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**Cour
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**International
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Date: **15 August 2022**

TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba, Presiding
Judge Maria del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godínez

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF *THE PROSECUTOR* v. *MAHAMAT SAID ABDEL KANI*

Confidential

**Prosecution response to the Defence's 'Demande d'autorisation d'interjeter appel de la
"Decision on the Use of Audio-Video Link Technology" (ICC-01/14-01/21-442)'**

Source: Office of the Prosecutor

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

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INTRODUCTION

1. On 4 August 2022, this Chamber, by majority, granted the Prosecution's request to allow witnesses to testify *via* audio-video link (AVL) from the Bangui Field Office.¹ Judge Ugalde dissented.² On 10 August 2022, the Defence requested leave to appeal the Decision.³
2. The Defence's request fails to meet the cumulative criteria and high threshold of article 82(1)(d) of the Statute. The three Issues are based either on a misreading of the Decision or constitute mere disagreements with the Majority's assessment. Moreover, the Defence has not shown that they *significantly* affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and that an immediate resolution by the Appeals Chamber would necessarily advance the proceedings. Accordingly, the Prosecution respectfully requests the Chamber to reject the Request.

LEVEL OF CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (RoC), the Prosecution files this response confidentially, since it responds to the Request which is similarly classified. Its response, however, does not contain confidential information. The Prosecution also notes that the underlying Decision is public. Therefore, the Prosecution requests the Chamber to reclassify this response as public.

SUBMISSIONS

A. The Issues are not appealable

4. Chambers have consistently required that an appealable issue must be "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion."⁴ No appealable issue arises if a party misreads or misstates the decision or record.⁵ Moreover, an appealable issue must emanate from the ruling of the decision concerned and does not merely represent an abstract question or hypothetical concern.⁶
5. The three Issues proposed do not satisfy these requirements.

¹ ICC-01/14-01/21-442 ("[Decision](#)"), paras. 9-19.

² ICC-01/14-01/21-442-Anx1 ("[Dissenting Opinion](#)"), paras. 1-18.

³ ICC-01/14-01/21-447-Conf ("Request").

⁴ [ICC-01/04-168 OA3](#), para. 9. *See also* [ICC-01/05-01/08-532](#), para. 17; [ICC-01/04-01/06-1557](#), para. 30. *Contra* Request, para. 9.

⁵ *See e.g.*, [ICC-01/04-01/10-487](#), paras. 32-33; [ICC-01/05-01/13-1489](#), paras. 9-10; [ICC-01/05-01/08-75](#), para. 32; [ICC-01/04-01/06-1557](#), paras. 27-30.

⁶ [ICC-01/05-01/08-532](#), para. 17.

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(i) *The First Issue misreads the Decision*

6. The First Issue—alleging that the Chamber erred in law by equating in person testimony and AVL testimony and thus violating article 69(2) of the Statute—fails to read the Chamber’s findings in their proper context.⁷

7. *First*, by arguing that the Chamber overlooked the legal principle in article 69(2) of the Statute, the Request misstates the Decision.⁸ Rather, the Majority expressly acknowledged the principle in article 69(2) requiring in person testimony, and following the plain text of article 69(2), it also acknowledged that it may permit testimony by AVL, if it was not prejudicial to or inconsistent with the rights of the accused.⁹

8. Further, contrary to the Request, the Majority did not limit itself to a “simple technical question on the feasibility of establishing an AVL link” under rule 67 of the Rules of Procedure and Evidence (RPE).¹⁰ Rather, the Majority’s findings were considerably more nuanced, including a broad range of factors.¹¹ In permitting the witness testimony by AVL, the Majority considered that it (i) causes the least disruption to the witnesses’ daily lives; (ii) avoids the need for a prolonged absence from their country of residence which could negatively affect their well-being and expose their cooperation and identity as witnesses; (iii) avoids the logistical challenges in transferring the witnesses to the seat of the Court, only exacerbated by the tense and volatile security situation in the CAR; (iv) may contribute to the smooth operation of the trial, especially given the likely COVID-related travel restrictions during the autumn and winter; and (v) is cost-efficient.¹² The Majority also considered the recent practice of several other Trial Chambers and important advances in AVL technology.¹³ The Majority further found that the use of AVL technology allowed the Chamber to closely observe witnesses’ reactions and facial expressions and to adapt the examination accordingly.¹⁴ Moreover, the Majority considered that regardless of whether the witnesses testified from inside the courtroom or *via* AVL, the Defence’s right to confront the witnesses would be guaranteed.¹⁵ In response to the Defence’s claim that the use of AVL would disadvantage them in cross-examination, the

