

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 8 November 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
"Decision on the defence's 'Motion to replace a witness'" of 7 November 2013**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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REGISTRY

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Victims and Witnesses Unit

Mr Patrick Craig

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Other

Victims Participation and Reparations Section

Trial Chamber III (“Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, issues the following Decision on the defence’s “Motion to replace a witness” (“Decision”).

I. Background and Submissions

1. [REDACTED],¹ [REDACTED].² [REDACTED].
2. [REDACTED]³, [REDACTED]⁴ [REDACTED].⁵
3. At a status conference held on 27 June 2013, the Victims and Witnesses Unit (“VWU”) informed the Chamber that Witness D04-[REDACTED] was available to travel to The Hague for his testimony and that the VWU could organise his travel as soon as possible.⁶ However, the defence submitted that it needed to withdraw Witness D04-[REDACTED] from its list because the witness had been [REDACTED].⁷ The defence further submitted that [REDACTED].⁸ The Chamber notes that in response to the defence’s contentions, the VWU indicated that [REDACTED],⁹ and that [REDACTED].¹⁰
4. [REDACTED]¹¹ [REDACTED]¹² [REDACTED].¹³

¹ [REDACTED].

² [REDACTED].

³ [REDACTED].

⁴ [REDACTED].

⁵ [REDACTED].

⁶ Transcript of hearing on 27 June 2013, ICC-01/05-01/08-T-331-CONF-ENG ET, page 21, lines 11 to 15 and page 22, line 19 to page 23, line 1. The Chamber underlines that the present Decision relates to a number of confidential or *ex parte* documents. However, in light of the principle of publicity of the proceedings enshrined in Articles 64(7) and 67(1) of the Statute, the present Decision is filed confidentially, together with a public redacted version. To the extent that the public redacted or confidential versions make reference to the existence or, to a limited extent, the content of documents filed on a confidential or *ex parte* basis, the Chamber considers that the information concerned does not warrant confidential or, as the case may be, *ex parte* treatment at this time.

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

5. On 6 September 2013, pursuant to an oral order of the Chamber,¹⁴ the defence filed its “Defence Submission as to the current timetable for the completion of its case”,¹⁵ in which it, *inter alia*, informed the Chamber that the remaining witnesses to be called were Witnesses D04-15, D04-54, D04-14, D04-41, and D04-44 and that it did not currently anticipate calling any further witnesses.¹⁶

6. At an *ex parte*—defence and Registry only—status conference held on 21 October 2013,¹⁷ the Registry submitted, *inter alia*, that neither the defence nor the Registry had been able to contact Witness D04-41.¹⁸ On 30 October 2013, pursuant to the Chamber’s instructions,¹⁹ the Registry filed its “Registry report on the remaining Defence Witnesses in compliance with Decision ICC-01/05-01/08-2842”,²⁰ in which it informed the Chamber that the final arrangements for hearing Witnesses D04-44 and D04-14’s testimony had not yet been concluded and that it had not been able to establish contact with Witness D04-41. Consequently, the Registry submitted that it was not in a position to provide any estimate as to the feasibility of having the witnesses appear before the Court.²¹

7. On 1 November 2013, the Chamber issued its “Decision on the time limit for the conclusion of the defence’s presentation of oral evidence at trial”,²² in

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ Transcript of hearing of 3 September 2013, ICC-01/05-08-T-342-CONF-ENG ET, page 32, line 20 to page 34, line 10.

¹⁵ Defence Submission as to the current timetable for the completion of its case, 6 September 2013, ICC-01/05-01/08-2796.

¹⁶ ICC-01/05-01/08-2796, paragraphs 1 to 4.

¹⁷ Transcript of hearing of 21 October 2013, ICC-01/05-01/08-T-346-CONF-EXP-ENG ET.

¹⁸ ICC-01/05-01/08-T-346-CONF-EXP-ENG ET, page 11, line 25 to page 12, line 2, page 17, lines 16 to 21, page 22, line 24 to page 23, line 4.

¹⁹ Decision on the testimony of Witnesses D04-54, D04-14, D04-41 and D04-44, 23 October 2013, ICC-01/05-01/08-2842.

²⁰ Registry report on the remaining Defence Witnesses in compliance with Decision ICC-01/05-01/08-2842, 30 October 2013, ICC-01/05-01/08-2856-Conf.

²¹ ICC-01/05-01/08-2856-Conf, paragraphs 1, 2, 4 and 5.

