

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 12 October 2010

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

**Redacted Decision on the "Request for the conduct of the testimony of witness
CAR-OTP-WWWW-0108 by video-link"**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Ms Petra Kneuer, Senior Trial Lawyer

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson

Counsel for the Defence

Mr Nkwebe Liriss

Mr Aimé Kilolo Musamba

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber III (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”) in the case of The Prosecutor v. Jean-Pierre Bemba Gombo hereby issues the following Decision on the “Request for the conduct of the testimony of witness CAR-OTP-WWWW-0108 by video-link”.¹

I. Background and Submissions

1. On 27 September 2010, the Office of Public Counsel for Victims (“OPCV”) filed its “Request for the conduct of the testimony of witness CAR-OTP-WWWW-0108 by video-link” (“Request”)² pursuant to Article 69(2) of the Rome Statute (“Statute”) and Rules 67 and 87 of the Rules of Procedure and Evidence (“Rules”). The OPCV, which files the Request in its capacity as legal representative of dual status victim witness CAR-OTP-WWWW-0108 (“Witness 108”), requests that the testimony of Witness 108 is heard by means of video link. According to the OPCV, the witness, as [REDACTED] in the CAR and his absence would seriously affect the functioning of [REDACTED] which is responsible for [REDACTED] in the country.³

2. On 1 October 2010, the Office of the Prosecutor (“prosecution”) filed its “Prosecution’s Response to the Office of Public Counsel for Victims’ “Request for the conduct of testimony of witness CAR-OTP-WWWW-0108 by video link””⁴ in which it supports the OPCV’s application that Witness 108 is allowed to testify by video-link.⁵

¹ Request for the conduct of the testimony of witness CAR-OTP-WWWW-0108 by video-link, 27 September 2010, ICC-01/05-01/08-905-Conf, with Confidential Annex A *ex parte* OTP and OPCV only, ICC-01/05-01/08-905-Conf-Exp-AnxA and with a redacted version of Confidential Annex A, ICC-01/05-01/08-905-Conf-AnxA-Red.

² ICC-01/05-01/08-905-Conf.

³ ICC-01/05-01/08-905-Conf, paragraph 7.

⁴ Prosecution’s Response to the Office of Public Counsel for Victims’s “Request for the conduct of the testimony of witness CAR-OTP-WWWW-0108 by video-link”, 1 October 2010, ICC-01/05-01/08-919-Conf.

⁵ ICC-01/05-01/08-919-Conf, paragraph 3. The parties were instructed to file their responses to the Request by 4 October 2010 : email communication from the Trial Chamber through a legal officer of the Trial Division on 28 September 2010.

3. On 4 October 2010, the defence for Mr Jean-Pierre Bemba Gombo (“defence”) filed its “Réponse de la Défense à la requête du Bureau du Conseil Public pour les victimes intitulée : « *Request for the conduct of the testimony of witness CAR-OTP-WWWW-0108 by video-link* » du 27 Septembre 2010”⁶ (“defence Response”) in which it requests the Chamber to reject the OPCV’s application.⁷

4. The defence submits that the reasons submitted by the OPCV for justifying witness testimony by video-link do not follow either the Court’s jurisprudence or ICTY jurisprudence.⁸ The defence notes the principle established by Trial Chamber I in its “Decision on various issues related to witnesses’ testimony during trial” that “[...] the presumption is that witnesses will give evidence by way of live in-court testimony, in accordance with Article 69(2) of the Statute”.⁹

5. The defence argues that so far testimony by video-link has only been allowed in exceptional circumstances.¹⁰ It submits that in the *Lubanga* case, video-link testimony was allowed after consultation with the Victims and Witnesses Unit in the specific situation of a very vulnerable witness who had never travelled before and for whom testifying by video-link was a reasonable alternative since live testimony at the seat of the Court would have been inimical to the psychological well-being and dignity of this witness.¹¹

⁶ Réponse de la Défense à la requête du Bureau du Conseil Public pour les victimes intitulée : « *Request for the conduct of the testimony of witness CAR-OTP-WWWW-0108 by video-link* » du 27 Septembre 2010, 4 October 2010, ICC-01/05-01/08-923-Conf.

⁷ ICC-01/05-01/08-923-Conf, paragraph 18.

⁸ ICC-01/05-01/08-923-Conf, paragraph 6.

⁹ ICC-01/05-01/08-923-Conf, paragraphs 7 and 8.

¹⁰ ICC-01/05-01/08-923-Conf, paragraphs 9 and 10.

¹¹ ICC-01/05-01/08-923-Conf, paragraph 11.

6. Further it submits that Witness 108's situation is in no way comparable to the situation of the witness in the *Lubanga* case since Witness 108 is unable to come to testify at the seat of the Court for [REDACTED] reasons.¹²
7. In addition, the defence submits that the OPCV, when referring to ICTY jurisprudence, omits to mention that video-link testimonies were all allowed for medical reasons that had physically prevented the witnesses from travelling.¹³ Further, it argues that the mere fact that Witness 108 consented to giving his testimony by video-link is not a reason for the Chamber to grant the OPCV's Request. It also underlines that Witness 108 had previously consented to testify at the Court in person.¹⁴
8. Finally the defence contends that many witnesses may encounter a variety of [REDACTED] difficulties and to categorize such difficulties as exceptional circumstances would establish a dangerous precedent.¹⁵

II. Relevant Provisions

9. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions:

Article 67 of the Statute

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(e) To examine, or have examined, the witnesses against him or her [...]