⁷ Request, paras. 15-23.

⁸ Request, para. 16.

⁹ [Decision](#), para. 9.

¹⁰ Request, para. 16.

¹¹ [Decision](#), paras. 12-18.

¹² [Decision](#), para. 12.

¹³ [Decision](#), para. 13.

¹⁴ [Decision](#), para. 14.

¹⁵ [Decision](#), para. 15.

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Majority also found that *provided the conditions of rule 67 of the RPE were respected*, there was no qualitative difference between examining a witness in person or *via AVL*.¹⁶ Finally, the Majority also considered the criteria under rule 67, RPE: it found that the AVL technology had generally functioned well in other cases, that the technical conditions and physical venue at the ICC Field Office in Bangui fully met the requirements of rule 67 RPE, that the conditions at the Bangui Field Office are conducive to giving truthful and open testimony and are adequate to safeguard the safety and well-being of the witnesses, and that the Registry staff at the Field Office can monitor the witnesses so as to avoid undue influence.¹⁷

9. *Second*, although the Request claims that the Majority made “wholesale and systematic use of AVL technology without any meaningful oversight by the Chamber” to support its Request, the Decision’s import is otherwise.¹⁸ While the Majority authorised the testimony of witnesses *via AVL* from the Bangui Field Office, it did not do so for witnesses who may testify from another location.¹⁹ For those witnesses, the Majority ordered the Prosecution to first give necessary information to the Registry and then the Registry to report on the feasibility of using AVL testimony from the other location.²⁰ The Majority ruled that it would only determine whether or not to authorise the use of AVL from that location once it has reviewed the information.²¹ More crucially, the Majority expressly declared its intention to exercise its oversight over the AVL testimony.²² It found expressly that if at any stage during the trial, the situation should change such that the examination of witnesses by AVL is compromised, it will take “necessary measures to avoid any prejudice to the rights of the accused”.²³

10. *Third*, several aspects of the Request impermissibly address the merits of any eventual appeal, should leave be granted.²⁴ Moreover, the Request expresses a mere disagreement, without articulating a specific issue relevant to article 82(1)(d) of the Statute. These submissions should be dismissed.

11. Accordingly, the First Issue should be dismissed.

¹⁶ [Decision](#), para. 14.

¹⁷ [Decision](#), paras. 16-18.

¹⁸ Request, paras. 21-23 (citing [Dissenting Opinion](#), para. 4).

¹⁹ [Decision](#), para. 19.

²⁰ [Decision](#), para. 19.

²¹ [Decision](#), para. 19.

²² [Decision](#), para. 18.

²³ [Decision](#), para. 18.

²⁴ Request, paras. 17-21; [ICC-01/04-01/06-1557](#), para. 26.

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(ii) *The Second Issue is a mere disagreement*

12. The Second Issue—alleging that the Chamber erred in fact in finding that there was no qualitative difference between examining witnesses in person or examining them *via* AVL—misreads the Decision and merely disagrees with it.²⁵

13. *First*, in its statement of the Issue and its submissions arguing that the Majority failed to distinguish between testimony in person and testimony *via* AVL and between the position of an examiner and cross-examiner conducting AVL testimony,²⁶ the Request fails to properly acknowledge that the Majority’s assessment was subject to the conditions of rule 67 RPE.²⁷ In rejecting the Defence claim that it would be disadvantaged in cross-examination, the Majority expressly found that it was not persuaded that “there is a qualitative difference between examining a witness who is physically present in the courtroom and examining them *via* AVL provided that the conditions under rule 67 are respected.”²⁸

