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No: **ICC-01/05-01/13**

Date: **1 March 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA,
JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND
NARCISSE ARIDO**

Public

**Jean Jacques Mangenda's Request for Reconsideration of Decision Concerning Video-
Conference Testimony**

Source: Defence for Jean-Jacques Kabongo Mangenda

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

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I. INTRODUCTION

1. Jean-Jacques Mangenda hereby requests reconsideration of the Trial Chamber's decision¹ denying hearing the expert testimony of Professor Dr. Otto Lagodny by video-link. The request is based on four grounds: (i) Professor Lagodny's adamant refusal to travel to The Hague, while at the same time expressing his willingness to testify by video-conference; (ii) the possibility of setting up a video-conference that costs the International Criminal Court no more than would be required to have Professor Lagodny travel to The Hague; (iii) the fact that even if a summons (which is not requested and would not be appropriate in present circumstances) were to be issued the most that could be ordered by way of remedy, according to the Appeals Chamber, would be video-conference testimony – to which the witness has already consented; and (iv) the flexibility reflected in past jurisprudence favouring video-conference testimony over the loss of testimony or an interruption of proceedings.

II. PROCEDURAL HISTORY

2. On 19 February 2016, the Trial Chamber denied a Defence motion requesting, *inter alia*, that Professor Lagodny be permitted to testify by video-conference. The reason for rejecting this relief was that:

The Mangenda Defence presents no justification for video-link beyond D23-1's personal preference and the alleged limited remuneration expert witnesses receive from the Court. D23-1 is an expert witness based in Western Europe, and the Mangenda Defence presents no concrete evidence that there would be any hardship, financial or otherwise, for him to testify in The Hague. The Chamber does not consider it justified to spend the time and resources to send a team from the court to set up a video-link solely to accommodate such a witness's personal convenience.²

3. The Defence immediately contacted Professor Lagodny to advise him of this decision and to canvass potential dates for his travel to The Hague. Settling on an available date also involved consultation with other Defence teams as to the availability and duration of their witnesses. Professor Lagodny, after some back and forth, indicated that he was prepared to travel to The Hague on 2 March 2016, with a departure after his testimony

¹ *Bemba et al.*, Decision on Request for Formal Submission of D23-1's Expert Report Pursuant to Rule 68(2)(b) or, in the Alternative, Rules 68(3) and 67, ICC-01/05-01/13-1641, 19 February 2016 ("Original Decision").

² *Id.* para. 12.

on 4 March 2016. On this basis, the Defence proposed to the Trial Chamber that Professor Lagodny testify in The Hague on 4 March 2016.³

4. On 27 February 2016, after further discussions with Counsel the previous evening about the logistics of travel and exact timing of testimony, Professor Lagodny indicated that he was no longer willing to travel to The Hague. On 28 February, Counsel tried to reassure Professor Lagodny about certain details and uncertainties about travel and scheduling that had been raised during the discussion on 26 February. Professor Lagodny nevertheless insisted that he was unwilling to travel to The Hague, primarily on the basis that the overall time consumption of three days (which was the only viable way of arranging travel, court familiarisation and testimony on a date certain) was simply too great.

III. SUBMISSIONS

(i) *Applicable Law*

5. The Trial Chamber has an inherent discretion to reconsider its previous decisions, in particular, where a new fact has arisen since the time of the original decision.⁴ Reconsideration may also be appropriate “to prevent an injustice,”⁵ or simply where “there is reason to believe that [a Trial Chamber’s] original Decision was erroneous.”⁶

³ Email from the Defences of Mr. Aimé Kilolo Musamba and Mr. Jean-Jacques Mangenda to the Trial Chamber, “Sequence of Defence Witnesses During Week 1”, 24 February 2016, 13h55 (“[i]t is therefore respectfully requested that Professor Lagodny’s testimony (for whom the examination estimate is one hour) be completed on 4 March 2016.”)

⁴ *Ruto & Sang*, Decision on the Sang Defence’s Request for Reconsideration of Page and Time Limits, ICC-01/09-01/11-1813, 10 February 2015, para.19 (“[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment”); *Kenyatta*, Decision on the Prosecution’s motion for reconsideration of the decision excusing Mr. Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013, para.11 (“[t]he Chamber finds support, as was also done by Trial Chamber I, in the relevant jurisprudence of the International Criminal Tribunals for the former Yugoslavia (‘ICTY’) and Rwanda (‘ICTR’) whose statutory provisions are equally silent as to the power of reconsideration, that those circumstances can include ‘new facts or new arguments’”); *Prlić et al.*, IT-04-74-A, Decision on Motions for Reconsideration, 5 September 2014, p. 4; *Stanišić & Župljanin*, IT-08-91-T, Decision Denying Joint Defence Motion for Reconsideration or Certification of the Decision of 18 April 2012 and Allowing the Defence to Reply to the Prosecution Response to the Joint Defence Final Submissions on the CHS, 10 May 2012.

