

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04-01/06

Date: 9 February 2010

TRIAL CHAMBER I

**Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann**

***SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO IN THE CASE
OF THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public

**Redacted Decision on the defence request for a witness to
give evidence via video-link**

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

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Unrepresented Victims

Legal Representatives of the Applicants

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massida

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States Representatives

Amicus Curiae

REGISTRY

Registrar

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Defence Support Section

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Detention Section

**Victims Participation and Reparations
Section Other**

Trial Chamber I (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following Decision on the “Requête de la Défense pour déposition par vidéoconférence d’un témoin de la Défense”.¹

I. Background and Submissions

1. In the Chamber’s “Decision on various issues related to witnesses’ testimony during trial”,² it was established that:

42. If a party or a participant seeks to introduce evidence via audio or video-link technology from a remote location (e.g. Democratic Republic of Congo), they shall file a request with the Chamber, whilst simultaneously informing the Victims and Witnesses Unit, not less than 35 days before the relevant testimony is due to be heard.

2. Pursuant to that Decision, the defence requests leave for witness DRC-D01-WWWW-0014 to give evidence via a video-link from an appropriate location in Ituri.³ The defence accepts that, as a general rule, it is preferable for witnesses to give evidence in person before the Chamber,⁴ but it advances a series of reasons as to why a different approach should be taken with this witness.
3. The defence is of the view that the witness is extremely vulnerable, and that she will suffer great prejudice and harm if she has to travel to the Court to testify.⁵ She is in her mid forties, and resides in a country area that is relatively inaccessible. She lives in conditions of extreme poverty, and has never previously travelled. Indeed, it is said that she has never used a toilet, a sink or a telephone. Given the length of time that the witness would need to

¹ Requête de la Défense pour déposition par vidéoconférence d’un témoin de la Défense, 27 November 2009, ICC-01/04-01/06-2197-Conf.

² Decision on various issues related to witnesses’ testimony during trial, 29 January 2008, ICC-01/04-01/06-1140.

³ ICC-01/04-01/06-2197-Conf, paragraphs 1 and 2.

⁴ ICC-01/04-01/06-2197-Conf, paragraph 9.

⁵ ICC-01/04-01/06-2197-Conf, paragraph 3.

spend, first, in Kinshasa obtaining a passport and, thereafter, in the Netherlands, the defence suggest that this would be a traumatic experience for her, and that she would be completely helpless and at a loss in these unfamiliar environs.⁶

4. The witness has already met with the Victims and Witnesses Unit, and the defence suggests that following a trip to Bunia (some 90 kilometres from the witness's home) it became clear that she has difficulties in adjusting to new circumstances.⁷
5. It is set out that the main focus of the witness's evidence will be that [REDACTED] witness DRC-OTP-WWWW-0299 and [REDACTED] witness DRC-OTP-WWWW-0298. Contrary to the latter's evidence that he is sure that his mother is dead, this witness will [REDACTED].⁸
6. The legal representatives of victim a/0002/06, following a request from the Chamber on 26 January 2010,⁹ filed a response on 29 January 2010, opposing the application.¹⁰
7. The legal representatives rely on jurisprudence from the International Criminal Tribunal for Rwanda, as follows:

A Chamber can authorize a witness to testify by videoconference under Article 54 of the Rules where, in the light that the elements shown below, are respected and that the interests of justice require so: i) the importance of the testimony, ii) the inability of the witness to appear in court or his refusal to do so, iii) the existence of valid reasons to justify his or her disability. When a witness refuses to appear in court, his refusal needs to be real and well founded, the Chamber must

⁶ ICC-01/04-01/06-2197-Conf, paragraphs 4 – 6 and 8.

⁷ ICC-01/04-01/06-2197-Conf, paragraph 7.

⁸ ICC-01/04-01/06-2197-Conf, paragraph 10.

⁹ Transcript of hearing on 26 January 2010, ICC-01/04-01/06-T-235-Red-ENG-WT, page 48, lines 13 – 22. The filing was subsequently notified to the legal representatives on 27 January 2010.

¹⁰ Réponse à la requête de la Défense pour déposition par vidéoconférence d'entendre un témoin de la Défense, 29 January 2010, ICC-01/04-01/06-2276-Conf.

have reasons to believe that if it does not authorize it the witness won't testify at all."¹¹

8. Against that background, it is observed by the legal representatives that this application is not made on the basis that the witness is unable to travel to The Hague or that she has refused to testify in person, but instead it is founded on her alleged vulnerability.¹² The legal representatives assume¹³ that the request is made under Rule 88 of the Rules of Procedure and Evidence ("Rules"), which provides that:

Special measures

1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.

