

PARTIALLY DISSENTING OPINION OF JUDGE HENDERSON

1. I am in agreement with my colleagues that the Chamber has a broad discretion to permit the *viva voce* testimony of witnesses to be given by means of video link technology. Nonetheless, I am unable to agree with the disposition allowing such testimony via video link in the particular instance. In my respectful view the Chamber has not identified what specific factors it considered and applied in the exercise of its discretion in permitting the use of video link testimony for the witnesses in question. The decision also appears unsupported by any relevant factual material.

2. There is little dispute that the Statute and the Rules give the Chamber a wide discretion to permit the *viva voce* testimony of witnesses to be given by means of video link technology, whenever this becomes necessary and appropriate, and is not prejudicial to or inconsistent with the rights of the Accused.¹ It is also indisputable that the Chamber is required to protect the psychological well-being and dignity of the witnesses that are called to appear before it through appropriate measures. In such cases, the decision of whether or not to permit testimony via video link requires a careful assessment of a range of factors that are fact-specific to the application under consideration. In terms of assessing the necessity of hearing a witness via video link, the Chamber may consider factors including but not limited to the witnesses' age, vulnerability, state of health and psychological well-being, the concerns and objections (if any) of the

¹ 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 ("*Bemba Decision*"); See also Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request for a witness to give evidence via video-link, 8 February 2010, ICC-01/04-01/06-2285-Conf, Para. 14-15 ("*Lubanga Decision*"); Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Public redacted version of Decision on Prosecution's request to hear P-0039's testimony by way of video-link, 12 October 2015, ICC-01/04-02/06-897-Red2, Para. 12. ("*Ntaganda Decision*")

Accused, the expeditiousness of the proceedings, as well as logistical concerns and the financial resources of the Court.² Factors that may be relevant for assessing the appropriateness of allowing a witness to appear via video link include, among others, the characteristics of the witness and the nature of the evidence. In particular, the Chamber ought to consider whether the witness is expected to testify about matters that are strongly contested by the parties or which pertain to core issues in the case. It is also relevant to consider the precise modalities of the video link, which must allow the non-calling party to properly confront the witness. This may require the ability to establish direct visual contact between Counsel and the witness.

3. The assessment of the appropriateness of video link evidence should be conducted in respect of each witness individually. I am in agreement with the submissions of the Prosecution that applications for video link testimony should be individualised and not be made in respect of a class of witnesses.³ In the exercise of the Chamber's discretion, such applications must be justified in the case of each witness, having regard to the peculiar circumstances of the witness and the range of factors previously identified. Where such is the case, it ensures the consistent and uniform application of the relevant principles to the particular facts under consideration. Apart from encouraging legal certainty, this is an important safeguard against what may well be inconsistent decisions of a Chamber.

² *Ntaganda Decision*, ICC-01/04-02/06-897-Red2, Para. 12. See Also *Lubanga Decision*, ICC-01/04-01/06-2285-Conf, Para. 15; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on "Defence Motion for authorization to hear the testimony of Witness D-45 via video-link", 6 March 2013, ICC-01/05-01/08-2525-Conf, Para. 7, a public redacted version of this decision was filed on 7 March 2013, ICC-01/05-01/08-2525-Red.

³ ICC-02/11-01/15-T-80-CONF-ENG; *Reaching a similar conclusion*, see Special Tribunal for Lebanon, *The Prosecutor v. Salim Jamil Ayyash et al.*, Decision on Prosecution Motion for General Authorisation for Video-Conference Link Testimony & Notice of Video-Conference Link Testimony for Witnesses PRH 006, PRH430, PRH 020, PRH007, PRH115, 7 July 2015, STL-11-01/T/TC F2050, Para. 9-11.

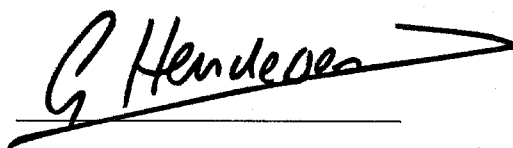
4. Regarding the automatic grant of protective measures, I am not in agreement with my colleagues that as a general rule, measures supported and recommended by the VWU will be granted by the Chamber.⁴ Appropriate protective measures are an important mechanism available to a Trial Chamber that enables the Chamber to strike the correct balance when dealing with at-risk witnesses, while at the same time fully respecting the rights of the Accused. Both the Statute and the Rules require the Chamber to balance these rights, and the Rules in particular set out a detailed procedure that the Chamber is required to follow to safeguard these respective rights. The decision to make such orders is made by the Chamber and the Chamber alone. While the Victims and Witnesses Unit has an advisory role on the appropriate protective measures that may be necessary for the well-being of a witness, the decision on whether such measures may nonetheless be or are prejudicial to or inconsistent with the rights of the accused and the dictates of a fair and impartial trial remain the exclusive responsibility of the Trial Chamber. Such a decision is not capable of being delegated.

5. Turning to the applications at hand and leaving aside the issue of whether the applications are now brought by the Prosecution who appear to have adopted the applications, the basis of the applications is, in my view, generic and factually threadbare. This Chamber has consistently expressed its disapproval of applications for measures that are supported by vague and generic statements with little or no factual support. The instant requests are open to this criticism. The basis of these applications was set out in an email of the VWU to the Trial Chamber I Communications inbox. Nothing factually was added for the Chamber's consideration during the hearing held for that purpose on 27 September 2016. Unlike the situation, for example, in Lubanga (vulnerable and unsophisticated witness from a remote area who had never

⁴ Decision, 11 October 2016, ICC-02/11-01/15-721, Para 14.

travelled) or Ntaganda (a medical report), no specific reason has been advanced for the Chamber's consideration. And if the generic basis argued provides the ground for granting the application, then there is nothing that would stand in the way of the Chamber running the entire trial by way of video link by allowing any witness to be examined via video link. Moreover, by relying on such a vague and generic basis, there is nothing to prevent the Chamber from giving inconsistent or totally arbitrary decisions. Indeed, it is difficult to understand the reasoned basis on which P-0106 and P-0230 will testify in person in court while the other witnesses are permitted to testify via video link, when the applications were all made on the same basis. Surely, it cannot be the case that the mere fact that the Prosecution expressed the simple wish to hear these witnesses in court suffices to distinguish between the witnesses.

6. In short, while I do not reject the possibility of hearing some of the witnesses via video link, I am of the view that the case for doing so has not been sufficiently made. Moreover, I believe it is not appropriate to hear witnesses who testify about core contested issues in the case via video link, unless there are compelling reasons for doing so. These reasons seem to be missing in this instance. For these reasons, I would have rejected the request.

A handwritten signature in black ink, appearing to read 'G. Henderson', with a long horizontal line extending to the right from the end of the signature.

Judge Geoffrey Henderson

Dated 18 October 2016

At The Hague, The Netherlands