

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08

Date: 3 April 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***

Public

Public Redacted version of the “Decision on ‘Defence Motion for authorisation to hear the testimony of Witness D04-21 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 ("Court"), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, issues the following Decision on "Defence Motion for authorisation to hear the testimony of Witness D04-21 via video-link" ("Decision").

I. Background and Submissions

1. On 1 March 2013, the Chamber orally decided on the appearance of Witness D04-21 between 18 and 20 March as proposed by the defence.¹
2. On 11 March 2013, the defence for Mr Jean-Pierre Bemba ("defence") filed its confidential "Defence Motion for authorisation to hear the testimony of Witness D04-21 via video-link" ("Defence Request"),² in which it requests that the testimony of the Witness D04-21 be heard *via* video-link.³ The defence submits that it "has been informed that [REDACTED] is seriously ill, and that necessitates his on-going presence in [REDACTED]".⁴
3. Although reiterating its expressed preference for live testimony in The Hague, the defence submits that, presenting the evidence of Witness D04-21 *via* video-link would provide the greatest chance of avoiding gaps in the presentation of evidence by the defence.⁵
4. On 13 March 2013, upon the Chamber's instruction by way of an email,⁶ the prosecution filed its "Prosecution's Response to Defence Motion for authorisation to hear the testimony of Witness D04-21 via video-link"

¹ Transcript of hearing, 1 March 2013, ICC-01/05-01/08-T-288-CONF-ENG ET, page 2, lines 8 to 13.

² Defence Motion for authorisation to hear the testimony of Witness D04-21 via video-link, 11 March 2013, ICC-01/05-01/08-2528-Conf.

³ ICC-01/05-01/08-2528-Conf, paragraph 4.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Email from the Assistant Legal Officer to the Trial Chamber to the prosecution and the legal representatives on 11 March 2013 at 16:14.

("Prosecution Response"),⁷ in which it opposes that Witness D04-21's testimony be given *via* video-link. The prosecution states that the defence "is routinely seeking the presentation of the evidence of its most important witnesses" by way of video-link, despite the fact that it should be used on an exceptional basis only.⁸ The prosecution further submits that the Defence Request is unsubstantiated as it does not provide the Chamber with any supporting documents relating to the health status of [REDACTED].⁹ The legal representatives of victims did not file any observations in response to the Defence Request and the defence did not file any reply to the Prosecution Response.¹⁰

5. By oral decision of 15 March 2013, due to scheduling constraints, the Chamber decided to postpone the commencement of Witness D04-21's testimony and deferred its decision on the Defence Request.¹¹

6. By oral decision of 20 March 2013, the Chamber directed the Victims and Witness Unit ("VWU") to update the Chamber by 25 March 2013 on Witness D04-21's ability to appear in person at the seat of the Court by 8 April 2013.¹² Accordingly, the VWU informed the Chamber that it had contacted the witness twice and he "firmly" refused to travel to The Hague to give evidence.¹³ On 2 April 2013, upon the Chamber's instruction,¹⁴ the VWU filed its "Registry's transmission of material provided by Witness CAR-D04-PPP-0021" and provided in a confidential *ex parte* Annex 1 supporting documentation to the Defence Request obtained from the witness.

⁷ Prosecution's Response to Defence Motion for authorisation to hear the testimony of Witness D04-21 via video link, 13 March 2013, ICC-01/05-01/08-2533-Conf.

⁸ ICC-01/05-01/08-2533-Conf, paragraphs 9 and 10.

⁹ ICC-01/05-01/08-2533-Conf, paragraph 11.

¹⁰ Transcript of hearing on 14 March 2013, ICC-01/05-01/08-T-294-CONF-ENG ET, page 2, lines 1 to 5.

¹¹ Transcript of hearing on 15 March 2013, ICC-01/05-01/08-T-295-ENG-ET, page 24, line 17 to page 26, line 6.

¹² Transcript of hearing on 20 March 2013, ICC-01/05-01/08-T-298-CONF-ENG ET, page 3, lines 15 to 18.

¹³ Email by a representative of the Registry to the Assistant Legal Officer to the Chamber, on 20 March 2013, at 18:24.

¹⁴ Email by the Assistant Legal Officer to the Chamber to a representative of the Registry, on 22 March 2013, at 10:34.