Article 69 of the Statute

Evidence

[...]

¹² ICC-01/05-01/08-923-Conf, paragraph 12.

¹³ ICC-01/05-01/08-923-Conf, paragraphs 13 to 15.

¹⁴ ICC-01/05-01/08-923-Conf, paragraph 16.

¹⁵ ICC-01/05-01/08-923-Conf, paragraph 17.

2. 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.

[...]

Rule 67 of the Rules of Procedure and Evidence (“Rules”)

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.

III. Analysis and Conclusions

10. The term “given in person” used by Article 69(2) of the Statute, does not imply that witness testimony shall necessarily, under any circumstances, be given by way of live testimony in court. Instead, the Statute and the Rules give the Court broad discretion, subject to the provisions of Rule 67 of the Rules, to permit evidence to be given *viva voce* (orally) by means of video or audio technology whenever necessary,¹⁶ provided that the Statute and the Rules are respected and that such measures are not prejudicial to, or inconsistent with, the rights of the accused.

11. The Chamber recalls that, according to Article 67(1)(e) of the Statute, the accused has the right to “examine or have examined the witnesses against him or her”. Further, pursuant to Rule 67(1) of the Rules, the Chamber may

¹⁶ The same view was adopted by Trial Chamber I in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“*Lubanga* case”), Decision on various issues related to witnesses’ testimony during trial, 29 January 2008, ICC-01/04-01/06-1140, paragraph 41.

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 examined by the defence at the time the witness so testifies. In relation to the present Request, the defence does not submit that the rights of the accused would be prejudiced by Witness 108 giving testimony by means of video-link.

12. Therefore, the Chamber is of the view that the testimony of a witness by video technology, unless otherwise shown, is compatible with the right of the accused to examine or have examined the witness against him, in accordance with Article 67(1)(e) of the Statute.

13. One of the relevant criteria in determining whether or not a witness should be allowed to give *viva voce* (oral) testimony by means of video technology is the witness's personal circumstances.¹⁷ Although personal circumstances have thus far been interpreted as linked to the well-being of a witness, the Chamber is not confined by the Statute in considering other types of personal circumstances which might justify a witness testifying by means of audio or video technology.

14. In the present case, the Chamber notes the specific [REDACTED] commitments and particular profile of Witness 108, namely that he is [REDACTED]. The Chamber is aware that the [REDACTED] and notes the information provided by the witness¹⁸ that [REDACTED], preventing him from travelling outside the CAR. Furthermore, the Chamber observes that Witness 108 is ready and willing to cooperate with the Court. Due to the exceptional nature of the personal circumstances explained by the OPCV

¹⁷ A similar view was adopted by Trial Chamber I in the *Lubanga* case, Redacted Decision on the defence request for a witness to give evidence via video-link, 9 February 2010, ICC-01/04-01/06-2285-Red, paragraph 16.

¹⁸ ICC-01/05-01/08-905-Conf-AnxA-Red.

concerning this witness, the Chamber considers that the reasons that prevent him from travelling to The Hague to give live testimony in Court until [REDACTED], are well-founded.

15. Subject to any further decision on the “Prosecution’s Updated Order of Presentation of its Witnesses at Trial” of 1 October 2010,¹⁹ the Chamber notes that Witness 108 would only testify as the 24th witness at trial. In the event that Witness 108’s evidence is to be given after [REDACTED], the Chamber may reconsider this Decision and order that the testimony of the witness be given live at the seat of the Court.

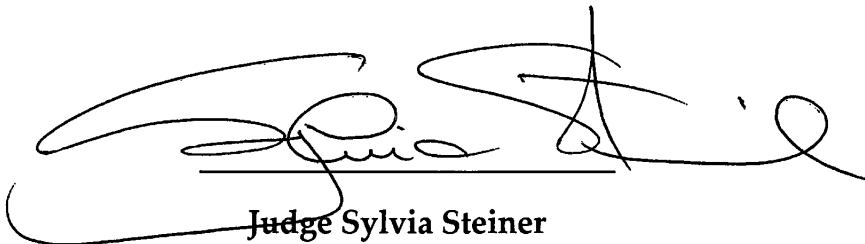
IV. Orders of the Trial Chamber

16. For the above reasons, the Chamber grants the Request of the OPCV and authorises Witness 108 to give *viva voce* (oral) testimony before the Chamber by means of video technology if such a testimony is given before [REDACTED].
17. The Registry, upon previous consultation with the OPCV and the prosecution, shall ensure that the technology to be used permits the witness to be examined by the prosecution, the defence, and by the Chamber itself, at the time the witness so testifies.
18. The Registry, upon prior consultation with the OPCV and the prosecution, shall ensure that the venue chosen for the conduct of the video-link testimony fulfils the requirements of Rule 67(3) of the Rules.

¹⁹ Prosecution’s Updated Order of Presentation of its Witnesses at Trial, 1 October 2010, ICC-01/05-01/08-918 and The Prosecution’s Updated Order of Witnesses, 21 September 2010, ICC-01/05-01/08-891.

19. The Registry shall ensure that the witness familiarisation process of Witness 108 is duly conducted.

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



Judge Sylvia Steiner



Judge Joyce Aluoch



Judge Kuniko Ozaki

Dated this 12 October 2010

At The Hague, The Netherlands