

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 15 February 2013

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***

**URGENT
Public**

Decision on issues related to the testimony of Witness D04-19 *via* video-link

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 Aimé Kilolo Musamba

Mr Peter Haynes

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson

Mr Assingambi Zarambaud

Legal Representatives of the 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

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Other

Trial Chamber III ("Chamber") of the International Criminal Court, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, issues the following Decision on issues related to the testimony of Witness D04-19 via video-link ("Decision").

I. Background and Submissions

1. On 31 January 2013, the defence for Mr Jean-Pierre Bemba ("defence") filed its "Defence Submission in Compliance with Decision ICC-01/05-01/08-2492" ("Defence's Request"), together with a confidential *ex parte* Annex A ("Annex A").¹ In Annex A, the defence requests, *inter alia*, that (i) the testimony of Witness D04-19 be given *via* video-link;² (ii) "the Chamber authorize two members of the Defence team to be present [...] with the witness and conduct his examination in situ";³ and (iii) "that the Registry facilitate privileged telephone communication between Counsel [...] and Mr Bemba in The Hague, in order to ensure that instructions can be provided in the same manner as if the testimony was being given at the seat of the Court in The Hague."⁴
2. On 6 February 2013, the Chamber issued its "Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497" ("Chamber's Order"),⁵ in which, *inter alia*, the Chamber granted one of the defence's requests and authorised Witness D04-19 to give testimony before

¹ Defence Submission in Compliance with Decision ICC-01/05-01/08-2492, 31 January 2013, ICC-01/05-01/08-2497 and Confidential *ex parte* Annex A, ICC-01/05-01/08-2497-Conf-Exp-AnxA. The Chamber notes that the present decision refers to matters addressed in the context of the confidential *ex parte* Annex. While some of the matters referred to therein should remain *ex parte* at this stage, in light of the principle of publicity of the proceedings enshrined in Articles 64(7) and 67(1) of the Statute, this Decision makes reference to information that the Chamber considers not to warrant *ex parte* treatment at this time.

² ICC-01/05-01/08-2497-Conf-Exp-AnxA, paragraph 2.

³ ICC-01/05-01/08-2497-Conf-Exp-AnxA, paragraph 3.

⁴ *Ibid.*

⁵ Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497, 6 February 2013, ICC-01/05-01/08-2500.

the Chamber *via* video-link.⁶ In relation to two further requests, the Chamber requested observations from the Office of the Prosecutor (“prosecution”), the legal representatives of victims and the Registry.⁷ In addition, the Chamber requested the defence and the Victims and Witnesses Unit (“VWU”) to jointly report to the Chamber on the proposed starting date for the video-link testimony of Witness D04-19.⁸

3. On 8 February 2013, the prosecution submitted its “Prosecution’s Observations on Defence Request to Alter the Mode of Questioning during Video-Link Testimony” (“Prosecution’s Submission”).⁹ The prosecution stresses that the practice followed so far by the Chamber in relation to testimony *via* video-link has been for the parties and the Chamber to question the relevant witness from the seat of the Court and that, “[w]ithout knowing the Defence’s particular justification, it is difficult to imagine any good reason to depart from this procedure and allow the Defence to be present with the witness while the Prosecution and the Chamber remain in The Hague”.¹⁰ Consequently, the prosecution submits that the requested procedure is unnecessary, would provide a distinct advantage to the defence during questioning, and would diminish the Chamber’s ability to control and oversee the proceedings.¹¹

4. On the same date, both legal representatives of victims submitted their observations (“Legal Representatives’ Observations”).¹² Mr Zarambaud

⁶ ICC-01/05-01/08-2500, paragraph 30.

⁷ ICC-01/05-01/08-2500, paragraph 31.

⁸ ICC-01/05-01/08-2500, paragraph 32.

⁹ Prosecution’s Observations on Defence Request to Alter the Mode of Questioning during Video-Link Testimony, 8 February 2013, ICC-01/05-01/08-2505.

¹⁰ ICC-01/05-01/08-2505, paragraph 2.

¹¹ ICC-01/05-01/08-2505, paragraph 2.

