

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No.: ICC-01/14-01/21**

**Date: 16 August 2022**

**TRIAL CHAMBER VI**

**Before:**

**Judge Miatta Maria Samba, Presiding Judge  
Judge María del Socorro Flores Liera  
Judge Sergio Gerardo Ugalde Godínez**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II**

**IN THE CASE OF**

***THE PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

**Public**

**Decision on the Defence Request for Leave to Appeal the  
Decision on the Use of Audio-Video Link Technology**

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan  
Ms Holo Makwaia

**Counsel for the Defence**

Ms Jennifer Naouri  
Mr Dov Jacobs

**Legal Representatives of Victims**

Ms Sarah Pellet

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
for Participation/Reparations**

**The Office of Public Counsel  
for Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

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**TRIAL CHAMBER VI** of the International Criminal Court, in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to article 82(1)(d) of the Rome Statute (the ‘Statute’) and rule 155 of the Rules of Procedure and Evidence (the ‘Rules’), and regulation 23bis of the Regulations of the Court (the ‘Regulations’) issues this ‘Decision on the Defence Request for Leave to Appeal the Decision on the Use of Audio-Video Link Technology’.

## **I. PROCEDURAL HISTORY**

1. On 4 August 2022, the Chamber, by majority, issued its Decision on the Use of Audio-Video Link Technology (the ‘Impugned Decision’).<sup>1</sup> Judge Ugalde Godínez appended a dissenting opinion.<sup>2</sup>
2. On 10 August, the Defence requested leave to appeal the Impugned Decision (the ‘Request’).<sup>3</sup> In the Request, the Defence identifies three issues it wants to submit to the Appeals Chamber:
  - a. First Issue: the Impugned Decision is vitiated by a legal error by equating testimony delivered inside the courtroom and testimony delivered via audio/video link technology (‘AVL’), thereby violating the principle of in-person testimony enshrined in article 69(2) of the Statute.<sup>4</sup>
  - b. Second Issue: the Impugned Decision is vitiated by a factual error by considering that there is no qualitative difference between testimony delivered inside the courtroom and testimony delivered via AVL.<sup>5</sup>
  - c. Third Issue: the Impugned Decision is vitiated by a factual and legal error by considering that it is not a factor militating against the use of AVL that certain witnesses whose testimony will be heard via AVL may also have their prior recorded testimony introduced via rule 68(3) of the Rules.<sup>6</sup>

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<sup>1</sup> ICC-01/14-01/21-442.

<sup>2</sup> ICC-01/14-01/21-442-Anx1.

<sup>3</sup> Demande d’autorisation d’interjeter appel de la "Decision on the Use of Video Link Technology" (ICC-0114-0121-442), ICC-01/14-01/21-447-Conf.

<sup>4</sup> Request, paras 15-23.

<sup>5</sup> Request, paras 24-30.

<sup>6</sup> Request, paras 31-36.

3. On 15 August 2022, the Office of the Prosecutor (the ‘Prosecution’) submitted its response (the ‘Response’).<sup>7</sup> The Prosecution argues that the Defence misreads the Impugned Decision and/or merely expresses its disagreement with it, without articulating a proper appealable issue. The Prosecution further asserts that the Defence has failed to demonstrate that the Issues could significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial, which must lead to the dismissal of the Request.

4. The Common Legal Representative of Victims did not submit a response.<sup>8</sup>

## II. ANALYSIS

5. The Chamber recalls previous jurisprudence regarding the application of article 82(1)(d) of the Statute.<sup>9</sup> Thus, in considering the request for leave to appeal, the Chamber must have regard to whether: (i) the matter is an ‘appealable issue’; (ii) the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.<sup>10</sup>

6. The three criteria under article 82(1)(d) of the Statute are cumulative.<sup>11</sup> Therefore, failure to fulfil one or more of the criteria will result in dismissal of the request for leave to appeal.<sup>12</sup> In particular, the Chamber notes that article 82(1)(d) of the Statute ‘cannot

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<sup>7</sup> 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)’, ICC-01/14-01/21-450-Conf.

<sup>8</sup> Email from the OPCV to the Chamber on 15 August 2022 at 09:47.

<sup>9</sup> [Decision on Defence Request for Reconsideration or Leave to Appeal the ‘Directions on the Conduct of Proceedings’ \(ICC-01/14-01/21-251\)](#), ICC-01/14-01/21-275, paras 9-11; [Decision on Defence Request for Leave to Appeal the ‘Decision Setting the Commencement Date of the Trial and Related Deadlines’ \(ICC-01/14-01/21-243\)](#), 15 March 2022, ICC-01/14-01/21-258, paras 11-15; *See also* Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on the Demande d’autorisation d’interjeter appel de la ‘Decision on the request for suspension of the time limit to respond to the Prosecutor’s Trial Brief submitted by the Defence for Mr Gbagbo’ \(ICC-02-11-01/15-1141\)](#), 13 April 2018, ICC-02/11-01/15-1150, para. 8; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the Defence request for leave to appeal the decision appointing experts on reparations](#), 29 June 2017, ICC-01/05-01/08-3536 (the ‘Bemba Decision’), paras 4-7; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on the Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68\(2\)\(b\)](#), 5 September 2018, [ICC-02/04-01/15-1331](#) (the ‘Ongwen Decision’), para. 8.

