

**THE TRIAL CHAMBER**

Case No.: STL-11-01/T/TC

Before: Judge David Re, Presiding
Judge Janet Nosworthy
Judge Micheline Braidy
Judge Walid Akoum, Alternate Judge
Judge Nicola Lettieri, Alternate Judge

Registrar: Mr. Daryl Mundis

Date: 25 February 2014

Original language: English

Classification: Public

THE PROSECUTOR

v.

SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDDINE
HASSAN HABIB MERHI
HUSSEIN HASSAN ONEISSI
ASSAD HASSAN SABRA

**GENERAL DECISION ON VIDEO-CONFERENCE LINK TESTIMONY
AND REASONS FOR DECISION ON VIDEO-CONFERENCE LINK
TESTIMONY OF WITNESS PRH128**

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INTRODUCTION

1. On 30 January 2014, the Trial Chamber issued its second decision on the admission of statements into evidence in lieu of oral testimony under Rule 155 of the Special Tribunal's Rules of Procedure and Evidence. In this decision it denied (relevantly, here) the Prosecution's application to admit the statement of one proposed Prosecution witness, Witness PRH128, under the Rule, holding that the Prosecution had to make the witness 'available to testify either in The Netherlands or via video-conference link'.¹ The Prosecution attempted to do exactly that the next day, on 31 January 2014, by filing a motion requesting that the witness testify by video-conference link from Beirut the following week.²

2. Rule 124 provides, 'At the request of either Party, the Pre-Trial Judge or a Chamber may, in the interests of justice, order that testimony be received via video-conference link'. Counsel for Mr. Salim Jamil Ayyash responded opposing the motion and arguing,³

The sole justification given by the Prosecution in support of its application is that '[i]t is impracticable for Witness PRH128 to travel to The Hague on such short notice to testify during the week of 3 February'. [footnote] The Ayyash Defence objects to the Prosecution using its own scheduling issues as a basis to deviate from the norm of in-court testimony. If, as here, the witness has no valid basis for not attending in person, nothing precludes the Prosecution from calling the witness in due course, when necessary travel arrangements can be made.

3. They further argued that in-court testimony is preferable to video-conference link, and that video-conference link is an exceptional measure. They urged adopting a 'three-prong test developed by the *ad hoc* tribunals against which an analysis of the "interests of justice" can take place'. This 'three-prong test', according to Defence counsel, includes: (i) the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal; (ii) the witness's testimony must be sufficiently important to make it unfair to the requesting party to proceed without it; and, (iii) the accused must not be prejudiced in the exercise of his or her rights to confront the witness.

¹ STL, *Prosecutor v. Ayyash, Badreddine, Oneissi and Sabra*, STL-11-01/T/TC, Second Decision on the Prosecution Motion for Admission of Written Statements Under Rule 155, 30 January 2013, para. 35. Counsel for Mr. Hussein Hassan Oneissi had objected to the statement, seeking to cross-examine the witness, *see* Defence for Hussein Hassan Oneissi Response to Prosecution's Rule 155 Application of 15 November 2013, Confidential, 27 November 2013, paras 2-4, 10, 15-25, 28. *See also*, Prosecution Rule 155 Motion for Admission of Written Statements in lieu of Oral Testimony for the First Section of the Prosecution Case, 15 November 2013.

² STL-11-01/T/TC, Urgent Prosecution Motion for Video-Conference Link Testimony for Witness PRH128, 31 January 2014.

³ STL-11-01/T/TC, Ayyash Defence Response to the Urgent Prosecution Motion for Testimony by Video-Conference Link for Witness PRH128, 3 February 2014, para. 6.

4. On 4 February 2014, the Trial Chamber granted the motion, holding ‘that the Prosecutor has provided good cause for the witness to testify by video conference link’ and stating that it would ‘issue a short written decision’ in relation to the points made by counsel for Mr. Ayyash.⁴ This decision provides those written reasons, firstly by setting out the principles relevant to testimony by video-conference link and then by dealing with the reasons for the decision concerning this witness.

VIDEO-CONFERENCING IN INTERNATIONAL CRIMINAL PROCEEDINGS AND AT THE SPECIAL TRIBUNAL

5. Generally speaking, video-conferencing allows communication by simultaneous two-way video and audio transmissions. A brief historical overview providing some technological context may help in addressing the legal arguments raised by Defence counsel in opposing the Prosecution’s motion.

