

**Cour
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**International
Criminal
Court**

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Date: **4 March 2016**

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Single Judge

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

Decision on Video-Link Testimony for Defence Witnesses

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

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber VII ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Article 69(2) of the Rome Statute ('Statute') and Rules 67, 68(3) and 134 *bis* of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Video-Link Testimony for Defence Witnesses'.

I. Procedural History

1. On 26 January 2016, the Single Judge set a deadline of 26 February 2016 for all essential arrangements to be completed for the appearance of Defence witnesses before the Court ('Essential Arrangements Deadline').¹ The Single Judge indicated that '[i]f such arrangements are not completed by this deadline for a particular witness, the Chamber may require the defence team concerned to call this witness by video-link in order to facilitate his/her appearance in a timely manner'.²
2. On 19 February 2016, the Registry informed the Chamber that, among other things, the first available witness in the defence witness order³ (D21-3) did not have 'any valid travel document available' and that video-link testimony would be needed to ensure his timely appearance ('Preliminary Report').⁴

¹ Directions Relating to Certain Defence Witnesses and Appearance Order, ICC-01/05-01/13-1578.

² ICC-01/05-01/13-1578, para. 7.

³ Annex A to the Soumission conjointe des équipes de Défense de MM. Bemba, Kilolo, Mangenda, Babala et Arido relative à l'ordre de la Chambre « Directions relating to certain defence witnesses and appearance order » (ICC-01/05-01/13-1578), 12 February 2016, ICC-01/05-01/13-1624-Conf-AnxA.

⁴ Victims and Witnesses Unit's Preliminary Report Concerning the Appearance of the first three Defence Witnesses, ICC-01/05-01/13-1642-Conf. D21-3 is listed second in the Defence witness order, but this same report explained that the first witness listed (D21-2) was unavailable when the hearing recommenced.

3. On 22 February 2016,⁵ the Office of the Prosecutor ('Prosecution')⁶ and defence team for Mr Kilolo ('Kilolo Defence')⁷ responded to the Preliminary Report.
4. On 23 February 2016, the Single Judge ruled that D21-3 would commence his testimony via video-link on 2 March 2016 and that the reasons for this decision would follow.⁸
5. On 26 February 2016,⁹ the Registry filed a report on whether essential arrangements had been made for all defence witnesses ('Final Report').¹⁰
6. On 1 March 2016, the Prosecution and the defence team for Mr Arido ('Arido Defence') responded to the Final Report during the hearing held that day ('1 March Hearing').¹¹ The Kilolo Defence also reiterated that its strong preference would have been for D21-3 to have testified at the seat of the Court.¹²
7. Later that same day, the Arido Defence informed the Chamber that it no longer intended to call two of the witnesses on its list (D24-9 and D24-11).¹³

II. Analysis

A. In-court and video link testimony

8. Before addressing any particular defence witnesses, the Single Judge notes that the Prosecution and the Kilolo Defence both argue that testifying while

⁵ The response deadline was shortened to this date. Email from Trial Chamber VII Communications to the parties and Registry, 19 February 2016 at 17:12.

⁶ Prosecution's Response to Victims and Witnesses Unit's Preliminary Report Concerning the Appearance of the First Three Defence Witnesses, ICC-01/05-01/13-1645-Conf (with annex).

⁷ Réponse de la défense de monsieur Aimé Kilolo au «Victims and Witnesses Unit's Preliminary Report Concerning the Appearance of the first three Defence Witnesses» (ICC-01/05-01/13-1642-Conf), ICC-01/05-01/13-1649-Conf.

⁸ Email from Trial Chamber VII Communications to the parties and Registry, 23 February 2016 at 10:55. D21-3 ultimately testified via video-link on 2-3 March 2016.

⁹ This report was sought by the Chamber and was due on this date, ICC-01/05-01/13-1578, para. 6.

¹⁰ Registry's Report Concerning the Appearance of the Defence Witnesses, ICC-01/05-01/13-1666-Conf (with five confidential *ex parte* annexes).