¹² Observations du Représentant légal Maître Zarambaud Assingambi sur la Décision de la Chambre de première instance III du 6 février 2013 « Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-01/08-2490-Red and ICC-01/05-01/08-2497 », 8 February 2013, ICC-01/05-01/08-2504-Conf and Observations du Représentante légale de victimes sur la Décision de la Chambre de première instance III du 6 février 2013 « Decision lifting the temporary suspension of the trial proceedings and addressing additional issues raised in defence submissions ICC-01/05-

submits, *inter alia*, that the testimony *via* video-link requires the prior resolution of a series of important technical, logistical and diplomatic issues, and therefore, it would be desirable for it not to be organised in a precipitous manner.¹³ In addition, and in light of scheduled contacts with victims, Mr Zarambaud expresses his preference for the hearings to be resumed on 4 March 2013.¹⁴ Ms Douzima submits that, taking into account the unexpected delays of the trial proceedings between August and December 2012, in order to avoid these kinds of situation it may be desirable to adopt the order of appearance of witnesses proposed by the defence, and not to consider the testimony of Witness D04-19 precipitously.¹⁵

5. On 8 February 2013, the Registry submitted its “Registry’s Report on the arrangements for the testimony of Witness D04-19 *via* video-link” (“Registry’s Report”),¹⁶ in which it submits that the Registry can support the defence’s requests with some limitations.¹⁷
6. In relation to the request for two members of the defence team to be present, the Registry states that a maximum of two language channels can be provided at the location of the video-link.¹⁸ Since the information provided by the defence is that the witness will testify in a language different than the one used by the defence in its questioning, the Registry could support that request

01/08-2490-Red and ICC-01/05-01/08-2497”, 8 February 2013, ICC-01/05-01/08-2506-Conf. The Chamber notes that the present decision refers to matters addressed in the context of those confidential filings. However, the Chamber is of the view that, in light of the principle of publicity of the proceedings enshrined in Articles 64(7) and 67(1) of the Statute, the information referred in this Decision does not warrant confidential treatment at this time.

¹³ ICC-01/05-01/08-2504-Conf, paragraph 8.

¹⁴ ICC-01/05-01/08-2504-Conf, paragraph 9.

¹⁵ ICC-01/05-01/08-2506-Conf, paragraphs 10 to 13.

¹⁶ Registry’s report on the arrangements for the testimony of Witness D04-19 *via* video-link, 8 February 2013, ICC-01/05-01/08-2507-Conf. The Chamber notes that the present decision refers to matters addressed in the context of this confidential filing. However, the Chamber is of the view that, in light of the principle of publicity of the proceedings enshrined in Articles 64(7) and 67(1) of the Statute, the information referred in this Decision does not warrant confidential treatment at this time.

¹⁷ ICC-01/05-01/08-2507-Conf, paragraph 1.

¹⁸ ICC-01/05-01/08-2507-Conf, paragraph 2.

“provided that no other languages will be used”.¹⁹ However, the Registry highlights that during the testimony, data and phone traffic at the location of the video-link would be virtually impossible, due to the fact that the testimony with two language channels being provided, would use almost all available data bandwidth to and from the location of the video-link. Therefore, the working environment at this location would be seriously disrupted in functioning during the video-link hours and for the entire duration of the testimony, which the defence anticipates to amount to approximately three weeks. This disruption should therefore be taken into consideration when establishing the sitting hours in order to affect the normal operations of the location of the video-link to the least extent possible.²⁰ In addition, the language channel for the video-link should be used for the testimony of the witness, while the questioning by the defence counsel, in a different language, should be conducted through a telephone line. As the audio quality of the telephone line is lower, it would be more tiring for the interpreters in the courtroom.²¹

7. In relation to the request for privileged communication between counsel at the location of the video-link and the accused in the courtroom in The Hague, the Registry informs the Chamber that secure (encrypted) communication can be accommodated and that a telephone could be installed in the courtroom, if approved by the Chamber.²² However, the Registry states that the consultation between the defence counsel, if present at the location of the video-link, and the accused in the courtroom may be heard by the people present at the location of the video-link and, given the small size of the room, the consultation may also be captured by the witness’s microphone, although this could be solved by installing a mute button on the microphone. In

¹⁹ ICC-01/05-01/08-2507-Conf, paragraph 2.