6. Video-conferencing has been used in national justice systems for many years for witness testimony and even the participation of accused persons in proceedings, and most particularly in bail hearings.⁵ International conventions on judicial cooperation also follow this approach.⁶

⁴ STL-11-01/T/TC, Transcript, 4 February 2014, p. 61.

⁵ See, among many others: **Belgium**, Section VII, article 112/317 of the Criminal Code which allows hearing witnesses, experts and suspects through videoconference, although caution is required in assessing the evidence; **Italy**, Article 205 *ter* of the Code of Criminal Procedure Implementation Rules on hearing witnesses detained abroad; **United Kingdom**, see for example, *Polanski v. Condé Nast Publications Limited*, [2005] UKHL 10, in particular Lord Nicholls of Birkenhead, ‘In the past oral evidence required physical presence. But recent advances in telecommunication technology have made video conferencing a feasible alternative way of presenting oral evidence in court, and Lord Slynn of Hadley, ‘although evidence given in court is still often the best as well as the normal way of giving oral evidence, in view of technological developments, evidence by video link is both an efficient and an effective way of providing oral evidence both in chief and in cross examination’; **Germany**, Articles 247a and 251 of the Code of Criminal Procedure (read in conjunction) allow video-link testimony insofar as this is necessary to establish the truth where ‘the witness or expert cannot reasonably be expected to appear at the main hearing given the great distance involved, having regard to the importance of his statement’; **Canada**, Section 714.1 of the Criminal Code of Canada allows the hearing of witnesses present in Canada by means of video-link if appropriate in all the circumstances, including: (a) the location and personal circumstances of the witness; (b) the costs that would be incurred if the witness had to be physically present; and (c) the nature of the witness’ anticipated evidence. Section 714.2 of the same Code allows for video-link testimony by witnesses outside of Canada as long as it is not contrary to the principles of fundamental justice. See also, *Slaughter v. Shuys*, 2010 BCSC 1576 (British Columbia), where Justice Beames held that ‘[p]roper and full cross examination can take place even when witnesses are appearing via videoconferencing. In my view, this is particularly so where the witnesses are experts and where credibility per se is not in issue and it is also the case where the evidence a witness may give is not overly contentious.’; and, **South Africa**, Section 158 (2) of Criminal Procedure Act (1977), (a) A court may [...] on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media. (b) A court may make a similar order on the application of an accused or a witness.

The **European Court of Human Rights** has even stated that an *accused* might in certain instances be required to participate in his own trial by video-link, thus being exposed to the evidence only via video, *Marcello Viola v. Italy*, case no. 45106/04, 5 October 2006, para. 67.

⁶ See Article 10 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, signed in Brussels on 29 May 2000, ‘If a person is in one Member State’s territory and has to be heard as a

7. International criminal law proceedings, though, differ greatly from national systems in that the cases are generally larger and more complex and typically feature a court situated in a country located far from most of the witnesses. Most witnesses must therefore either travel internationally to testify or do so via a video-conference link to the courtroom. But even then, testifying by video-conference link may require witnesses to travel from their homes in one part of a country to another where the video-conference link facility is located. In the Special Tribunal's case that is in Beirut.

8. Receiving testimony via video-conference link is crucial to an international court or tribunal's ability to operate, and, since the commencement of the first modern trial in international criminal law at the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1996, in the *Tadić* case, hundreds of witnesses have now testified by video-conference link.

9. The *Tadić* trial occurred in the immediate aftermath of the war in Bosnia and Herzegovina in circumstances in which there was no real functioning state. During the defence case, it became apparent that a video-conference link was required to ensure the testimony of certain witnesses, and, consequently, 18 of the 126 witnesses testified by video-conference link. The Trial Chamber described it as being 'through a live television link with the courtroom which will enable all persons concerned to see, hear, and communicate with the witness, even though he is not physically present'.⁷ In its trial judgement, the Trial Chamber explained the circumstances leading to its permitting video-conference link testimony, saying,⁸

A. Access to Evidence

A difficulty encountered by both parties has been their limited access to evidence in the territory of the former Yugoslavia, due in no small part to the unwillingness of the authorities of the *Republika Srpska* to cooperate with the International Tribunal. While witnesses called by the Prosecution, mainly Muslims and former residents of Bosnia, were now living in Western European or North American countries, most Defence witnesses, almost all Serb, were still resident in *Republika Srpska*.

witness or expert by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by videoconference, as provided for in paragraphs 2 to 8'. See also, Article 6 of the Agreement on Mutual Legal Assistance between the European Union and the United States of America, signed in Washington D.C. on 25 June 2003, 'The Contracting Parties shall take such measures as may be necessary to enable the use of video transmission technology between each Member State and the United States of America for taking testimony in a proceeding for which mutual legal assistance is available of a witness or expert located in a requested State, to the extent such assistance is not currently available'.