9. The legal representatives observe that the application has not been advanced by the witness or by the Victims or Witnesses Unit but by the defence. It is highlighted that the issue of the witness's consent is not referred to, and that no supporting evidence is provided to confirm her particular personal circumstances. It is observed that other vulnerable individuals have already testified before the Court.¹⁴
10. It is argued that because supporters of the accused are influential in Bunia, they may have contact with the witness and influence her evidence. Generally, it is suggested that the integrity of her evidence will be better protected if she testifies in The Hague.¹⁵

¹¹ ICTR, *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Trial Chamber III, Decision on Joseph Nzirorera's Motion for Video-Link Testimony of Jean Baptiste Butera, 19 March 2008, paragraph 3.

¹² ICC-01/04-01/06-2276-Conf, paragraph 7.

¹³ ICC-01/04-01/06-2276-Conf, paragraph 7.

¹⁴ ICC-01/04-01/06-2276-Conf, paragraphs 8 and 10.

¹⁵ ICC-01/04-01/06-2276-Conf, paragraph 9.

11. Rule 67 of the Rules provides:

Live testimony by means of audio or video-link technology

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.

2. The examination of a witness under this rule shall be conducted in accordance with the relevant rules of this chapter.

3. The Chamber, with the assistance of the Registry, shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.

12. The legal representatives suggest that in all the circumstances the requirements of Rule 67(3) of the Rules have not been met.

13. The prosecution does not oppose this application.¹⁶

II. Analysis and Conclusions

14. It is to be stressed that this Court's approach to the issue of witness protection is not necessarily the same as that taken by other international tribunals. Although it is useful to investigate the jurisprudence from other courts, it is in no sense binding. Critically in this situation, under Article 68(1) of the Rome Statute ("Statute"), "[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors [...]" and, furthermore, under Article 68(2) of the Statute "[a]s an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part

¹⁶ Transcript of hearing on 26 January 2010, ICC-01/04-01/06-T-235-Red-ENG-WT, page 48, lines 1 – 2.

of the proceedings *in camera* to allow the presentation of evidence by electronic or other special means. [...]”. The governing provision is Article 69(2) of the Statute which provides:

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.

15. Accordingly, contrary to the contention of the legal representatives, applications for evidence to be given via a video link are not restricted to the two suggested limited situations, namely when the witness has either refused to attend court or is unable to do so. Instead, the Chamber is generally enjoined to protect the psychological well-being and dignity of its witnesses; subject to the fundamental dictates of a fair trial, and this calls for a fact-specific Decision, in which a wide variety of different factors may be relevant. Rule 67 of the Rules is framed in a way that leaves the Chamber with a broad discretion, subject particularly to the provisions of Rule 67(3) of the Rules.

16. Addressing the merits of this application, in the view of the Chamber the suggested personal circumstances of the witness lead to a strong *prima facie* conclusion that requiring her to travel to The Hague to give evidence would be inimical to her psychological well-being and her dignity. On the basis of the defence submissions, the change in environment could be extremely destabilising and upsetting for the witness, bearing in mind her domestic circumstances and her unfamiliarity with the basic norms of life in Europe. However, as the Chamber has recently observed,¹⁷ neither party “owns” the witnesses it intends to call; witnesses are witnesses of the Court and it is for

¹⁷ Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses, 19 November 2009, ICC-01/04-01/06-2192-Conf, paragraph 49; public redacted version, 20 January 2010, ICC-01/04-01/06-2192-Red, paragraph 49.

the Chamber to assess the needs of the individual if exceptional measures are proposed. It is for the Victims and Witnesses Unit to assess the matters raised by the defence, reporting thereafter to the Court as to whether giving evidence in the Netherlands will be significantly detrimental to the witness and whether using a video-link is a reasonable alternative for her.

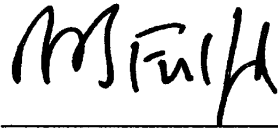
17. Moreover, the Registry must ensure that the fears expressed by the legal representatives as to interference with her evidence by supporters of the accused, or others, will not be realised. The Chamber will need reassurance that appropriate steps can be taken to ensure that the circumstances are “[...] conducive to the giving of truthful and open testimony” (see Rule 67(3) of the Rules) before resolving this application.

18. In all the circumstances this application is adjourned to enable the Registry to report to the Chamber on the matters identified above.

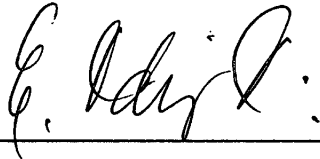
Postscript

19. The Chamber directs that if in due course this application is granted, as part of the familiarisation process the witness is to be given one or more “trial runs” at speaking over the video-link, by way of questions and answers, so that she can understand the need to speak clearly, slowly and to pause after each question before answering. It is important that she is comfortable with this method of giving evidence, if this procedure is used.

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



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 9 February 2010

At The Hague, The Netherlands