⁵ *Ntaganda*, Decision on the Defence request for reconsideration, ICC-01/04-02/06-611, 27 May 2015, para.12.

⁶ *Nizeyimana*, ICTR-00-55C-T, Decision on Defence Motion to Reconsider the June 15 Decision on the Extremely Urgent Motion for Reconsideration of Trial Chamber 7 June 2011 Decision on Prosecutor’s Motion for Leave to Present Evidence in Rebuttal to the Alibi Defence, 1 July 2011, para. 13.

(ii) *Professor Lagodny's Firm Refusal to Travel to The Hague Is a New Fact*

6. Professor Lagodny's willingness to travel to The Hague has traversed from disinclination to acceptance to refusal. The Defence has applied its best efforts of persuasion, without success. Even though Professor Lagodny, immediately following the Original Decision, expressed his willingness to come to The Hague, he now refuses to do so. The basis for this change of mind is Professor Lagodny's becoming aware, in his view, of uncertainties, inconveniences and consumption of time that would be occasioned by such travel. In fairness to Professor Lagodny, his appearance in person to give testimony was not a condition for commissioning his report. At that time, the issue was left to be resolved at a later date, which was deemed a necessary expedient given the paucity of eminently-qualified experts in the field; the need for expeditiousness in getting a report produced; and the fact that the rate of remuneration permitted by the Registry was relatively modest – in fact, less than half of the rate that Professor Lagodny indicated was his usual fee.

7. The effect of Professor Lagodny's refusal to travel is that the Defence will be unable to tender his report into evidence, and the Trial Chamber will be deprived of the benefit of the answers to any questions posed by the Prosecution or any other party. It is respectfully submitted, regardless of whether Professor Lagodny's preferences are objectively justified or reasonable, that the interests of justice are better served in the circumstances by hearing Professor Lagodny's testimony by video-link than not at all.

(iii) *The "Time and Resources" to Set Up a Video-link May Not Significantly Exceed the Cost of Professor Lagodny's Travel and Accommodation in The Hague*

8. The Original Decision cites the "time and resources" that would be imposed on the Court, and the need to send a "team from the Court to set up a video-link", as factors weighing against video-conference testimony.⁷ The Defence is unaware of any submissions by the Registry about logistics, either in terms of total cost, or the reasons that might justify sending a technical team to set up a video-link. The Defence is therefore not in a position to respond to any specific information that may underlie these presumptions. In any event, the Defence suggests, based on the information

⁷ Original Decision, para. 12.

available to it, that such costs should not greatly exceed the cost of Professor Lagodny's travel to The Hague.

9. First, the Defence notes that Professor Lagodny will testify in English, thus obviating the need for concurrent audio-channels that sometimes require specialised technology. Second, commercial providers of video-link facilities are widely available and presumably exist in Freiburg, Germany – which is the witness's preferred location for giving video-link testimony. The cost of such services, even for several hours, should not exceed a few hundred Euros at the most based on counsel's own previous experience of such costs in The Hague. Such communications are understood to be highly secure; even if they are not, however, Professor Lagodny's testimony can be given entirely in open session. Accordingly, there should be no need for any specialised equipment to be set up that would require the dispatch of a team from the Court.⁸ Third, even assuming that the presence of a single Registry staff member at the point of transmission is required, the cost of such presence should be no greater than the cost of Professor Lagodny's presence at the seat of the Court. In fact, the overall burden on Registry resources is actually likely to be reduced, as video-conference testimony eliminates the need for personal escorts for the witness and drivers in The Hague. Fourth, if cost is a factor of decisive importance, the Registry could consider whether a less expensive video-conference option such as Skype is feasible and/or consider whether the presence of a Registry official is really required in current circumstances. The documents to be used with the witness could be sent by courier and/or projected concurrently with the witness's testimony. Notably, Rule 67(1) of the Rules of Procedure and Evidence does not prescribe any particular technology or modalities for testimony by video-conference other than that it must "permit[] the witness to be examined by the Prosecutor, the defence and by the Chamber."

(iv) The Only Available Remedy Cannot Appropriately be Ordered and, Even if it Could, Would Result Only in an Order for Video-link Testimony

10. The Defence does not believe that a request for a summons would be appropriate. Professor Lagodny is an expert witness whose association with this case, unlike a fact witness, is exclusively professional. In most legal systems, an expert would be

⁸ The ICTY has sometimes heard video-link testimony from local courthouses, which frequently contain such facilities given the extent to which video-link testimony and communications are now used in national court practice.

remunerated for their testimony at a negotiated rate. Such remuneration is apparently not available in the present case, either through VWU or through the Registry, which has already indicated that it would not accord any further resources to pay Professor Lagodny, even assuming it would be appropriate to allocate any funds over and above those expressly authorised by VWU.