⁷ *Prosecutor v. Duško Tadić*, IT-94-1-T, Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-Link, 25 June 1996 (*Tadić* decision), para. 17.

⁸ *Prosecutor v. Duško Tadić*, IT-94-1-T, Opinion and Judgement, 7 May 1997, paras 530-531.

A number of steps have been taken by the International Tribunal to assist the parties. A video-conferencing link from a secure location in the territory of the former Yugoslavia was established so that numerous Defence witnesses otherwise unable or unwilling to give evidence were able to do so. The identities were suppressed of a number of Defence and Prosecution witnesses who sought it as a condition of giving evidence and some testimony was given in closed session or with special steps taken to conceal their identity from the public. Some Defence witnesses, concerned about coming to the seat of the International Tribunal to testify, were granted safe conduct against arrest or other legal process against them by the Prosecutor of the International Tribunal while present to testify in The Hague. These steps did appear to alleviate the inherent difficulties of the situation.

10. The first version of the ICTY's Rules of Procedure and Evidence adopted in 1994 had no rule specifically allowing video-conference link testimony, but also had no rule explicitly allowing its Chambers to accept witness statements in lieu of oral testimony. The ICTY's Rule 92 *bis*, equivalent to the Special Tribunal's Rule 155, was introduced only in December 2000; this possibly explains why in the first ICTY trial proportionately more witnesses testified by video-conference link than any in other trial, as later trials more extensively used witness statements in lieu of oral testimony.

11. In the 1990s before the adoption of a specific rule authorising testimony by video-conference link, ICTY Trial Chambers considered that the evidentiary value of video-conference link testimony was not 'as weighty' as in-court testimony,⁹ but at the same time stressed that video-conference link testimony acknowledged the need for flexibility and 'innovation' in the circumstances of an international tribunal.¹⁰ As a result, several principles developed including that: (i) video-conference link is merely an extension of the courtroom to the location of the witness; (ii) despite the witness's physical absence, the rights of the accused are respected; and, (iii) video-conference link allows the Chamber to assess the credibility and reliability of the witness.¹¹

12. The first ICTY Rule explicitly authorising video-conference link testimony was adopted in mid-1997, but only in 'exceptional circumstances and in the interests of justice'; the reference to exceptional circumstances, however, was deleted in late 1999.¹² Advances since then in internet

⁹ *Tadić* decision, para. 21; *Prosecutor v. Delalić and Delić*, IT-96-21-T, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, 28 May 1997 (*Delalić* decision), para. 18.

¹⁰ *Tadić* decision, para. 18; *Delalić* decision, para. 16.

¹¹ *Delalić* decision, para. 15.

¹² Rule 90 (A), adopted on 25 July 1997, stated, 'witnesses shall, in principle, be heard directly by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71 or where, *in exceptional circumstances and in the interests of justice*, a Chamber has authorized the receipt of testimony via video-conference link'. Before then from the original Rules adopted in February 1994, the only Rule allowing video-conference evidence was rule 71 (D), 'Deposition evidence may also be given by means of a video-conference'.

broadband and satellite capacity and in computer processing power have greatly improved the efficiency and reliability of the technology. By 2006, the technological advances were such that the ICTY had declared that ‘the testimony of witnesses by video-link conference should be given as much probative value as testimony presented in the courtroom’.¹³

13. The Rules of all the international criminal courts and tribunals—except the International Criminal Tribunal for Rwanda (ICTR)—now allow testimony by video-conference link;¹⁴ the ICTR allows it without an explicit authorising rule.¹⁵ The Chambers of the ICTY, ICTR, Special Court for Sierra Leone and the Special Tribunal assess whether a request for testimony by video-conference link is in ‘the interests of justice’. The Rules of the International Criminal Court (ICC) and Extraordinary Chambers in the Courts of Cambodia (ECCC) do not require this assessment and permit video-conference link testimony if the technology permits the witness to be examined by the Parties and the Chamber. The ECCC has held that ‘[t]he decision of whether to grant video-link testimony is a matter within the broad discretion of the Trial Chamber’.¹⁶ The ICC has a ‘wide

Rule 71 *bis* adopted 17 November 1999 replaced the reference to video-conference link in Rule 90 (A) and provided ‘At the request of either party, a Trial Chamber may, in the interests of justice, order that testimony be received via video-conference link’. This is now the text of Rule 81 *bis*.