¹¹ Transcript of Hearing, ICC-01/05-01/13-T-39-ENG ET.

¹² 1 March Hearing, ICC-01/05-01/13-T-39-ENG ET, page 40 lines 17-22.

¹³ Email from the Arido Defence to the parties, Registry and Chamber, 1 March 2016, at 14:32.

physically present before the Court is the rule and that video-link is an exception to this rule.¹⁴ The Single Judge also notes that previous decisions of this Court have made similar pronouncements as well.¹⁵

9. The Single Judge does not consider that video-link and in-person testimony are meaningfully different for the following reasons.
10. The legal texts of the Court equate in-court and video link testimony. Article 69(2) of the Statute¹⁶ and Rule 67 of the Rules¹⁷ expressly allow for *viva voce* (oral) testimony to be given by means of video technology. Rule 134 *bis* of the Rules also speaks of video technology as a means of ‘presence’,¹⁸ albeit not in the context of witness testimony. Rule 68(3) of the Rules also governs introduction of prior recorded testimony for a witness who is ‘present before the Trial Chamber’, and this Chamber has accepted recourse to this rule for video-link witnesses.¹⁹
11. Thus, the statutory scheme confirms that video technology is one possibility for giving *viva voce* (oral) testimony. If video-link witnesses are ‘present’ before the Chamber and give ‘*viva voce*’ testimony, then there is simply no statutory imperative to treat video-link significantly differently from in-court testimony.

¹⁴ ICC-01/05-01/13-1645-Conf, para. 8; ICC-01/05-01/13-1649-Conf, para. 10. *See also* 1 March Hearing, ICC-01/05-01/13-T-39-ENG ET, page 37 line 21 to page 38 line 7.

¹⁵ Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted version of the “Decision on ‘Defence Motion for authorisation to hear the testimony of Witness D04-21 via video-link’”, 3 April 2013, ICC-01/05-01/08-2572-Red, para. 11; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, 29 January 2008, ICC-01/04-01/06-1140, para. 41.

¹⁶ Article 69(2) of the Statute provides that (with emphasis added): ‘The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. *The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology*, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused’.

¹⁷ Rule 67(1) of the Rules provides that: ‘In accordance with article 69, paragraph 2, a Chamber may allow a witness to give *viva voce* (oral) testimony before the Chamber by means of audio or video technology, provided that such technology permits the witness to be examined by the Prosecutor, the defence, and by the Chamber itself, at the time that the witness so testifies’.

¹⁸ Rule 134 *bis*(1) of the Rules provides: ‘An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial’.

¹⁹ Transcript of Hearing, 21 October 2015, ICC-01/05-01/13-T-25-Red-ENG (Witness P-272).

12. Indeed, the factual similarities between in-court testimony and video-link testimony must be emphasised. Video-link witnesses give testimony directly to the Chamber in real-time. They take the oath no differently than in-court witnesses, and the non-calling parties can examine them without constraints.²⁰ Assuming a quality connection, which in 2016 is a fair assumption and becomes fairer still as video-conference technology continues to advance, the Chamber can observe the demeanour and composure of video-link witnesses (and seek clarifications on aspects of testimony) no differently than in-court witnesses. In fact, these considerations are exactly the ones emphasised by the Appeals Chamber as being important features of in-court testimony.²¹
13. Moreover, in certain circumstances, video-link may also be more conducive to the efficient administration of justice than in-court testimony. Witnesses may have travel, health, security or other concerns which militate in favour of their attendance at a video-link location rather than the seat of the Court.²² The parties may prefer hearing witnesses via video-link to accommodate witness preferences or overcome logistical obstacles so that witnesses can testify in a specific sequence. The Registry, the organ tasked with the non-judicial aspects of the Court's administration,²³ may also have time and resource constraints which make video-link preferable to in-court testimony.
14. The Appeals Chamber has held that, in reference to the part of Article 69(2) of the Statute governing video-link testimony, a Chamber has the 'discretion to receive the testimony of a witness by means other than in-court personal

²⁰ See Article 67(1)(e) of the Statute.

