 2014”**

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

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

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

Mr Xavier-Jean Keïta

States Representatives

Amicus Curiae

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

**Other
Pre-Trial Chamber II**

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (“Bemba case”) issues the following Decision on “Transmission of a submission from Mr. Nick Kaufman dated 22 January 2014”.

I. Background and submissions

1. On 23 January 2014, the Registry transmitted a submission from Mr Nicholas Kaufman (“Mr Kaufman”) dated 22 January 2014 and entitled “Request for Access to the Confidential Record of Case ICC-01/05-01/08” (“Mr Kaufman’s Request”).¹

2. Mr Kaufman, who is Counsel for Mr Jean-Pierre Bemba Gombo (“Mr Bemba”) in the case of *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”), and in the past was a legal consultant² and subsequently “associate counsel”³ in the *Bemba* case, requests that the Chamber order the Registrar to restore his access to the confidential record in the *Bemba* case. Mr Kaufman submits that Mr Bemba wishes to communicate to him, as his Counsel in case ICC-01/05-01/13, confidential information arising out of the *Bemba* case “so that Counsel may better substantiate his defence strategy and arguments in case ICC-01/05-01/13.”⁴ Mr Kaufman contends that “[i]t would be wholly unreasonable for Counsel to order his client to abstain from communicating to him confidential developments in [the *Bemba* case]” and asserts that should he fail to explore recent confidential developments in the

¹ Transmission of a submission from Mr. Nick Kaufman dated 22 January 2014, 23 January 2014, ICC-01/05-01/08-2944 and annex 1.

² ICC-01/05-01/08-670-Conf-AnxK; see also Decision on the “Prosecution’s Request to Invalidate the Appointment of Legal Consultant to the Defence Team”, 7 May 2010, ICC-01/05-01/08-769.

³ Transcript of hearing of 29 November 2010, ICC-01/05-01/08-T-37-Red ENG, page 1, lines 22 to 24.

⁴ ICC-01/05-01/08-2944-Anx1, paragraph 7.

Bemba case with Mr Bemba “he would be laying himself open to a justifiable charge of professional malpractice”.⁵ Accordingly, Mr Kaufman submits that “Counsel should [...] be entitled to access all sources of information legitimately available to his client.”⁶

3. Pursuant to the Chamber’s instruction,⁷ the defence,⁸ and the Registry⁹ filed their observations on Mr Kaufman’s request on 27 and 28 January 2014, and the legal representative of victims, Maître Marie-Edith Douzima-Lawson (“Me Douzima”),¹⁰ and the Office of the Prosecutor (“prosecution”)¹¹ submitted their observations on 30 and 31 January 2014.

4. The Registry explains that in a letter of 20 December 2013,¹² Mr Bemba informed the Registry of the appointment of Mr Peter Haynes (“Mr Haynes”) as Counsel and of the composition of his defence team in the *Bemba* case which, as subsequently confirmed by Mr Haynes, does not include Mr Kaufman.¹³ Consequently, Mr Kaufman has no access to non-public documents in the *Bemba* case.¹⁴ The Registry further submits that the fact that Mr Kaufman is Counsel for Mr Bemba in case ICC-01/05-01/13 does not bestow on him any right to have access to confidential documents in the *Bemba* case, which are under the responsibility of Mr Haynes and may only be divulged to “co-counsel, assistants and other staff working on the

⁵ ICC-01/05-01/08-2944-Anx1, paragraph 7.

⁶ ICC-01/05-01/08-2944-Anx1, paragraph 7.

⁷ Email from the Chamber to the defence, the prosecution and the legal representative of victims of 24 January 2014 at 16.15.

⁸ Defence Response to “Request for Access to the Confidential Record of Case ICC-01/05-01/08”, 27 January 2014, ICC-01/05-01/08-2947-Conf. A redacted version of the defence’s response was filed on the same day, ICC-01/05-01/08-2947-Red.

⁹ Observations du Greffier relatives au document ICC-01/05-01/08-2944-Anx1, daté du 22 janvier 2014, 28 January 2014, ICC-01/05-01/08-2949.

¹⁰ Observations de la Représentante légale des victimes à “Request for Access to the Confidential Record of Case ICC-01/05-01/08” (ICC-01/05-01/08-2944-Anx1), 30 January 2014, ICC-01/05-01/08-2952.

¹¹ Response to “Request for Access to the Confidential record of Case ICC-01/05-01/08”, 31 January 2014, ICC-01/05-01/08-2953-Corr.

¹² Enregistrement d’une lettre de M. Jean-Pierre Bemba Gombo désignant librement son conseil et précisant la composition de l’équipe assurant sa défense, 6 January 2014, ICC-05/01/08-2927-Conf-Anx1.

¹³ ICC-01/05-01/08-2949, paragraphs 1 to 3.