14. *Second*, while the Request states categorically that examining witnesses *via* AVL would not lead to the same results as examining them in person, these submissions are largely unsupported at this stage when the witnesses are yet to testify.²⁹ Further, and significantly, the Request fails to acknowledge that the Majority ruled that it would take necessary measures if the witness testimony *via* AVL was compromised at any stage.³⁰ Since the Defence submissions disregard the safeguards built into the process and merely disagrees with the Majority’s findings, they should be dismissed.

15. *Third*, while the Request relies on the Prosecution’s earlier 2016 submissions in *Gbagbo & Blé Goudé* as support, this reliance is inapposite and incorrect.³¹ The Prosecution’s submissions in *Gbagbo & Blé Goudé* related to the witness familiarisation process conducted by the Victims and Witnesses Unit (VWU) in that case, and not to witness testimony³²—a distinction the Request fails to make. In particular, in *Gbagbo & Blé Goudé*, the Prosecution had addressed the practice of conducting vulnerability assessments of witnesses by the VWU

²⁵ Request, paras. 24-30.

²⁶ Request, paras. 25, 29-30.

²⁷ [Decision](#), para. 14.

²⁸ [Decision](#), para. 14 (emphasis added).

²⁹ Request, paras. 25-26, 29-30.

³⁰ [Decision](#), para. 18.

³¹ Request, para. 28.

³² Request, para. 28, relying on [ICC-02/11-01/15-385-Red.](#)

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Psychologist *via* video-link.³³ In contrast, this Decision relates to a different aspect of the proceedings (witness testimony).

16. Accordingly, the Second Issue should be dismissed.

(iii) *The Third Issue misunderstands the law and misreads the Decision*

17. The Third Issue—alleging that the Chamber erred in fact and in law by finding that introducing the testimony of a number of witnesses under rule 68(3) RPE was not a relevant factor in authorising testimony *via* AVL—misstates the law relating to rule 68(3) RPE.³⁴ It also disregards key aspects of the Decision.³⁵ Further, any disagreement that the Defence may have with the use of rule 68(3) in the case does not arise from this Decision.

18. *First*, while the Issue is premised on the (mis)understanding that rule 68(3) RPE should be used exceptionally,³⁶ the Appeals Chamber has not limited it in this manner.³⁷ Rather, the Appeals Chamber has found that several factors on a non-exhaustive list may be legitimately considered for introducing testimony under rule 68(3).³⁸ Although Chambers must carefully consider factors allowing the use of rule 68(3) on a case by case basis, they are not limited to making such use “exceptional”.³⁹ In particular, rule 68(3) is a particular tool to enhance the expeditiousness of proceedings.⁴⁰ The Request fails to acknowledge the law and practice of this Court.

19. *Second*, in claiming that the Defence would suffer particular prejudice as the cross-examining party for rule 68(3) testimony heard *via* AVL,⁴¹ the Request overlooks that the Majority expressly found that that its key consideration was that the Defence has the opportunity to confront the witnesses (*i.e.* to put questions to them directly to which the witness must respond).⁴² It also held that this right to cross-examine will be guaranteed regardless of whether the witness testified in person or *via* AVL.⁴³ The Majority also found that it would

³³ [ICC-02/11-01/15-385-Red](#), paras. 7-12.

³⁴ Request, paras. 31-36.

³⁵ Request, paras. 31-36.

³⁶ Request, paras. 33-36.

³⁷ See ICC-02/11-01/15-744 OA8 (“[Gbagbo Rule 68 AD](#)”), paras. 57-84.

³⁸ [Gbagbo Rule 68 AD](#), para. 61.

³⁹ [Gbagbo Rule 68 AD](#), para. 69; ICC-01/05-01/08-1386 OA5 OA6 (“[Bemba Rule 68 AD](#)”), paras. 74-81 (with respect to the earlier version of rule 68 RPE).