¹³ *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*, IT-05-87-T, Decision on Prosecution Motion for Protective Measures and for Testimony to be Heard via Video-Link Conference, 15 August 2006, para. 3. *See also, Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Decision on Prosecution Urgent Motion to Bar Testimony of Proposed Defence Witnesses – and – on Milan Lukić’s Motion for Video-Link Testimony, 20 January 2009, p. 4; *Prosecutor v. Gotovina, Čermak, and Markač*, IT-06-90-T, Reasons for Decision on Prosecution’s Renewed Motion for Evidence of Witness 82 to be Presented via Video-Conference Link from Zagreb and Reasons for Decision on the Request of the Markač Defence to Conduct Cross-Examination in Zagreb, 26 February 2009, para. 18; Reasons for Decision Granting Prosecution’s Motion to Cross-Examine Four Proposed Rule 92 *bis* Witnesses and Reasons for Decision to Hear the Evidence of Those Witnesses via Video-Conference Link, 3 November 2009, para. 8.

¹⁴ **ICTY Rule 81 *bis***, ‘At the request of a party or *proprio motu*, a Judge or a Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link.’

ICC Rule 67, ‘Live testimony by means of audio or video-link technology’, reads at part 1: ‘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’.

SCSL Rule 85, ‘Presentation of Evidence’, reads at part (D): ‘Evidence may be given directly in court, or via such communications media, including video, closed-circuit television, as the Trial Chamber may order’. The SCSL has interpreted this to mean that testimony by video-conference link is only allowed when in the interests of justice (see, SCSL, *Prosecutor v. Taylor*, SCSL-03-1-T, Decision on Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link, 30 March 2007, para. 25).

ECCC Internal Rule 26, ‘Live Testimony by means of Audio or Video-link Technology’, reads at part 1: ‘The testimony of a witness or expert during a judicial investigation or at trial shall be given in person, whenever possible. However, the Co-Investigating Judges and the Chambers may allow a witness to give testimony by means of audio or video technology, provided that such technology permits the witness to be interviewed by the Co-Investigating Judges or the Chambers, and the parties, at the time the witness so testifies. Such technologies shall not be used if they would be seriously prejudicial to, or inconsistent with defence rights’.

¹⁵ *See for example: Emmanuel Rukundo v. The Prosecutor*, ICTR-2001-70-A, Judgement, 20 October 2010, para. 221.

¹⁶ *Co-Prosecutors v. Nuon and Khieu*, Order for Video-Link Testimony of KHIEU Samphan Character Witnesses TCW-277 and TCW-84, 24 April 2013; Order for Video-Link Testimony of Civil Party TCCP-13, 22 May 2013.

discretion' to permit evidence to be given by video-conference link as long as the Statute, the Rules, and the rights of the accused are respected.¹⁷

14. At the ICTY, several accused persons have entered their pleas of guilty or not guilty by video link,¹⁸ and two other accused have been permitted for health reasons to participate in the proceedings via video-conference link between the Tribunal in The Hague and the nearby United Nations Detention Unit in Scheveningen, The Netherlands.¹⁹ Rule 105 of the Special Tribunal's Rules also specifically permits an accused to participate in hearings via video-conference provided that his or her counsel attends the hearings in person; the new ICC Rule 134 *bis* will authorise a Trial Chamber to permit an accused person 'to be present through the use of video technology during parts of his or her trial'.

REASONS FOR THE DECISION IN RELATION TO WITNESS 128

The witness

15. Defence counsel opposed the Trial Chamber allowing this witness to testify via video-conference link from Beirut, objecting 'to the Prosecution using its own scheduling issues as a basis to deviate from the norm of in-court testimony'. Yet this is an incorrect characterisation of the circumstances that were facing the Trial Chamber when it allowed the video-conference link testimony. Arranging international witness testimony is very different to calling witnesses to court in national justice systems, as witnesses require travel documents such as passports and visas to travel to The Netherlands, and flights must be booked. Making these arrangements may take several weeks.

