

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/08
Date: 3 February 2012

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

Public redacted decision on the "Prosecution request to hear Witness CAR-OTP-PPPP-0036's testimony via 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

Counsel for the Defence

Mr Nkwebe Liriss
Mr Aimé Kilolo Musamba

Legal Representatives of the Victims

Ms Marie Edith Douzima-Lawson
Mr Assingambi Zarambaud

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Ms Maria-Luisa Martinod-Jacome

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 “Prosecution request to hear Witness CAR-OTP-PPPP-0036’s testimony via video-link”.

I. Background and Submissions

1. On 10 January 2012, the Office of the Prosecutor (“prosecution”) filed its “Prosecution request to hear Witness CAR-OTP-PPPP-0036’s testimony via video-link” (“Request”)¹ pursuant to Articles 68(1) and (2) and 69(2) of the Rome Statute (“Statute”). The prosecution requests that the testimony of Witness CAR-OTP-PPPP-0036 (“Witness 36”) be heard by means of video-link. The prosecution submits that the witness was involved [REDACTED] and, as a result, he “remains physically impaired and more importantly, is still highly traumatized [REDACTED]”.² The prosecution argues that hearing the testimony via video-link would prevent “the inevitable pain and suffering [the witness] would endure by travelling to The Hague”. Referring to the jurisprudence of this Chamber³ and of the Court,⁴ the prosecution further justifies its Request arguing that the use of video-link testimony in these exceptional personal circumstances will not be prejudicial to or inconsistent with the rights of the accused.⁵
2. On 16 January 2011, the defence filed the “Defence response to Prosecution request to hear Witness CAR-OTP-PPPP-0036’s testimony via video-link” (“Response”).⁶ The defence disagrees with the prosecution’s assertion that the rights of the accused would not be prejudiced should the Request be

¹ Prosecution request to hear Witness CAR-OTP-PPPP-0036’s testimony via video-link, 10 January 2012, ICC-01/05-01/08-2038-Conf and confidential Annex A.

² ICC-01/05-01/08-2038-Conf, paragraph 3.

³ ICC-01/05-01/08-2038-Conf, paragraph 4.

⁴ ICC-01/05-01/08-2038-Conf, paragraph 6.

⁵ ICC-01/05-01/08-2038-Conf, paragraphs 5 and 7.

⁶ Defence Response to Prosecution Request to hear Witness CAR-OTP-PPPP-0036’s testimony via video-link, 16 January 2012, ICC-01/05-01/08-2046-Conf.

granted.⁷ The defence further states that “[it] is prepared to concede, however, that due to particular circumstances concerning Witness 36’s health, he should be permitted to give evidence via video-link”.⁸ The defence further argues that, in the absence of any supporting documents showing Witness 36’s [REDACTED], the Chamber should not make any factual findings as to the witness’s [REDACTED] health.⁹

3. On 19 January 2012, upon the Chamber’s instruction,¹⁰ the prosecution filed a reply to the defence’s Response,¹¹ in which the prosecution reiterates its Request and informs that it has no supporting material in its possession with regard to the witness’s physical and emotional state.¹²

II. Relevant Provisions

4. In accordance with Article 21(1) of the Statute, the Trial Chamber has considered the following provisions: Articles 64(7), 67(1), 67(1)(e), 68(1) and 69(2) of the Statute, Rule 67 of the Rules of Procedure and Evidence (“Rules”) and Regulation 23bis3 of the Regulations of the Court (“Regulations”).

III. Analysis

Testimony by video-link

5. The term “given in person” used in 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

⁷ ICC-01/05-01/08-2046-Conf, paragraph 4.

⁸ ICC-01/05-01/08-2046-Conf, paragraph 4.

⁹ ICC-01/05-01/08-2046-Conf, paragraph 5.

¹⁰ Email from the Assistant Legal Officer to the Chamber to the prosecution, on 17 January 2012 at 16:37.

¹¹ Prosecution reply to “Defence Response to Prosecution Request to hear Witness CAR-OTP-PPPP-0036’ testimony via video-link”, 19 January 2012, ICC-01/05-01/08-2048-Conf.

¹² ICC-01/05-01/08-2048-Conf, paragraph 1.