¹⁴ ICC-01/05-01/08-2949, paragraph 4.

particular case to which the information relates".¹⁵ According to the Registry, Mr Kaufman's Request thus constitutes a request for a variation of protective measures, which would need to be assessed by the Chamber in accordance with Regulation 42 of the Regulations of the Court.¹⁶ Should the Chamber consider that a precise list of confidential documents is of relevance for case ICC-01/05-01/13, the Registry is of the view that the only appropriate solution would be to register these documents in the record of the case ICC-01/05-01/13.¹⁷ In this manner, Mr Kaufman would have a clear right of access to the documents and would become responsible for their confidentiality under Article 8 of the Code of Professional Conduct for counsel.¹⁸

5. The defence submits that it "has no instructions to oppose Mr Kaufman being granted access to confidential materials" in the *Bemba* case. However, considering the volume of the case file, the defence explains that to its understanding, the accused is interested in the provision of confidential materials and documents which relate to the litigation concerning a specific issue and "appear of clear relevance to what has so far been made public concerning the Article 70 proceedings, and should be released to the Defence in case ICC-01/05-01/13."¹⁹

6. The prosecution and Me Douzima request that the Chamber reject Mr Kaufman's Request.²⁰ To that end, the prosecution endorses the Registry's determination that Mr Kaufman's Request constitutes a request for variation of protective measures, which should be limited in scope and narrowly tailored to a specific identified purpose and demonstrate the necessity of the requested variation. According to the prosecution, Mr Kaufman's Request

¹⁵ ICC-01/05-01/08-2949, paragraph 7.

¹⁶ ICC-01/05-01/08-2949, paragraph 8.

¹⁷ ICC-01/05-01/08-2949, paragraph 9.

¹⁸ ICC-01/05-01/08-2949, paragraph 9.

¹⁹ ICC-01/05-01/08-2947-Red, paragraphs 2 to 3.

²⁰ ICC-01/05-01/08-2953-Corr, paragraph 12 ; ICC-01/05-01/08-2952, page 8.

fails to meet these requirements and for any future request to succeed, Mr Kaufman should identify the evidence in relation to which he requests variation of protective measures and explain the relevance thereof in other proceedings before this Court as well as the reason why the variation sought is appropriate and necessary.²¹

7. Me Douzima submits that in the absence of any link between the charges in the *Bemba* case and case ICC-01/05-01/13, Mr Kaufman failed to demonstrate legal standing to be granted access to the confidential case file in the former case.²² She further submits that Mr Kaufman failed to demonstrate the extent to which a refusal of such access would prejudice the interests of his client in case ICC-01/05-01/13.²³ Finally, Me Douzima asserts that Mr Kaufman's Request is contrary to the interests of the victims she represents. In this respect, she stresses that granting Mr Kaufman access to confidential information in relation to participating victims and witnesses would not only endanger the safety, physical and psychological well-being, dignity and privacy of participating victims, some of whom are dual status individuals, but would also jeopardise the safety of other protected prosecution witnesses and other third parties whose identity has been mentioned in the context of the proceedings.²⁴

II. Analysis

8. In accordance with Article 21(1) of the Rome Statute ("Statute"), in making its determination, the Chamber has considered Article 64(6)(c) of the Statute and Regulation 23*bis* of the Regulations.

9. At the outset, the Chamber notes that further to the registration of Mr

²¹ ICC-01/05-01/08-2953-Corr, paragraphs 10 to 11.

²² ICC-01/05-01/08-2952, paragraphs 6 to 9.

²³ ICC-01/05-01/08-2952, paragraphs 10 to 11.

²⁴ ICC-01/05-01/08-2952, paragraphs 13 to 15.

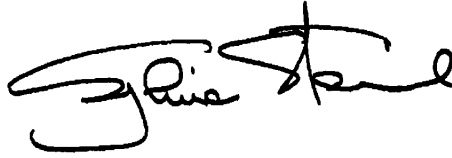
Bemba's letter and as confirmed in the Registry's observations, Mr Kaufman is no longer a member of the defence team in the *Bemba* case and, as such, he does not have access to documents classified as "confidential", "*ex parte*", or "under seal". Any request for access to a document classified as "confidential", "*ex parte*", or "under seal" must be specific and would need to be assessed in light of the nature and content of the document. Moreover, a legal and factual justification for such a request must be provided.

10. In the present case, Mr Kaufman requests access to the *entirety* of the confidential case record in the *Bemba* case, arguing that such access would be necessary to substantiate his defence strategy and arguments and to ensure an effective representation of the accused in case ICC-01/05-01/13. Absent any specific indication as to the nature and content of the documents at issue and without any justification as to why they are necessary to ensure the effective representation of the accused, the Chamber is not in a position to further analyse the merits of Mr Kaufman's Request at this stage. Consequently, Mr Kaufman's request for access to the entire confidential case record in the *Bemba* case is to be rejected.

11. Should Mr Kaufman wish to pursue this matter, he should identify, on the basis of the material that is publicly available, the specific documents he considers to be necessary for the effective representation of Mr Bemba in case ICC-01/05-01/13 and provide a substantiated justification for any specific request. This will enable the Chamber to determine whether granting Mr Kaufman access to specifically identified documents is appropriate and consistent with the Chamber's obligations under the statutory framework.

12. In view of the above, the Chamber hereby **REJECTS** Mr Kaufman's Request.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 13 February 2014

At The Hague, The Netherlands