²² Decision on the time limit for the conclusion of the defence’s presentation of oral evidence at trial, 1 November 2013, ICC-01/05-01/08-2861.

which it (i) considered that Witness D04-41 was not willing and available to appear as witness, and therefore decided that it no longer expected him to provide testimony and instructed the Registry to desist from taking any further measures to contact him; and (ii) extended the deadline for the defence to present the testimony of Witnesses D04-14 and D04-44, provided that they both complete their testimony by 15 November 2013, at the latest.²³

8. On 4 November 2011, the defence filed its “Motion to replace a witness”²⁴ (“Defence Motion”), in which it requests that the Chamber authorise the defence “to present the testimony of Witness D04-[REDACTED], in lieu of that of Witness D04-41”.²⁵ In this regard, the defence submits that (i) the witness has [REDACTED] and has informed the defence that he is available to begin his testimony as soon as required;²⁶ (ii) due to the role played by Witnesses D04-41 and D04-[REDACTED] during the time of the relevant events, there is a “significant overlap in the proposed content of their evidence”;²⁷ and (iii) [REDACTED] and that “this witness is now in a position to be able to testify before the Chamber”.²⁸
9. Neither the prosecution nor the legal representatives of victims filed any observations on the Defence Motion within the time limit set by the Chamber.²⁹

II. Analysis

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)

²³ ICC-01/05-01/08-2861, paragraph 11.

²⁴ Motion to replace a witness, 4 November 2013, ICC-01/05-01/08-2862-Conf.

²⁵ ICC-01/05-01/08-2862-Conf, paragraph 10.

²⁶ ICC-01/05-01/08-2862-Conf, paragraph 5.

²⁷ ICC-01/05-01/08-2862-Conf, paragraph 6.

²⁸ ICC-01/05-01/08-2862-Conf, paragraphs 8.

²⁹ By email of 5 November 2013 at 12.38, the Chamber informed the parties and participants that any written response by the prosecution and the legal representatives of victims shall be filed by Wednesday, 6 November 2013.

and (7), 67(1), and 69(2) of the Statute, Rules 67, 134(3), and 140 of the Rules of Procedure and Evidence (“Rules”), and Regulation 43 of the Regulations of the Court.

On the defence’s request to replace the testimony of Witness D04-41 with the testimony of Witness D04-[REDACTED]

11. In relation to the defence’s request to replace the testimony of Witness D04-41 with the testimony of Witness D04-[REDACTED], at the outset, the Chamber notes that it has already ruled that Witness D04-41 would no longer testify.³⁰ Moreover, as Witness D04-[REDACTED] was previously withdrawn from the defence’s list of witnesses, the Defence Motion in fact entails not only a request to “replace” a witness, but also a request to “reinstate” one previously withdrawn. The Chamber also notes that the general deadline for the defence to present its oral evidence has already lapsed and the defence was only granted further time in order to allow the presentation of the testimony of three specific remaining witnesses.³¹

12. Nonetheless, the Chamber notes that the prosecution and the legal representatives of victims have been aware of the defence’s intention to call this witness since July 2012,³² and that they did not raise any objections to the defence’s request. In addition, the Chamber notes that the comprehensive summary, lists of documents, and legal representatives’ applications relating to Witness D04-[REDACTED] were submitted in May 2013.³³ Under these circumstances, the Chamber allows the defence to

³⁰ ICC-01/05-01/08-2861, paragraphs 8 and 11(i).

³¹ [REDACTED].

³² See Annex A to the Defence Disclosure of its List of Witnesses and the Factual and Legal Elements of its Case, 13 July 2012, ICC-01/05-01/08-2243-Conf-AnxA.

³³ See [REDACTED]; prosecution’s updated list of documents for the purpose of the examination of Witness CAR-D04-PPPP-[REDACTED], email from the prosecution to the Chamber, the defence and the legal representatives of victims of 16 May 2013 at 19.34; updated list of defence documents for the purpose of the examination of Witness CAR-D04-PPPP-[REDACTED], email from the defence to the Chamber, the prosecution and the legal representatives of victims of 16 May 2013 at 17.06; Me Douzima’s updated list of

reinstate Witness D04-[REDACTED] to its list, provided that the witness completes his testimony by no later than 15 November 2013, the final deadline for the conclusion of the defence's presentation of oral evidence at trial.³⁴