²¹ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386, OA5 OA6, para. 76 ('Bemba OA5 OA6 Judgment').

²² In this regard, the Court must take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, Article 68(1) of the Statute. See also Rule 87(3)(c) of the Rules.

²³ Article 43(1) of the Statute.

testimony, as long as this does not violate the Statute and accords with the Rules of Procedure and Evidence’.²⁴ Given the insignificant differences between in-court and video-link testimony, the Single Judge considers that this discretion should be exercised broadly.²⁵

15. For these reasons, the Chamber does not evaluate video-link witnesses any differently than in-court witnesses. The judges receive them equally and, in principle, ultimately weigh them no differently.²⁶ As such, it is generally not unduly prejudicial to change from in-court to video-link, especially when such changes enable the calling party to present its evidence in the most efficient manner possible.
16. However, because in-court testimony and video-link testimony require different kinds of preparation by the Registry, the parties have been required to give timely notice for video-link testimony.²⁷ The Single Judge permits the parties a degree of deference in whether they wish for witnesses to appear in-court or via video-link. This deference is subject to countervailing considerations, including the relative logistical burdens on the Registry²⁸ and the Chamber’s overarching obligation to ensure a fair and expeditious trial.²⁹

²⁴ *Bemba* OA5 OA6 Judgment, ICC-01/05-01/08-1386, para. 77.

²⁵ See also Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, 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, 15 August 2013, ICC-01/05-01/08-2740, para. 9.

²⁶ *Reaching the same conclusion*, see Special Tribunal for Lebanon, *The Prosecutor v. Salim Jamil Ayyash et al.*, General Decision on Video-Conference Link Testimony and Reasons for Decision on Video-Conference Link Testimony of Witness PRH128, 25 February 2014, STL-11-01/T/TV, F1425, para. 23 (‘[v]ideo-conference link testimony should also generally be given as much probative value as testimony presented in the courtroom’; further ICTY authorities for the same proposition referenced in footnote 13 of this same decision).

²⁷ Directions on Defence Presentation of Evidence, 3 November 2015, ICC-01/05-01/13-1450, para. 9; Directions on the conduct of the proceedings, 2 September 2015, ICC-01/05-01/13-1209, para. 17.

²⁸ See 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, 19 February 2016, ICC-01/05-01/13-1641, para. 12. This decision was later reconsidered after subsequent consultations between the Registry and defence team for Mr Mangenda. See Transcript of Hearing, 2 March 2016, ICC-01/05-01/13-T-40-CONF-ENG ET, page 83 line 22 to page 84 line 2, *ruling on Jean Jacques Mangenda’s Request for Reconsideration of Decision Concerning Video-Conference Testimony*, 29 February 2016, ICC-01/05-01/13-1674 (notified 1 March 2016).

²⁹ Article 64(2) of the Statute.

B. Video-link for certain witnesses

17. The Registry informs the Chamber that D21-3 and D24-1 do not currently have the necessary travel documents to travel to the seat of the Court to testify. As regards D21-3, and noting that he is the first witness in the overall witness order who is available to testify, the Registry advised that a video-link is the only way to secure his timely appearance.³⁰ As regards D24-1, the Registry also explains that it had to make additional arrangements for travel after being incorrectly informed that this witness had valid travel documents.³¹ In order to prevent any delays, the Registry recommends video-link for these two witnesses.³² The Registry generally confirms that essential arrangements are in place for all remaining defence witnesses, but suggests that video-link may not be necessary for D24-12.³³
18. The Single Judge notes that the delays in getting D21-3 and D24-1 travel documents make it entirely uncertain if and when they can testify at the seat of the Court. The Essential Arrangements Deadline was clearly not met for D24-1 in this respect, and the Arido Defence made no submission contesting this point during the 1 March 2016 Hearing. For D21-3, the Registry was directed to proceed with video-link testimony just before this deadline, but only after the Preliminary Report made it clear that essential arrangements could not be completed by 26 February 2016.
19. The Single Judge notes that the Kilolo Defence argues that D21-3 is a particularly important witness and that he could testify at the seat of the Court if he was moved towards the end of the defence evidence presentation.³⁴ This

³⁰ Preliminary Report, ICC-01/05-01/13-1642-Conf, para. 11.