<sup>10</sup> [Bemba Decision](#), para. 4; [Ongwen Decision](#), para. 8.

<sup>11</sup> [Bemba Decision](#), para. 5; [Ongwen Decision](#), para. 8.

<sup>12</sup> [Bemba Decision](#), para. 5; [Ongwen Decision](#), para. 8.

be used to litigate abstract or hypothetical issues'.<sup>13</sup> As consistently held in the Court's jurisprudence 'an issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion [...it is further] constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination'.<sup>14</sup> Moreover, the Appeals Chamber has confirmed the Chamber's authority to formulate issues for appeal.<sup>15</sup>

7. The Chamber has considered the Request and finds that, while the Impugned Decision contains important questions of law, the Issues as formulated by the Defence do not fulfil the requirements of article 82(1)(d) of the Statute. With regard to the First Issue, the Defence mischaracterises the Impugned Decision, which clearly states that testimony via video or audio technology is only permissible when this is not prejudicial to or inconsistent with the rights of the accused and in accordance with the Statute and the Rules.<sup>16</sup> The Impugned Decision then undertakes a thorough analysis of whether the conditions of rule 67 of the Rules are fulfilled. Accordingly, the First Issue – as formulated by the Defence – does not arise from the Impugned Decision.

8. The Second Issue constitutes a mere disagreement with the Impugned Decision and is an attempt by the Defence to continue litigation on this matter.<sup>17</sup> Indeed, as clearly stated in the Impugned Decision, whether or not there is a qualitative difference between in-court testimony and testimony via AVL depends on a number of practical conditions that must be in place.<sup>18</sup> The Chamber then went on to find that these conditions are fulfilled as far as the ICC Field Office in Bangui is concerned.<sup>19</sup> The Defence has not explained in which way the Chamber would have erred in this regard

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<sup>13</sup> [Bemba Decision](#), para. 6.

<sup>14</sup> Appeals Chamber, *Situation in the DRC*, [Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal](#), (the 'DRC Decision') 24 July 2006, ICC-01/04-168, para. 9.

<sup>15</sup> [DRC Decision](#), para. 20; Appeals Chamber, *Situation in the DRC*, [Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial I of 24 December 2007](#), 19 December 2008, ICC-01/04-556, para. 38.

<sup>16</sup> Impugned Decision, para. 9.

<sup>17</sup> See for example: Request, para. 28, where the Defence simply continues to argue its original request.

<sup>18</sup> Impugned Decision, para. 14.

<sup>19</sup> Impugned Decision, paras 16-18.

and it would be entirely pointless to ask the Appeals Chamber to entertain abstract and speculative questions on this point.

9. Lastly, concerning the Third Issue, this relates primarily to the use of rule 68(3) of the Rules, which is not the subject of the Impugned Decision. Indeed, the Defence fails to explain how the questions raised by it are specific to the use of AVL.<sup>20</sup> As such, the Third Issue does not arise from the Impugned Decision and the Defence appears to be using this decision in order to litigate the purpose and appropriateness of rule 68(3) of the Rules.<sup>21</sup>

10. The above notwithstanding, the Chamber agrees that the Impugned Decision gives rise to questions which constitute a subject or topic the resolution of which is essential for the determination of matters arising in the judicial cause under examination and which could significantly affect the fair and expeditious conduct of the proceedings. In exercise of its discretion in this regard, the Chamber therefore formulates the following issue for appeal:

Does the Court's legal framework allow Trial Chambers to treat testimony given via audio-video technology as an equivalent alternative to in-court testimony, which can be resorted to whenever the conditions of rule 67 of the Rules are satisfied, or are there additional criteria that Trial Chambers should consider in exercising their discretion, in general or on a case-by-case basis, before authorising the use of audio-visual technology?

11. Considering the date for commencement of trial and the significant legal and practical implications of this matter, the Chamber is of the view that an immediate resolution of the issues herein by the Appeals Chamber would materially advance these proceedings.

12. The Chamber also notes the classification as confidential of the Request and the Response but can find no justification for this. Consequently, the Chamber orders the Request and the Response to be reclassified as public.

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<sup>20</sup> Request, para. 32. The Chamber explained the reasoning in paragraph 15 of the Impugned Decision.

<sup>21</sup> Request, paras 33-35.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**GRANTS** leave to appeal the issue as formulated in paragraph 10;

**REJECTS** the remainder of the Request; and

**ORDERS** the reclassification of the Request and the Response to public.

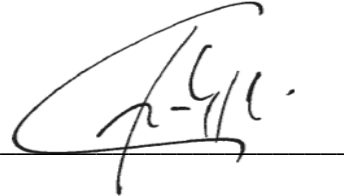


**Judge Miatta Maria Samba**

**Presiding Judge**



**Judge María del Socorro Flores Liera**



**Judge Sergio Gerardo Ugalde Godínez**

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

Dated 16 August 2022

At The Hague, The Netherlands