⁴⁰ See *e.g.*, [Gbagbo Rule 68 AD](#), paras. 60-61; [ICC-01/04-02/06-961](#), para. 13.

⁴¹ Request, paras. 34-36.

⁴² [Decision](#), para. 15.

⁴³ [Decision](#), para. 15.

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take specific measures if the examination *via* AVL was compromised.⁴⁴ By disregarding these findings, the Request expresses a mere conflicting opinion which should be dismissed.

20. *Third*, although the Request alleges that the equality of arms would be affected if the Defence were to cross-examine witnesses *via* AVL,⁴⁵ it fails to note that the Defence may exercise its right to conduct a full cross-examination of all rule 68(3) witnesses (whether in person or *via* AVL), while the Prosecution's examination of those witnesses is necessarily curtailed under rule 68(3) RPE. In these circumstances, the Defence's submissions alleging an inequality of arms misunderstand rule 68(3) of the RPE and should be dismissed.

21. Accordingly, the Third Issue should be dismissed.

B. The Request does not meet the remaining criteria for leave to appeal under article 82(1)(d) of the Statute

22. Since the Request fails to articulate an appealable issue, the Chamber should dismiss it at this stage. Additionally, the Request fails to meet the remaining cumulative criteria under article 82(1)(d) of the Statute. These submissions should also be dismissed.

23. *First*, although the Defence argues that by allowing "75 % of the witnesses to testify *via* AVL", the Majority "radically transformed" the nature of the trial thus affecting its fairness,⁴⁶ it overlooks the specific safeguards that the Majority provided to ensure exactly this fairness. In particular, the Majority found that if the examination of witnesses by AVL was compromised at any stage, it would take the necessary measures to avoid any prejudice to the accused's rights.⁴⁷ In these circumstances, given the availability of alternative measures to ensure the trial's fairness (including the possibility to call witnesses before the Chamber on a case-by-case basis, should their AVL testimony be compromised) and the Majority's intention to use them, the Defence's arguments alleging unfairness are premature. Further, the Request overlooks the Majority's finding that the Defence's fundamental right to cross-examine witnesses would be guaranteed.⁴⁸ As the Appeals Chamber has held, the issue must be likely to have repercussions on the fair and expeditious conduct of proceedings.⁴⁹ Generalised claims of unfairness are inadequate. Moreover, although a party seeking leave to appeal must demonstrate the impact

⁴⁴ [Decision](#), para. 18.

⁴⁵ Request, para. 32.

⁴⁶ Request, para. 37.

⁴⁷ [Decision](#), para. 18.

⁴⁸ [Decision](#), para. 15.

⁴⁹ [ICC-01/04-168 OA3](#), para. 10.

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on fairness *and expeditiousness* of the proceedings, the Defence fails to address the latter prong of the test. Its arguments should be dismissed.

24. *Second*, regarding the potential impact on the outcome of the trial, the Defence's submission that the final judgment would be affected by its alleged inability to conduct its cross-examination in proper conditions should be dismissed.⁵⁰ Given the measures that the Majority has said it will take to ensure the proper examination of witnesses, the Defence's submissions regarding a flawed final judgment are speculative at this stage.

25. *Third*, contrary to the Request, the Issues do not require an immediate resolution by the Appeals Chamber to materially advance the proceedings.⁵¹ In particular, considering the Majority's decision to take all necessary measures to ensure that witness examination is not compromised to safeguard the fairness of the trial, intervention by the Appeals Chamber would be premature at this stage. Likewise, in these circumstances and contrary to the Request, it is unnecessary for the Appeals Chamber to render an advisory opinion on the extent to which the use of technology may be permitted to facilitate the proceedings at this Court.⁵²

CONCLUSION

26. For the foregoing reasons, the Prosecution respectfully requests the Chamber to reject the Request.



Karim A. A. Khan QC., Prosecutor

Dated this 15th day of August 2022

At The Hague, The Netherlands.

⁵⁰ Request, para. 37.

⁵¹ Request, paras. 38-40.

⁵² Request, para. 40.