On the appearance of Witness D04-[REDACTED] via video-link

13. As previously stated, the term "given in person"—used in Article 69(2) of the Statute—does not imply that witness testimony must always be given live in court. Instead, the Statute and the Rules give the Court wide discretion, subject to the provisions of Rule 67 of the Rules, to permit or order evidence to be given *viva voce* by means of video or audio technology where 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.³⁵ 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 questioned by the Prosecutor, the defence, and by the Chamber itself, at the time that the witness so testifies."
14. The Chamber has previously held that one of the relevant criteria to be considered in determining whether or not it would be appropriate for a witness to give testimony by means of video technology is the witness's

documents for the purpose of the examination of Witness CAR-D04-PPPP-[REDACTED], email from the legal representative of victims to the Chamber, parties and participants; Me Zarambaud's list of documents for the purpose of the examination of Witness CAR-D04-PPPP-[REDACTED], email from the legal representative of victims to the Chamber, parties and participants of 15 May 2013 at 13.27; Requête du Représentant légal de victimes afin d'être autorisé à interroger le témoin [REDACTED], 14 May 2013, ICC-01/05-01/08-2626-Conf; Requête de la Représentante légale de victimes afin d'être autorisée à interroger le témoin [REDACTED], 14 May 2013, ICC-01/05-01/08-2627-Conf.

³⁴ ICC-01/05-01/08-2861, paragraph 11.

³⁵ See 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; 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, paragraph 6; 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, paragraph 10.

personal circumstances.³⁶ In addition, the Chamber has held that “other relevant circumstances, such as logistical difficulties in arranging a witness’s travel to testify at the seat of the Court in The Hague, which would seriously impact upon the expeditious conduct of the proceedings”, can also justify a witness’s testimony being heard by means of video technology.³⁷

15. In relation to Witness D04-[REDACTED], the Chamber notes that in an *ex parte*—defence and Registry only—status conference held on 11 February 2013, it instructed the VWU “to make all necessary arrangements for [W]itness[...] [REDACTED] [...] to be brought to testify in person at the seat of the Court”.³⁸

16. However, the Chamber was informed by the Registry that in order for the witness to travel to the seat of the Court, the VWU would need one week in order to [REDACTED].³⁹ In view of this delay, the Chamber considers that it would be appropriate for the testimony of Witness D04-[REDACTED] to be given via video-link.

17. The Chamber considers that the presentation of Witness D04-[REDACTED]’s testimony by means of video technology would not be prejudicial to, or inconsistent with, the rights of the accused. This is especially so because the logistical arrangements required for the witness to travel to the seat of the Court would delay the witness’s appearance and most likely prevent the defence from completing its presentation of oral evidence within the time limit set by the Chamber.

³⁶ Public redacted version of “Decision on ‘Defence Motion for authorization to hear the testimony of Witness D-45 via video-link’” of 6 March 2013, 7 March 2013, ICC-01/05-01/08-2525-Red, paragraph 7; 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.

³⁷ ICC-01/05-01/08-2525-Red, paragraph 7.

³⁸ Transcript of hearing on 11 February 2013, ICC-01/05-01/08-283-CONF-EXP-ENG ET, page 26, lines 11 to 14. Witness D0

³⁹ Email from the Registry to the Chamber on 7 November 2013 at 13.14.

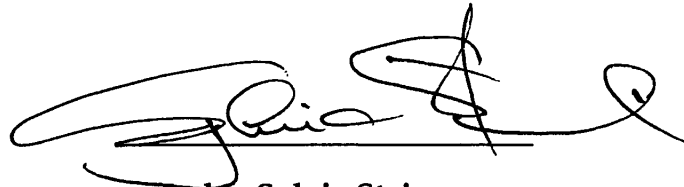
18. The Chamber further notes that, in line with Rule 67(1) of the Rules, the available video technology permits the witness to be questioned by both parties, the Chamber, and the legal representatives of victims at the time the witness testifies.

III. Conclusions


19. For the above reasons, the Trial Chamber hereby:

- (i) GRANTS the Defence Motion provided that Witness D04-[REDACTED] completes his testimony no later than 15 November 2013;
- (ii) ORDERS that the testimony of Witness D04-[REDACTED] be given *viva voce* before the Chamber by means of video technology;
- (iii) ORDERS the Registry to make the necessary arrangements for the conduct of the video-link testimony to start on Tuesday, 12 November 2013; and
- (iv) ORDERS the defence to file a public redacted version of the Defence Motion by 11 November 2013.


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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 8 November 2013

At The Hague, the Netherlands