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,¹³ 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.

6. In accordance with 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 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 prosecution, the defence and the Chamber at the time the witness so testifies.
7. One of the relevant criteria for determining whether or not a witness may be allowed to give *viva voce* (oral) testimony by means of video technology relates to the witness’s personal circumstances, which have thus far been interpreted as being linked to, *inter alia*, the well-being of a witness.¹⁴
8. In the present case, the Chamber notes the specific circumstances concerning Witness 36, namely that he sustained [REDACTED].
9. The Chamber acknowledges the witness’s personal circumstances and notably his unwillingness to travel to The Hague given [REDACTED]. Although no supporting materials were submitted in order to allow the Chamber to assess the witness’s health status, the Chamber sees no compelling reason for doubting the prosecution’s submission that Witness

¹³ See Trial Chamber I, *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.

¹⁴ 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.

36 is effectively not in a position to travel and come to testify to The Hague at the moment.

10. The Chamber further notes that the defence itself acknowledges the particular circumstances Witness 36 is facing and is prepared to question the witness by means of video-link. In the Chamber's view, the current exceptional situation of the witness and the fact that the defence will be in a position to appropriately question Witness 36 even if he is not physically present in the courtroom mitigate any prejudice to the accused's rights as enshrined in Article 67(1)(e) of the Statute.
11. In the present circumstances, the Chamber considers that the reasons that prevent Witness 36 from travelling to The Hague to give live testimony are well-founded.

Classification of documents

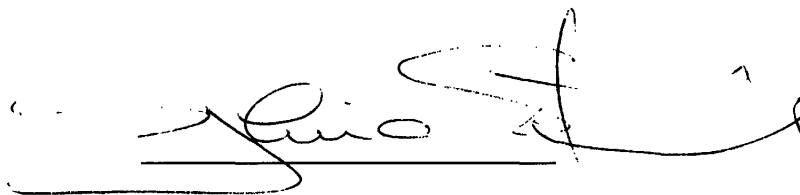
12. The Chamber notes that the documents pertaining to the prosecution's Request are classified as confidential in order to protect, *inter alia*, the psychological well-being, dignity and privacy of the witness, in accordance with Article 68(1) of the Statute. In striking a balance between the protection of Witness 36 and the Chamber's duty to ensure the publicity of the proceedings as enshrined under Articles 64(7) and 67(1) of the Statute, the Chamber finds, pursuant to Regulation 23bis(3) of the Regulations, that the related documents may be classified as public save for the information [REDACTED] suffered by Witness 36, which should remain confidential.

IV. Orders of the Chamber

13. For the foregoing reasons, the Chamber:

- a) grants the prosecution's Request and authorises Witness 36 to give *viva voce* testimony before the Chamber by means of video technology;
- b) orders the Registry to ensure that the technology to be used permits the witness to be questioned by the parties and participants, and by the Chamber itself, at the time the witness testifies.
- c) orders the Registry to choose an appropriate venue for the conduct of the video-link testimony in order to fulfil the requirements of Rule 67(3) of the Rules;
- d) orders the Registry to ensure that the familiarisation process of Witness 36 is duly conducted;
- e) orders the reclassification of document ICC-01/05-01/08-2048-Conf as public.
- f) orders the prosecution to file a public redacted version of document ICC-01/05-01/08-2038-Conf, in accordance with the guidance provided in paragraph 12 above, no later than 16.00 on 6 February 2012.
- g) orders the defence to file a public redacted version of document ICC-01/05-01/08-2046-Conf, in accordance with the guidance provided in paragraph 12 above, no later than 16.00 on 6 February 2012.

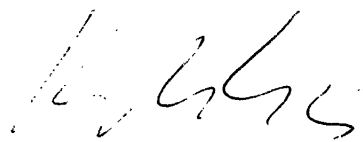
Done in both English and French, the English version being authoritative.

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Judge Sylvia Steiner

A handwritten signature in black ink, appearing to read 'Joyce Aluoch', written over a horizontal line.

Judge Joyce Aluoch

A handwritten signature in black ink, appearing to read 'Kuniko Ozaki', written over a horizontal line.

Judge Kuniko Ozaki

Dated this 3 February 2012

At The Hague, The Netherlands