

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

No.: **ICC-01/05-01/08**

Date: **4 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***

Confidential

**Defence Response to the Application by the Office of Public Counsel for Victims
Entitled: "Request for the conduct of the testimony of witness CAR-OTP-
WWW-0108 by video-link" of 27 September 2010**

Source: Defence Team for Mr Jean-Pierre Bemba Gombo

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Fatou Bensouda
Petra Kneur

Counsel for the Defence

Nkwebe Liriss
Aimé Kilolo Musamba

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar
Silvana Arbia and Didier Preira

Counsel Support Section
Defence

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

RELEVANT PROCEDURAL HISTORY

1. On 24 June 2010, the Prosecution filed its “Prosecution Application for Leave to Submit in Writing Prior Recorded Testimony by CAR-OTP-WWWW-0032, CAR-OTP-WWWW-0080, and CAR-OTP-WWWW-0108”.¹
2. One of those witnesses was CAR-OTP-WWWW-108. (“Witness 108”).
3. On 16 September 2010, Trial Chamber III (“the Chamber”) rendered a decision rejecting the Prosecution's application in its entirety:

The Chambers rejects the prosecution's application in its entirety.²

4. Subsequently, on 27 September 2010, the Office of Public Counsel for Victims (OPCV), in its capacity as Legal Representative of Victim a/0292/08, who is also Witness 108, filed in turn an application for this witness-victim to be heard by the Chamber via video-link (“OPCV Application”).³ In the Application, the OPCV draws attention to the fact that the Prosecution supports it:

the Office of the Prosecutor has been consulted and has indicated to agree with an support his request.⁴

RESPONSE

5. In its Decision denying leave to submit prior-recorded testimony as testimony, the Chamber stated: “For these reasons, Witness 108 shall testify in person pursuant to Article 69(2) of the Statute.”⁵ The OPCV considers, however, that

¹ “Prosecution Application for Leave to Submit in Writing Prior Recorded Testimony by CAR-OTP-WWWW-0032, CAR-OTP-WWWW-0080, and CAR-OTP-WWWW-0108”, No. ICC-01/05-01/08-801-Conf-Exp-tENG, 24 June 2010.

² *Decision on the “prosecution Application for Leave ot Submit in Writting Prior Recorded Testimonies by CRA-OPT-WWWW-0032, CAR-OTP-WWWW-0080, et CAR-OTP-WWWW-0108”*, No. ICC-01/05-01/08-886, 16 September 2010.

³ “Request for the conduct of the testimony of witness CAR-OTP-WWWW-0108 by video-link”, No. ICC- 01/05-01/08-905-Conf, 27 September 2010.

⁴ ICC-01/05-01/08-905-Conf, para. 4.

⁵ No. ICC-01/05-01/08-886, para. 25.

Witness 108 “will not be able to testify at the seat of the Court”,⁶ the reason given being the witness’s professional obligations.

6. The Defence submits that neither the reason given by the witness nor the submissions of the OPCV justify implementing video-link testimony.
7. The general rule and basis for determining whether video-link testimony is admissible is article 69(2), which states:

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.

8. In the *Lubanga* case, Trial Chamber III clearly concluded that the presumption is that witnesses will give live in-court testimony.⁷ The presumption that witnesses will appear in The Hague to give testimony is, moreover, consistent with the approach taken by the International Tribunals.
9. In the decision rendered in the *Tadić* case on which the OPCV relies, in a highly selective manner moreover, the Chamber stated:

It cannot be stressed too strongly that the general rule is that a witness must physically be present at the seat of the International Tribunal. The Trial Chamber will, therefore, only allow video-link testimony if certain criteria are met, namely that the testimony of a witness is shown to be sufficiently important to make it unfair to proceed without it and that the witness is unable or unwilling to come to the International Tribunal.⁸

10. The question then arises: under what circumstances can a refusal by, or inability of, a witness to come to The Hague to give testimony justify the Chamber in departing from the general rule that testimony must be given in person? It is suggested that the Trial Chamber might usefully learn from the experience of the

⁶ ICC-01/05-01/08-905-Conf, para. 7.

⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, No. ICC-01/05-01/06-1140, *Decision on various issues related to witnesses' testimony during trial*, 29 January 2008, para. 41.

⁸ *Prosecutor v. Duško Tadić*, IT-91010T, “Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-link”, 25 June 1996, para. 19.

Lubanga case in the matter of video-link testimony, and conclude that such testimony is an “exceptional measure”,⁹ with the presumption that such action should not therefore be taken if there are no exceptional circumstances to justify it.