16. The Prosecution's 'own scheduling issues' were not at play here; to the contrary, the Trial Chamber had denied the Prosecution's Rule 155 application in respect of this witness *only the day before the Prosecution made the application*. It is apparent that it would not have been logistically possible to have the witness, a Lebanese citizen, travel to The Netherlands on a few days notice. Witness PRH128 was available to testify in the week of 3 February 2014, five days after the Trial Chamber's Rule 155 decision, but he could not do so in The Netherlands. With that short notice, video-conference link was the only viable option.

¹⁷ *Prosecutor v. Bemba*, ICC-01/05-01/08, 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 (*Bemba* decision), para. 9.

¹⁸ Ivan Čermak and Mladen Markač in *Prosecutor v. Gotovina, Čermak, and Markač*, IT-06-90-T, Judgement, 15 April 2011, para. 263; and Biljana Plavšić in *Prosecutor v. Plavšić*, IT-00-39 & 40-PT, Transcript, 2 October 2002, p. 337.

¹⁹ Milan Simić in *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgement, 17 October 2002, para. 8; and Jovica Stanišić in *Prosecutor v. Stanišić and Simatović*, IT-03-69-T, Judgement, 30 May 2013, paras 2429, 2437.

17. This submission also ignores that trial hearings in this case had only commenced on 23 January 2014, in the week before the Prosecution's application, and that testimony by video-conference link represented the only practical solution to have a number of witnesses testify. This was in circumstances in which the Trial Chamber was under extreme time pressures, from the transfer of the case file to it only on 28 October 2013, some 11 weeks before the scheduled trial date of 13 January 2014, thus resulting in its issuing delayed decisions under Rule 155.

18. Moreover, a hearing had then been scheduled for 11 February 2014 on the possible joinder of this case with that of Mr. Hassan Habib Merhi, carrying with it a potential joinder decision and hence an immediate adjournment of the trial. There was therefore no reason to delay this witness' testimony, which was part of the Prosecution's first stage of its case, until the resumption of the trial at a later point. Additionally, the nature of the evidence was such that the Prosecution should not have been forced to proceed without it, and it should have been heard by the Special Tribunal without undue delay or unnecessary burden upon its resources. The decision caused no prejudice to the four Accused as they had long been notified of the witness' identity and the nature of his evidence.

19. Accordingly, and while logistical concerns may not always be a sufficient basis to apply for testimony by video-conference link, the Trial Chamber was satisfied that this factor weighed in favour of granting the motion for the witness. In this respect, the ICC has similarly found that '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 proceedings' can justify the use of video-conference link.²⁰

20. Further, counsel for Mr. Ayyash did not raise any specific and legitimate concerns regarding the anticipated testimony of the witness that would have required him to appear in person at the Special Tribunal. Indeed, in responding to the Prosecution's motion to admit the statement of the witness into evidence under Rule 155 in lieu of oral testimony, counsel for Mr. Ayyash did not ask for the witness to be made available for cross-examination.²¹

The principles

21. Testimony heard by video-conference link in proceedings conducted under the principles of international criminal law should be viewed today as an extension of the courtroom. Counsel and the

²⁰ *Bemba* decision, para. 10.

²¹ STL-11-01/PT/TC, Ayyash Response to Prosecution Rule 155 Motion for Admission of Written Statements in lieu of Oral Testimony for the First Section of the Prosecution Case, 27 November 2013.

Trial Chamber judges can effectively question a witness via video-conference link, documents can be tendered and shown electronically to a witness and witnesses can mark these documents in a manner that allows them to be electronically captured and saved (this is known as document conferencing). The testimony is heard from a dedicated room in the Special Tribunal's Beirut Office and in the presence of a 'presiding officer' who is an official from the Special Tribunal's Registry. A Practice Direction regulates the procedure, including, in Article 1 (3), that:²²

- a) All participants, including the witness or the Accused at the location with which the video-conference link shall be established, must be able to see, hear, and communicate with each other simultaneously;
- (b) All participants must be able to see, hear, and otherwise observe any physical evidence or exhibits presented during the proceedings, whether by video, facsimile, or any other method;
- (c) Video quality must be adequate to allow participants to observe each other's demeanour and non-verbal communications. The audio and video feed must be synchronised;
- (d) The interpretation arrangements required under Rule 10 of the Rules must be such that each participant can both hear the proceedings and express himself in the language in which he is entitled.

22. The Trial Chamber is satisfied that all of these technical requirements were met with respect to each witness whose testimony has so far been received by video-conference link.

