

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05
Date: 20 November 2013

THE PRESIDENCY

Before: Judge Sang-Hyun Song, President
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Akua Kuenyehia, Acting Second Vice-President

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

Under seal, *Ex parte* with three under seal *ex parte* annexes

Only for the Prosecutor and the Registrar

**Decision on the urgent application of the Single Judge of Pre-Trial Chamber II of
19 November 2013 for the waiver of the immunity of lead defence counsel and
the case manager for the defence in the case of *The Prosecutor v Jean-Pierre
Bemba Gombo***

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 James Stewart

Mr Jean-Jacques Badibanga

Counsel for Jean-Pierre Bemba

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others
Pre-Trial Chamber II

The Presidency has before it an urgent application from the Single Judge of Pre-Trial Chamber II in the case of *The Prosecutor v Jean-Pierre Bemba Gombo* for the waiver of the immunity enjoyed by lead defence counsel and the case manager for the defence in that case.

Background

1. This application for the waiver of immunity ("Application") arises from a request, dated 19 November 2013, by the Prosecutor before Judge Tarfusser, Single Judge of Pre-Trial Chamber II ("Single Judge"), pursuant to article 58 of the Rome Statute, for the issuance of a joint warrant of arrest against, *inter alia*, Mr Aimé Kilolo Musamba and Mr Jean-Jaques Mangenda Kabongo, lead defence counsel and case manager for the defence, respectively, in the case of *The Prosecutor v Jean-Pierre Bemba Gombo* ("case") for offences committed against the administration of justice, under article 70 of the Rome Statute of the International Criminal Court ("Rome Statute").¹
2. By Application addressed to President Song and Vice-President Monageng on the same date, the Single Judge informed the latter that he is minded to grant the request of the Prosecutor and issue the warrant of arrest against the persons concerned and others ("Annex I").² The essence of the reasoning of the Single Judge was contained in a draft arrest warrant annexed to the Application.
3. The Single Judge also requested to be excused from sitting as a member of the Presidency, in his capacity as Second Vice-President, in the deliberations of the Presidency on the Application on the ground of a conflict of interest. On 20 November 2013, the Presidency decided to grant that application ("Annex II") and

¹ ICC-01/05-67-US-Exp with under seal annexes A to L.

² 2013/PRES/412.

on the same day called Judge Kuenyehia to act as Second Vice-President for the purposes of deciding on the Application ("Annex III").

Application

4. The Single Judge takes the view that there are reasonable grounds to believe that the persons concerned have committed crimes within the jurisdiction of the Court, namely intentionally presenting evidence that the parties know is false or forged, pursuant to article 70(1)(b) of the Rome Statute, and intentionally "[c]orruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness", pursuant to article 70(1)(c) of the Rome Statute.
5. Furthermore, the Single Judge takes the view that the persons concerned present a serious flight risk if they are not remanded in custody pending completion of the article 70 proceedings against them and, as such, their arrest and detention is necessary, in accordance with article 58(1)(b), (i) to ensure their appearance in those proceedings, (ii) to ensure that they do not obstruct or endanger the investigation or the court proceedings, or (iii) to prevent them from continuing to commit a crime.
6. In their capacity as counsel and case manager in the case, the persons concerned enjoy immunities pursuant to, inter alia, the Rome Statute, the Headquarters Agreement between the International Criminal Court and the Host State ("Headquarters Agreement") and the Agreement on the Privileges and Immunities of the Court ("Immunities Agreement").
7. By the Application, the Single Judge requests the Presidency to waive the immunities they enjoy in order to issue and execute a joint arrest warrant against them and others, pursuant to article 58 of the Rome Statute, for article 70 offences against the administration of justice.

Determination

8. The Presidency notes the terms of article 25 of the Headquarters Agreement which, *inter alia*, regulates the immunities of counsel in the territory of the host State, and provides that counsel and persons assisting counsel in accordance with rule 22 of the Rules of Procedure and Evidence ("Rules") "...shall enjoy...privileges, immunities and facilities to the extent necessary for the independent performance of their functions...". Pursuant to article 25(1)(c), such immunities include "...immunity from legal process of every kind in respect of words spoken or written and all acts performed by them in their official capacity...".
9. Furthermore, the Presidency notes the terms of article 18 of the Immunities Agreement, which, *inter alia*, regulates the immunities of counsel on the territory of signatory States other than the host State, and provides that counsel and persons assisting counsel in accordance with rule 22 of the Rules "...shall enjoy immunities to the extent necessary for the independent performance of his or her functions...". Pursuant to articles 18(1)(a) and 18(1)(b), such immunities include "...[i]mmunity from personal arrest or detention..." and immunity from "legal process of every kind in respect of words spoken or written and all acts performed by him or her in official capacity..."
10. The request of the Single Judge is that the Presidency waive the immunities enjoyed by the persons concerned in order to allow the relevant authorities to issue and execute an arrest warrant against them for article 70 offences against the administration of justice. As stipulated in the Headquarters Agreement and the Immunities Agreement, such immunities are granted to counsel and persons assisting counsel only to the extent necessary for the performance of their functions.

The legitimate functions to be performed by counsel and persons assisting them do not extend to the types of conduct depicted in articles 70(1)(b) and article 70(1)(c) of the Rome Statute, which the persons concerned are alleged to have undertaken. Consequently, there is no immunity attaching to the acts allegedly committed by the persons concerned which presents a bar to their arrest and potential detention on remand for alleged article 70 offences in the instant case and it follows, therefore, that no waiver need be granted.

11. However, to the extent that it might be argued that counsel and the case manager may nevertheless enjoy such immunities, pursuant to articles 30 of the Headquarters Agreement and article 26 of the Immunities Agreement, the Presidency has a duty to waive the immunities where the following two conditions are satisfied; where: (i) "...they would impede the course of justice" and (ii) "can be waived without prejudice to the purposes for which they are accorded". The facts of the present case meet these criteria.
12. On the first ground, the immunity from arrest and detention afforded to the persons concerned may impede the course of justice were those persons, whom it is argued present a serious flight risk, to flee and evade investigation or prosecution for article 70 offences against the administration of justice.
13. On the second ground, the immunities may be waived without prejudice to the purpose for which they were granted in the instant case. The Presidency has previously found that the relevant purposes of such immunities are the good administration of justice, the proper functioning of the Court and the independent performance of counsel's functions.³ The purposes for which immunity is granted do not include the commission of offences against the administration of justice. As

³ Decision of the Presidency 19 March 2010 on the application for the waiver of immunity from legal process enjoyed by counsel, 2010/PRES/132-2.

such, the Presidency has a duty to waive any attaching immunity. The immunity of counsel and the case manager is therefore waived to the extent necessary for the issuance and execution of the arrest warrant against them for alleged crimes committed against the administration of justice and for their potential detention on remand pending investigation or prosecution of those offences.

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


Judge Sang-Hyun Song
President

Dated 20 November 2013
At The Hague, The Netherlands