II. Analysis

7. 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), 67(1)(c) and (e), and 69(2) of the Statute, Rule 67 of the Rules of Procedure and Evidence ("Rules") and Regulations 23 *bis*, 43 and 54 of the Regulations of the Court.
8. As previously stated, the term "given in person" used by Article 69(2) of the Statute does not imply that witness testimony shall necessarily, under any circumstances, be given by way of live testimony in court. Instead, the Statute and the Rules give the Court broad discretion, subject to the provisions of Rule 67 of the Rules, to permit evidence to be given *viva voce* by means of video or audio technology whenever necessary, provided that the Statute and the Rules are respected and such measures are not prejudicial to, or inconsistent with, the rights of the accused.¹⁵
9. The Chamber recalls that, according to Article 67(1)(e) of the Statute, the accused has the right "to obtain the attendance and examination of witnesses on his or her behalf". Further, pursuant to Rule 67(1) of the Rules, the Chamber may allow a witness to give *viva voce* (oral) testimony by means of audio or video technology, provided that such technology permits the witness to be examined by the defence at the time the witness so testifies. In the present case, the Chamber notes that the request for the testimony of Witness

¹⁵ 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, paragraph 29; Decision on the "Prosecution request to hear Witness CAR-OTP-PPPP-0036's testimony via video-link", 2 February 2012, ICC-01/05-01/08-2101-Conf and its Public redacted decision on the "Prosecution request to hear Witness CAR-OTPPPPP-0036's testimony via video-link", 3 February 2012, ICC-01/05-01/08-2101-Red2, paragraph 6; 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-Conf and its Redacted Decision on the "Request for the conduct of the testimony of witness CAR-OTPWWW-0108 by video-link", 12 October 2010, ICC-01/05-01/08-947-Red, paragraph 10.

D04-21 to be presented by means of video technology was submitted by the defence itself in order to avoid gaps in the presentation of evidence.

10. The Chamber has previously held that one of the relevant criteria to be considered in determining whether or not a witness should be allowed to give testimony by means of video technology is the witness's personal circumstances.¹⁶ However, as previously stressed by the Chamber, although personal circumstances have been interpreted as linked to the well-being of a witness, the Chamber is not confined by the Statute in considering other types of personal circumstances which might justify a witness testifying by means of audio or video technology.¹⁷

11. In the present case, the Chamber acknowledges the witness's personal circumstances and notably his unwillingness to travel to The Hague given the serious illness of [REDACTED]. The Chamber also notes the prosecution's argument that Witness D04-21 is presented as a key witness and would be the third witness to be heard *via* video-link. However, in line with previous decisions on this matter, the Chamber recalls that certain circumstances may justify resorting to an exceptional remedy such as hearing a testimony *via* video-link as opposed to *in person* which remains the applicable principle pursuant to Article 69(2) of the Statute. The Chamber also notes that the witness provided reliable supporting documentation which allows the Chamber to better assess the witness's unavailability to testify at the seat of the Court at least until 20 April 2013.

12. In view of the above, the Chamber considers that, although the reasons for not giving evidence in person at the seat of the Court do not directly concern the witness himself but [REDACTED], the fact that [REDACTED] is seriously

¹⁶ ICC-01/05-01/08-2500, paragraph 30; ICC-01/05-01/08-2101-Red2, paragraph 7; ICC-01/05-01/08-947-Red, paragraph 13.

¹⁷ ICC-01/05-01/08-947-Red, paragraph 13.

ill constitute personal and exceptional circumstances preventing the witness from leaving his place of residence. In these circumstances, the Chamber considers that the witness's well-being during his testimony would be affected if he was to travel abroad at present. Therefore, the Chamber finds the Defence Request well-founded and considers that the presentation of Witness D04-21's testimony by means of video technology will not be prejudicial to, or inconsistent with, the rights of the accused.

Classification of documents

13. The Chamber notes that the Defence Request and the Prosecution Response are classified as confidential in order to protect, *inter alia*, the psychological well-being, dignity and privacy of the witness, in accordance with Article 68(1) of the Statute. In striking a balance between the protection of Witness D04-21 and the Chamber's duty to ensure the publicity of the proceedings as enshrined in Articles 64(7) and 67(1) of the Statute, the Chamber finds, pursuant to Regulation 23bis(3) of the Regulations, that the related documents may be treated as public save for the information concerning the health status of [REDACTED], which should remain confidential.

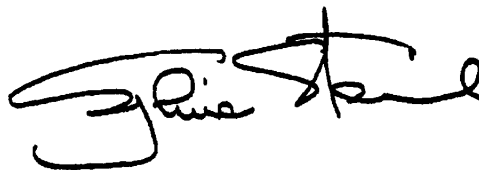
III. Orders

14. In view of the foregoing, the Chamber:

- a. GRANTS the Defence Request and authorises the testimony of Witness D04-21 to be given *viva voce* before the Chamber by means of video technology;
- b. ORDERS the Registry to make the necessary arrangements for the conduct of the video-link testimony; and

- c. ORDERS the defence, the prosecution and the Registry to file public redacted versions of their submissions¹⁸ in accordance with the guidance provided in paragraph 13 above, by no later than 8 April 2013.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 3 April 2013

At The Hague, the Netherlands

¹⁸ ICC-01/05-01/08-2528-Conf, ICC-01/05-01/08-2533-Conf and ICC-01/05-01/08-2571-Conf.