²⁰ ICC-01/05-01/08-2507-Conf, paragraph 3.

²¹ ICC-01/05-01/08-2507-Conf, paragraph 4.

²² ICC-01/05-01/08-2507-Conf, paragraph 7.

addition, in light of the fact that the consultations may lead to multiple adjournments of the hearings, the Registry recommends that while one defence counsel is questioning the witness, the other member could make consultations from a room in close vicinity to that in which the video-link will take place.²³

8. In relation to the earliest starting date for the video-link testimony of Witness D04-19, the Registry states that it can be arranged within 14 calendar days as of the day the Chamber sets the starting date of the testimony.²⁴ In addition, the Registry recalls that, as submitted by the defence *via* email to the Chamber,²⁵ the witness is available to commence his testimony as of 22 February 2013. However, since the confirmation of charges hearing in the case of *The Prosecutor v. Laurent Gbagbo* is scheduled to take place from 19 February to 1 March 2013, the Registry stresses that, while it is able to accommodate two simultaneous proceedings, certain consequences and restrictions will apply due to the shortage of resources.²⁶
9. On 11 February 2013, a confidential *ex parte* defence, Registry and VWU only status conference was held to discuss issues related to the defence's presentation of evidence. During the status conference, the Chamber requested the defence and the Registry, *inter alia*, to clarify whether the testimony of Witness D04-19 is scheduled to last for three weeks since, according to the calculations of the Chamber, it should take no longer than 30 hours. The representative of the Registry clarified that, taking into account the extra time that may be required for testimony given by way of video-link, the testimony may take around ten days, with four to four and a half hours of

²³ ICC-01/05-01/08-2507-Conf, paragraph 9.

²⁴ ICC-01/05-01/08-2507-Conf, paragraph 10.

²⁵ Email from the Legal Assistant of Mr Jean-Pierre Bemba to the Chamber's Assistant Legal Officer, 8 February 2013, at 11h08.

²⁶ ICC-01/05-01/08-2507-Conf, paragraph 12.

hearings per day.²⁷ In addition, the defence reiterated that the witness was ready and available to start at the earliest opportunity.²⁸

10. For the purpose of the present Decision, the Chamber has considered, in accordance with Article 21(1) of the Rome Statute ("Statute"), Articles 64(2), 64(3)(a), 64(8)(b), 67(1)(b), (c) and (e), 68(2), and 69(2) of the Statute, Rule 67 of the Rules of Procedure and Evidence ("Rules") and Regulations 23(1), 43 and 54(d) and (k) of the Regulations of the Court ("Regulations").

II. Analysis

The starting date and the length of the testimony of Witness D04-19

11. As to the starting date of the testimony of Witness D04-19 – the only witness the defence presented as available before 4 March 2013 – the Chamber is mindful of the Legal Representatives' Observations and their preference for resuming the proceedings as of 4 March 2013, as well as of the Registry's Report and the scheduling constraints created by two simultaneous hearings. That notwithstanding, taking into account its duty under Articles 64(2) and 67(1)(c) of the Statute to ensure the expeditiousness of the trial and that the accused is tried without undue delay, and given that the witness is available to start his testimony earlier, the Chamber decides that the testimony of Witness D04-19 shall commence on 25 February 2013, at 09.00, which will be presented *via* video link from a location to be determined by the Registry.

12. As to the length of questioning time required for this witness, the Chamber notes that the defence has been granted 10 hours and the legal representatives

²⁷ Transcript of hearing on 11 February 2013, ICC-01/05-01/08-T-283-CONF-EXP-ENG, page 14 line 13 to page 16 line 19.

²⁸ ICC-01/05-01/08-T-283-CONF-EXP-ENG, page 17 lines 8-9.

of victims jointly two hours to question the witness.²⁹ In addition, the Chamber is aware of the Registry's submission that, due to the video-link system and the additional time required for simultaneous interpretation in the language chosen by the witness to testify and the different languages used for questioning, the testimony of Witness D04-19 may last longer than initially calculated by the Chamber.

