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

Date: **29 August 2022**

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public Document

**Defence Appeal Brief against the “Decision on the Use of Video-Link
Technology” (ICC-01/14-01/21-442) delivered on 4 August 2022**

Source: Defence team for Mahamat Said Abdel Kani

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

Office of the Prosecutor

Mr Karim A. A. Khan QC, Prosecutor
 Mr Mame Mandiaye Niang
 Ms Helen Brady
 Ms Holo Makwaia

Counsel for the Defence

Ms Jennifer Naouri
 Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
 Participation/Reparations**

Office of Public Counsel for Victims

Ms Sarah Pellet
 Mr Tars van Litsenborgh

**Office of Public Counsel for the
 Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
 Section**

Other

I. Procedural history

1. On 13 June 2022, the Prosecution filed its final list of witnesses, stating whether it wanted witnesses to testify via video-link.¹

2. That same day, the Defence wrote to the Prosecution, enquiring when it was intending to file its requests for the specified witnesses in its list of evidence to testify via video-link:

[TRANSLATION] We have just been notified of the Prosecution's list of witnesses and related documents. We note, after reading Annex B, that the Prosecution intends to request that certain *viva voce* witnesses be allowed to testify by videoconference, and that nothing is mentioned about the mode of testimony foreseen by the Prosecution regarding witnesses for whom there is a pending request under rule 68(3). For the purposes of work planning, the Defence would like to know whether the Prosecution has an idea of when it will be able to file its requests under article 69(2) of the Statute and whether it intends to file consolidated requests.²

3. On 16 June 2022, the Prosecution responded to the Defence that

regarding AVL the List of Witnesses contains the possible recommendations based on the Prosecutions own assessment. Following your question I reached out to the Legal Officer of the Chamber to enquire how the Chamber would like us to proceed on the issue of AVLs. The answer was that the Chamber would first like the parties to discuss whether agreement could be reached on the use of video-link testimony and for which witnesses. In a second step, a formal petition should be filed with the Chamber. Could you let me know by early next week for which witnesses – if any – you would be in agreement to make use of the AVL?³

4. On 17 June 2022, the Defence filed a request for clarification of the Chamber's instructions regarding the topic of the *inter partes* discussions that have to precede any formal request regarding the possibility of hearing a witness via video-link, in order to ensure fruitful and fully-informed *inter partes* exchanges.⁴

5. On 20 June 2020, the Prosecution stated that it would provide "general reasons for AVL recommendations for each witness to the Defence by email by 24 June 2022".⁵

¹ ICC-01/14-01/21-354-Conf-AnxA.

² Email from the Defence to the Prosecution on 13 June 2022 at 12.39.

³ Email from the Prosecution to the Defence on 16 June 2022 at 12.14.

⁴ ICC-01/14-01/21-364-Conf.

⁵ Email from the Prosecution to the Defence and the Chamber on 20 June 2022 at 21.10.

6. On 21 June 2022, the Chamber responded to the parties, stating that as the *inter partes* discussions were “[TRANSLATION] ongoing” it would wait for the outcome of the discussions.⁶
7. On 23 June 2022, the Prosecution asked the Defence whether it agreed to the use of audio-video link for the specified witnesses in its “List of Witnesses”.⁷
8. On 23 and 29 June 2022, the Defence informed the Prosecution that it had to perform legal and factual verifications before being able to state its informed position.⁸
9. On 5 July 2022, the Defence submitted its observations, taking formal note *inter alia* of the Prosecution’s refusal to provide it with specific information on each witness and stating its position (it remains the rule that testimony is given in person and that exceptions to this rule must be justified on a case-by-case basis).⁹
10. On 6 July 2022, the Prosecution responded that, in its view, it had provided sufficient information, and refused to provide detailed information.¹⁰
11. On 8 July 2022, the Defence stated that absent such information, it could not agree to certain witnesses being heard by audio-video link.¹¹
12. On 11 July 2022, the Prosecution stated that as no agreement was reached, it would revert to the Chamber for guidelines on the matter.¹²
13. On 12 July 2022, the Prosecution filed the “Prosecution’s Submissions on Audio-Video Link Testimony”.¹³
14. On 21 July 2022, the Registry filed “Observations on the ‘Prosecution’s Submissions on Audio-Video Link Testimony’ (ICC-01/14-01/21-403-Conf)”.¹⁴
15. On 25 July 2022, the Defence filed the “*Réponse de la Défense aux ‘Prosecution’s Submissions on Audio-Video Link Testimony’ (ICC-01/14-01/21-430-Conf)*”, moving the Trial Chamber to reject the Prosecution’s request on the ground that it had failed

⁶ Email from Chamber on 21 June 2022 at 17.16.

⁷ Email from the Prosecution to the Defence on 23 June 2022 at 12.15.

⁸ Email from the Defence to the Prosecution on 23 June 2022 at 17.04 and 29 June 2022 at 13.21.

⁹ Email from the Defence to the Prosecution on 5 July 2022 at 18.39.

¹⁰ Email from the Prosecution to the Defence on 6 July 2022 at 19.36.

¹¹ Email from the Defence to the Prosecution on 8 July 2022 at 15.26.

¹² Email from the Prosecution to the Defence on 11 July 2022 at 11.56.

¹³ ICC-01/14-01/21-403-Conf.