11. Compelling an expert to give testimony in these circumstances, it is respectfully submitted, would amount to an expropriation of services. Accordingly, the Defence does not consider this remedy to be available or appropriate, and does not request this remedy.

12. Even if such a remedy were available, however, the Appeals Chamber has made clear in its previous rulings in the *Ruto & Sang* case that State Parties only have the obligation to execute such a summons by way of a video-conference, or calling the witness to an *in situ* sitting of the Chamber. According to the Appeals Chamber, “article 93(1)(b) of the Statute provides the appropriate legal basis to issue a request to Kenya to compel witnesses to appear before the Trial Chamber sitting *in situ* or by way of video-link.”⁹ This reflects the view enunciated in the Report of the Preparatory Committee on the Establishment of an International Criminal Court that “witnesses or experts may not be compelled to testify at the seat of the Court. If they do not wish to travel to the seat of the court, their testimony shall be taken in the country in which they reside or in some other place which they determine by common accord with the Court”.¹⁰ The Prosecution has agreed with this view, citing numerous sources in its submissions before the Appeals Chamber in the *Ruto & Sang* case in support of the view that States “sought only to prevent imposing obligations on State Parties to force witnesses physically to travel to the seat of the Court.”¹¹

⁹ *Ruto & Sang*, Judgement on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 17 April 2014 entitled “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”, ICC-01/09-01/11-1598, 9 October 2014, para. 128.

¹⁰ *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume II, (A/51/22), 282.

¹¹ *Ruto & Sang*, Prosecution consolidated response to Mr. Ruto and Mr. Sang’s appeals against the “Decision on the Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation”, ICC-01/09-01/11-1380, 20 June 2014, paras. 4, 33-42, 47. *See also Ruto & Sang*, Corrected and amended version of “Prosecution’s request under article 64(6)(b) and article 93 to summon witnesses” (ICC-01/09-01/11-1120-Conf-Exp), ICC-01/09-01/11-1120-Red2-Corr, 5 December 2013.

13. Given that the only remedy available upon the issuance of a summons is an order to appear by video-conference, it is respectfully submitted that this remedy is otiose in light of Professor Lagodny's willingness to do so.

(v) *Hearing the Testimony by Video-link Is Preferable to Losing the Testimony*

14. Previous decisions have, in certain circumstances, exhibited considerable flexibility in deciding whether to hear a witness's testimony by video-link. The *Bemba* Trial Chamber authorised hearing at least twelve witnesses whose reason for not being able to travel was "logistical difficulties" facing the Defence in the form of a witness's lack of personal documentation that could not be obtained in time for travel for their scheduled testimony;¹² difficulty in obtaining such documentation;¹³ or other "difficulties" securing the appearance of witnesses.¹⁴
15. The interests of justice are best served by entertaining evidence even when it cannot be presented in the most ideal form. As professional judges, this Trial Chamber is more than capable of discounting the witness's testimony if the medium in any way impairs its probative value or reliability. This is a particularly appropriate approach in the current circumstances given that Professor Lagodny's testimony is not nearly as complex as some expert witnesses (such as those heard during the Prosecution case) and his report does not purport to apply his legal analysis to any particular facts (which could entail a more intensive use of documents).

¹² *Bemba*, Decision on "Defence Motion for authorisation to hear the testimony of Witness D04-39 via video-link", ICC-01/05-01/08-2580, 12 April 2013, para. 9.

¹³ *Bemba*, Decision on the "Second Further Revised Defence Submissions on the Oder of Witnesses" (ICC-01/05-01/08-2644) and on the appearance of Witnesses D04-02, D04-09, D04-03, D04-04 and D04-06 via video-link, ICC-01/05-01/08-2646, 31 May 2013, paras. 9-13.

¹⁴ *Bemba*, Decision on the "Submissions on the remaining Defence evidence" and the appearance of Witnesses D04-23, D04-26, D04-25, D04-36, D04-29, and D04-30 via video-link, ICC-01/05-01/08-2740, 15 August 2013, para. 11.

IV. CONCLUSION AND RELIEF REQUESTED

16. Mr. Mangenda requests that the Trial Chamber reconsider the Original Decision; grant authorisation to hear Professor Lagodny's testimony by video-link pursuant to Rule 67(1); and order the Registry to find the most economical and effective means of facilitating such testimony.



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Respectfully submitted this 1 March 2016,
At The Hague, The Netherlands