³¹ Annex 5 of the Registry Report, ICC-01/05-01/13-1666-Conf-Exp-Anx5, pages 1-4.

³² Preliminary Report, ICC-01/05-01/13-1642-Conf, para. 11; Annex 5 of the Registry Report, ICC-01/05-01/13-1666-Conf-Exp-Anx5.

³³ Annex 5 of the Registry Report, ICC-01/05-01/13-1666-Conf-Exp-Anx5, pages 8-9.

³⁴ ICC-01/05-01/13-1649-Conf, para. 10.

alternative is not persuasive – after failing to meet the Essential Arrangements Deadline, the Kilolo Defence has no specific indication to suggest that travel arrangements will be feasible at a later point in the defence teams’ evidence presentation. The only other information before the Single Judge rather cuts against these difficulties being overcome in the near future, as the Final Report raises the possibility of D21-3 also having security issues above and beyond the logistical barriers to him travelling.³⁵

20. Along the lines set out above, the Single Judge further considers that changing D21-3 to a video-link witness does not impact the probative value of his testimony in any way. The alleged centrality of D21-3’s testimony is perfectly preserved by having him testify via video-link; he can be examined by the Kilolo Defence and evaluated by the Chamber no differently than if he would appear in-person. The Single Judge does not consider that the Kilolo Defence is prejudiced by making D21-3 a video-link witness. Video-link is the only means available to ensure D21-3 could testify in a timely manner. Video-link also allows D21-3 to testify early in the defence evidence presentation as indicated by the defence teams in the overall witness order.
21. For these reasons, and as recommended by the Registry, the Single Judge directs that D21-3 and D24-1 testify via video-link.
22. In light of the withdrawal of two witnesses by the Arido Defence, the Registry does not recommend video-link for any other witnesses who the defence teams wish to call to testify at the seat of the Court. As regards D24-12, the Single Judge notes that the Registry suggests that in-person appearance would be easier for it, while the Arido Defence cites to unnamed difficulties facing this

³⁵ Final Report, ICC-01/05-01/13-1666-Conf-Exp-Anx1, page 1. The Kilolo Defence agrees that the witness has security concerns, at least to the extent that it requested protective measures for him. *See* Soumissions de la défense Kilolo demandant à la Chambre de première instance VII d’ordonner des mesures de protection, 4 February 2016, ICC-01/05-01/13-1596-Conf.

witness in the country where the witness resides.³⁶ The Arido Defence did not provide more specific information in this regard. However, given the Court's past history with this witness,³⁷ the Single Judge gives deference to the Arido Defence's position that video-link is the best way to ensure his testimony gets heard. As D24-12 is scheduled only towards the end of the presentation of evidence by the five defence teams, the Single Judge also anticipates that video-link can be arranged in a timeframe which would not create any delays in the proceedings.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DIRECTS that D21-3, D24-1 and D24-12 testify via video-link; and

ORDERS the Registry and parties to file public redacted versions – or request reclassification – of the Preliminary Report, Final Report, ICC-01/05-01/13-1645-Conf and ICC-01/05-01/13-1649-Conf within 14 days of notification of the present decision.

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



Judge Bertram Schmitt, Single Judge

Dated 4 March 2016

At The Hague, The Netherlands

³⁶ 1 March Hearing, ICC-01/05-01/13-T-39 ET, page 39 line 25 to page 40 line 11.

³⁷ See generally Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on “Defence Submissions on the Testimony of CAR-D04-PPPP-0007”, 21 October 2013, ICC-01/05-01/08-2839.