23. Video-conference link testimony should also generally be given as much probative value as testimony presented in the courtroom.²³ It allows the Trial Chamber to assess a witness' credibility and reliability while protecting the rights of the Accused, even when allowance is made for nuances lost in interpretation and the culturally specific ways that witnesses give their evidence.²⁴ One ICTY judge actually opined that the demeanour of a witness was usually better on that tribunal's television screens than with the naked eye, although that was in 1999.²⁵

24. Although the Special Tribunal's courtroom allows the judges a direct and close view of a testifying witness, its video-conference link facilities are first-class. The judges and counsel can

²² Practice direction for video-conference links at the Special Tribunal for Lebanon, STL-PD-2010-03, dated 10 January 2010.

²³ See footnote 13.

²⁴ STL-11-01/T/TC, Transcript, 9 January 2014, p. 13; Transcript, 22 January 2014, p. 66; Transcript, 29 January 2014, p. 65. See also, footnote 11 above.

²⁵ *Prosecutor v. Kupreškić et al.*, IT-95-16-AR73.3, Separate Opinion of Judge David Hunt on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, 15 July 1999, para. 30, which reads: 'Such is the geography of the courtrooms used by the Tribunal that the view of the witness and of the witness's demeanour on the television screens provided throughout the courtroom is usually better than that from across the room'.

follow a witness' testimony by video-conference link both on a personal computer screen and on a very large 2.4 metre by 1.5 metre in-court television screen. Its high-definition capability further enhances the image quality. Moreover, the available technology also allows witnesses testifying remotely to see different speakers in the courtroom with dynamic camera views. With these technological resources, the Trial Chamber has no doubt that it can appropriately assess the credibility and reliability of a witness testifying by video-conference link.

25. Additionally, the Trial Chamber is not prepared to declare—as Defence counsel request—that testimony by video-conference link is an exceptional measure. These arguments overlook both the historical developments and technological advancements in video-conference technology since 1996, including that the original 1997 requirement in the ICTY Rules of 'exceptional circumstances' before allowing video-conference link testimony was removed in 1999, over fourteen years ago.

26. At the Special Tribunal, according to Rule 124, testimony by video-conference link is permissible, when in the interests of justice. The ordinary course for *viva voce* testimony is in-court presence, and this is why the Special Tribunal's Rules require an application for video-conference link testimony and an assessment of the interests of justice. However, nothing in Rule 124, or the Practice Direction, suggests that video-conference link testimony is 'exceptional' in the manner required by the first ICTY Rule in 1997.

27. The Trial Chamber, while not adopting the 'three-prong test' urged by counsel for Mr. Ayyash, nonetheless considers all relevant factors—including those in the 'three-prong test'—when evaluating whether the interests of justice permit testimony by video-conference link for a particular witness. This more comprehensive approach involves considering all appropriate and relevant criteria, including: the rights of the Accused; the nature of the evidence; the reported views and personal circumstances of the witness; the current situation in Lebanon; the concerns and objections, if any, of the Defence; the expeditiousness of the proceedings; and, the Special Tribunal's logistical and financial resources.²⁶

28. The ICTY also recently used a comparable approach, considering factors additional to those in its own original 'three-prong test', declaring in *Mladić* that while video-conference link testimony must be consistent with the interests of justice, the particular circumstances of each request must be

²⁶ See, STL-11-01/T/TC, Transcript, 9 January 2014, pp. 12-14; Transcript, 22 January 2014, pp. 65-66; and, Transcript, 29 January 2014, pp. 64-66.

considered.²⁷ Consequently, the Trial Chamber finds that the interests of justice cannot be appropriately assessed if it limits its consideration solely to those factors in the ‘three-prong test’.

29. Consistent with the general principles identified in this decision, the Trial Chamber considers that the rights of the five Accused to a fair trial were not prejudiced by granting the motion for this witness to testify by video-conference link. If the Trial Chamber considers that the interests of justice do not favour receiving testimony by video-conference link, it will decide accordingly.

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

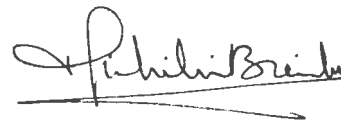
Leidschendam,
The Netherlands
25 February 2014



Judge David Re, Presiding



Judge Janet Nosworthy



Judge Micheline Braidy



²⁷ *Prosecutor v. Mladić*, IT-09-92-T, Decision on Prosecution Motion for Testimony of Witness RM-088 to be Heard via Video-Conference Link, 1 November 2012, paras 4-13.