13. In addition, given the scheduling constraints due to simultaneous proceedings that will last until Thursday 28 February 2013,³⁰ and given that the Chamber will not be able to sit due to a Plenary of the Judges and the Solemn Undertaking of the Deputy Prosecutor on Tuesday 5, Thursday 7 and Friday 8 March 2013, the Chamber informs the public, parties and participants that, unless otherwise decided, the testimony of Witness D04-19 shall be completed by 6 March 2013. For that purpose, the Chamber hereby decides that it will sit for two sessions of two hours on Monday 25, Tuesday 26, Wednesday 27 and Thursday 28 February 2013, and for three sessions of two hours on Friday 1, Monday 4 and Wednesday 6 March 2013. This schedule provides for 34 hours of hearing time, which should be sufficient to conclude the witness's questioning and should accommodate any delays attributable to the use of video-link. However, this will only be achieved if the parties and participants comply, when applicable, with the questioning time granted by the Chamber and focus their inquiry on strictly relevant issues.

²⁹ Pursuant to Decision on the "Submissions on Defence Evidence", 7 June 2012, ICC-01/05-01/08-2225, paragraph 10 in relation to Annex A to the Defence Submissions to the Chamber concerning its witnesses, 11 May 2012, ICC-01/05-01/01/08-2214-Conf-Exp-AnxA, the defence was granted 10 hours to question Witness D04-19. In addition, by Oral Decision of 15 October 2012, the legal representatives of victims were granted together up to two hours to question each of the witnesses called to give evidence by the defence, see Transcript of Hearing on 15 October 2012, ICC-01/05-01/08-T-254-RED-ENG WT, page 66 line 15 to 24.

³⁰ See *The Prosecutor v Laurent Gbagbo*, Decision on the schedule for the confirmation of charges hearing, 12 February 2013, ICC-02/11-01/11-397 and Public Annex ICC-02/11-01/11-397-Anx.

14. In accordance with the Chamber's prior rulings,³¹ in case the legal representatives of victims wish to question Witness D04-19, they should submit a relevant application and list of questions at least 7 days before the witness is scheduled to testify. However, in the present case the Chamber is of the view that such deadline should be modified.

The defence's requests for two members of the defence team to question Witness D04-19 "in situ" and for privileged telephone communication to be facilitated between counsel at the place of the video-link and the accused in The Hague

15. At the outset, the Chamber notes that the defence has failed to justify its requests in accordance with Regulation 23(1) of the Regulations. Although the failure to specify the legal and factual basis for the requests might be considered sufficient for their denial, on an exceptional basis and solely in relation to these requests, the Chamber will address their merits.

16. Pursuant to Articles 64(2), 64(3)(a) and 64(8)(b) of the Statute, the Chamber and its Presiding Judge have the duty to ensure and facilitate the fair and expeditious conduct of the proceedings and shall adopt such procedures and give directions as are necessary in this regard. By the same token, and in accordance with Regulation 43 of the Regulations, the Presiding Judge, in consultation with the other members of the Chamber, shall determine the mode of questioning witnesses so as to (i) make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth; and (ii) avoid delays and ensure the effective use of time. In addition, in accordance with Article 67(1) of the Statute, the accused is entitled to a fair hearing conducted impartially, in full equality, with a number of minimum

³¹ Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, ICC-01/05-01/08-807-Corr, paragraph 102 h); Decision on common legal representation of victims for the purpose of trial, 10 November 2010, ICC-01/05-01/08-1005, paragraph 39; and Decision on Directions for the Conduct of the Proceedings, 19 November 2010, ICC-01/05-01/08-1023, paragraphs 18-19.

guarantees including, *inter alia*: (i) “to be tried without undue delay”, as enshrined in sub-paragraph (c); and (ii) “to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her”, as guaranteed by sub-paragraph (e).