11. In that decision in the *Lubanga* case, the Trial Chamber was considering the situation of an extremely vulnerable witness, who was living in conditions of extreme poverty, who had never travelled and had never used a toilet, sink or telephone. These factors led to a strong *prima facie* conclusion that an initial journey to Kinshasa to obtain a passport, and then a second journey to The Netherlands, would be “inimical to her psychological well-being and dignity”, and “the change in environment could be extremely destabilising and upsetting for the witness”.¹⁰ Thus, the Chamber ordered the Victims and Witnesses Unit to make an assessment in order to determine whether giving evidence via video-link was a reasonable alternative for the witness, and to report back to the Chamber.¹¹
12. That decision illustrates the type of circumstances required in order for a Chamber to be impelled to determine whether it is advisable to authorise the hearing of video-link testimony. There is no comparison between the demands of professional responsibilities and the situation of a witness for whom travel abroad would be “inimical ... psychological well-being and dignity”.
13. The OPCV cites several decisions of the ICTY that purportedly support the argument for video-link testimony.¹² It would appear, however, that in each of the decisions cited by the OPCV video-link testimony was admitted only after the party seeking the measure had demonstrated to the Chamber that the witness in question was either too ill or too frail to travel to The Hague. In the *Karadzi*

⁹ *the Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2285-Red, *Redacted Decision on the defence request for a witness to give evidence via video-link*, 9 January 2010, para. 16.

¹⁰ ICC-01/04-01/06-2285-Red, paras. 3 and 16.

¹¹ ICC-01/04-01/06-2285-Red, para. 16.

¹² ICC-01/05-01/08-905-Conf, para. 9.

decision cited by the OPCV, the witness concerned was suffering from “ongoing” and “recently intensified” health problems as a result of a shelling incident that had caused serious injuries making the journey extremely difficult.¹³

14. In the *Stanisic* decision, also cited by the OPCV, video-link testimony was authorised for witnesses who had provided medical certificates or who were sufficiently advanced in age to justify their inability to travel to The Hague.¹⁴
15. In the *Hadžihasanović* decision cited by the OPCV, video-link testimony was authorised for witnesses who had been issued with medical certificates showing that it was physically impossible for them to travel to The Hague.¹⁵ In that decision, the Chamber categorically rejected the application for a video-link for witnesses who did not have supporting medical certificates. The OPCV does not cite any decision either of the ICC or of the International Tribunals in which it appears that video-link testimony was authorised for the sake of a witness's professional convenience.
16. The Defence notes the OPCV's statement that the witness in question “expressed his consent” for the implementation of such a measure.¹⁶ The Defence has two observations to make on this subject:

In the first place, witness consent is not a relevant criterion for assessing whether the Chamber can order an extraordinary measure of this kind, which falls outside the normal procedure for trials before the Court. The hearing of video-link testimony is cumbersome, logically difficult, and costly. The Defence respectfully considers rather that this procedure should be reserved for witnesses who are genuinely unable, or can give a good reason, for

¹³ *Prosecutor v. Radovan Karadzic*, IT-95-5/18-T, “Decision on prosecution's motion for testimony to be heard via video-conference link”, 122 July 2010, paras. 9 and 10.

¹⁴ *Prosecutor v. Jovica Stanisic & Franko Simatovic*, IT-03-69-T, “Decision on prosecution motions to hear witnesses by video-conference link”, 24 February 2010.

¹⁵ *Prosecutor v. Enver Hadžihasanović & Amir Kubura*, IT-01-47-T, “Decision on Prosecution Motion for Receiving Testimony by Video-conference Link”, 11 March 20054

¹⁶ ICC-01/05-01/08-905-Conf, para. 10.

refusing to travel to The Hague, and not as a possible alternative to meet the demands of a witness's professional obligations.

In the second place, the Defence notes that, on 5 February 2009, this witness expressed a wish to “[TRANSLATION] appear as a witness before the Court”,¹⁷ which further negates the OPCV assertion that this witness fulfils the criteria for a ruling in favour of a video-link.

17. In any case, all the witnesses, or at least most of those who will have to testify in this trial, will experience difficulties and personal inconvenience, ranging from the tolerable to the extreme. Many of these witnesses who testify will also face professional inconvenience as a result of their willingness to travel to the Court to participate in the administration of justice. The Defence submits that allowing the witnesses to rely on those difficulties as an “exceptional” measure, justifying video-link testimony, would set an unjustified and dangerous precedent.

Request for Confidentiality

18. The OPCV Application to which the Defence is responding has been classified as confidential, and for this reason the Defence would request that the present document be classified as confidential.

¹⁷ CAR-OTP-0037-0252.

For all of these reasons,

The Defence for the Accused Jean Pierre Bemba Gombo requests that the OPCV Application be denied.

[signed]

Aimé Kilolo Musamba

Associate Counsel

[signed]

Nkwebe Liriss

Lead Counsel

Dated this 4 October 2010

At The Hague, the Netherlands