17. In assessing the defence’s requests, the Chamber has taken into account the issues of fairness and equality of arms raised in the Prosecution’s Submissions and the consequences, in terms of expeditiousness – as explained in detail in the Registry’s Report – that the defence’s requests might entail for the proceedings if granted. In terms of fairness and equality of arms, the Chamber notes that the practice of this Chamber and that of the Court as a whole, has been consistent in relation to the mode of appearance of witnesses when authorised to provide testimony by means of video technology. In the present case, the two witnesses called to testify by the prosecution who provided testimony *via* video-link – Witnesses 108³² and 36³³ – testified remotely from a location at which only representatives of the Registry were present, while the parties, the participants and the Chamber questioned the witnesses from the seat of the Court in The Hague.³⁴ Consequently, for the accused’s right to question the witnesses he has called “under the same conditions” as the witnesses brought against him to be upheld, it is not necessary for members of the defence team to be authorised to question the witness from the location of the video-link.

³² Redacted Decision on the “Request for the conduct of the testimony of Witness CAR-OTP-WWWW-0108 by video-link”, 12 October 2010, ICC-01/05-01/08-947-Red; and Decision on the Prosecution’s Requests for extension of the Chamber’s authorisation to hear testimony via video-link and protective measures for Witness CAR-OTP-WWWW-0108, 13 June 2011, ICC-01/05-01/08-1507-Conf.

³³ Public redacted decision on the “Prosecution request to hear Witness CAR-OTP-PPPP-0036’s testimony via video-link”, 3 February 2012, ICC-01/05-01/08-2101-Red2.

³⁴ During the testimony of Witness 108, two lawyers assisting the legal representative of victims were denied the possibility to enter the room from where the testimony of the witness was provided by means of video technology, and the Chamber ordered that no one other than the court officer and the two IT technicians in charge of handling the equipment could be present in the room during the testimony of the witness. See Transcript of Hearing on 28 June 2011, ICC-01/05-01/08-T-133-RED-ENG WT, page 3 lines 6 to 9.

18. The Chamber notes that, on the basis of the submissions made by the Registry on the technical aspects of the video-link arrangements, the presence of counsel at the location of the video-link may delay the proceedings. In particular, as noted in the Registry's Report, the use of two language channels – for testimony and questioning – would require the Chamber to consider adopting flexible, and probably shorter sitting hours, in order to disrupt to the least extent possible the functioning of the location of the video-link. In addition, one of the language channels would need to use a telephone line, with which the sound quality would be lower, which would not only be more difficult for the interpreters but which might also lead to the need for repetition and a slower pace of questioning. Given the Chamber's scheduling constraints, as described in paragraph 13 above, shortened sitting hours and a slower presentation of testimony entailing a longer period of time for completing this witness's testimony, would not be desirable.

19. As the Chamber denies the above request to have counsel present at the location of the video-link, the Chamber considers the related request of privileged communication between the counsel and the accused moot.

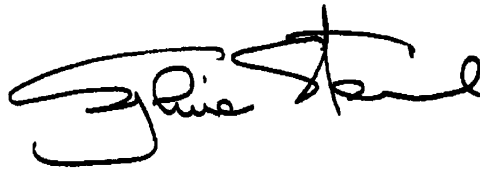
III. Orders

20. In view of the foregoing, the Chamber:

- a. DECIDES that the testimony of Witness D04-19 shall commence on 25 February 2013 at 09.00;
- b. INFORMS the public, parties and participants that, unless otherwise decided, the testimony of Witness D04-19 shall conclude by 6 March 2013;
- c. ORDERS the legal representatives of victims, in case they wish to question Witness D04-19, to submit the relevant applications and lists of questions by no later than 20 February 2013;

- d. DENIES the defence's requests for two members of the defence team to be present at the location of the video-link and for privileged telephone communication to be facilitated between counsel at the place of the video-link and the accused in The Hague;
- e. ORDERS the legal representatives of victims and the Registry to file public redacted versions of their submissions,³⁵ and/or to ask for their reclassification if they consider that no redactions are necessary, by no later than 20 February 2013;
- f. REMINDS the VWU to submit to the Chamber its bi-monthly report on the appearance of defence witnesses by no later than 18 February 2013; and
- g. ORDERS the defence to circulate its weekly and monthly anticipated witness schedule as from 25 February 2013.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 15 February 2013

At The Hague, The Netherlands

³⁵ ICC-01/05-01/08-2504-Conf, ICC-01/05-01/08-2506-Conf and ICC-01/05-01/08-2507-Conf.