¹⁴ ICC-01/14-01/21-418-Conf.

to provide detailed information for each witness to warrant the use of audio-video link testimony.¹⁵

16. On 4 August 2022, the Trial Chamber delivered its “Decision on the Use of Audio-Video Link Technology” in which, by majority, Judge Ugalde Godinez dissenting,¹⁶ it allowed the Prosecution witnesses to testify by audio-video link without the Prosecution having to justify the need for audio-video link on a case-by-case basis, and accepted the generic reasons, considering audio-video link testimony equivalent to testimony in person before the Bench and the parties.¹⁷

17. On 10 August 2022, the Defence filed the “*Demande d’autorisation d’interjeter appel de la ‘Decision on the Use of Video Link Technology’ (ICC-01/14-01/21-442)*”, in which it sought leave to appeal the decision of 4 August 2022, arguing three errors of law and fact.¹⁸

18. On 15 August 2022, the Prosecution filed the “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)’*”.¹⁹

19. On 16 August 2022, the Chamber delivered the “Decision on the Defence Request for Leave to Appeal the Decision on the Use of Audio-Video Link Technology”, granting the Defence leave to appeal the decision of 4 August 2022.²⁰ The Chamber laid down that the following question be put to the Appeals Chamber:

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?²¹

¹⁵ ICC-01/14-01/21-431-Conf.

¹⁶ ICC-01/14-01/21-442-Anx1.

¹⁷ ICC-01/14-01/21-442.

¹⁸ ICC-01/14-01/21-447-Conf. The request was reclassified as public by the Chamber’s decision of 16 August 2022.

¹⁹ ICC-01/14-01/21-450-Conf. The response was reclassified as public by the Chamber’s decision of 16 August 2022.

²⁰ ICC-01/14-01/21-453.

²¹ ICC-01/14-01/21-453.

II. Discussion

Introduction

20. The issue of video-link testimony is of vital importance to ensuring that the basic principles of criminal proceedings, such as the right to a fair trial, are observed, and is therefore not a discussion limited to a mere technical matter. An audio-video link is no substitute for the relationship that arises between witness and the examining (or cross-examining) party and allows the discussion to be conducted in an optimal manner for the truth to emerge. Examination or cross-examination by audio-video link cannot be expected to produce the same result as examination or cross-examination conducted when the key figures are present in person (see below).

21. In this instance, the Prosecution's bid for 75% of the witnesses whom it intends to call to give evidence by audio-video link will necessarily affect the nature of the trial. If the Prosecution is to abide by the letter and the spirit of the Court's founding instruments, it is important that it does the utmost for most of the trial to be held in the courtroom instead of online. That being so, it was important to require the Prosecution to justify on a case-by-case basis the need for a witness to testify by audio-video link, which it refused to do, be it during the *inter partes* discussions or in its formal request filed before the Chamber.

22. In authorizing, by majority, Prosecution witnesses to testify by audio-video link without requiring any justification from the Prosecution, the Chamber has placed testimony by audio-video link on a par with in-court testimony. This approach constitutes both an error of law, as it runs counter to the in-person testimony rule laid down by article 69(2) of the Statute, and an error of fact as testimony by audio-video link can never create the same conditions of examination that in-person testimony can, which is why it must be used sparingly and in specific contexts where a trade-off between logistical considerations and the importance of in-person testimony has been possible.

23. To concur with the Bench – that to hear someone in-person is equivalent to doing so by audio-video link, provided an appropriate technical connection can be

established – would quite simply mark the end of in-person testimony at the International Criminal Court.

24. In particular, the Defence notes that were the hearing of persons by audio-video link to be warranted solely as a means of avoiding the logistical issues of bringing a witness to the Court, then it would become the rule, radically altering the nature of trial before the International Criminal Court. Logistical issues associated with bringing a witness to the Court are intrinsic to the International Criminal Court as an institution located thousands of kilometres away from the situations in which the Court is brought to bear. To concur with the Bench would call into question the very creation of the Court, as the drafters of the Statute were well aware, when founding the Court, that witnesses would have to be brought to The Hague with all that it entails in terms of logistics. This fact cannot now prevent the Court from introducing measures so that it operates as a true court of law; otherwise no witness would ever again testify in The Hague and trials would not observe the basic principles of criminal proceedings aimed at ensuring a fair trial and hence of exemplary justice that is above suspicion.

25. Much is therefore at stake in the present appeal – not only now, in order to ensure a fair trial is held in the case *sub judice*, but also as regards the future, in all the cases to come before the International Criminal Court. This is because to validate the approach taken in the impugned decision would pave the way for justice that is virtual and not in the flesh – a far cry from the example to be set by international criminal justice, whose legitimacy would ultimately be affected.

1. Grounds of appeal

1.1. First ground of appeal: the impugned decision puts testimony by audio-video link on a par with in-court testimony, in violation of the in-person testimony rule laid down by article 69(2), which constitutes an error of law that invalidates the impugned decision

26. In the impugned decision, the Chamber considers that

article 69(2) of the Statute provides that “[t]he testimony of a witness at trial shall be given in person” and that the Court may also permit the giving of oral testimony by means of video or audio technology. The same provision sets out only one explicit limitation on the

use of technology for hearing witnesses - that it “shall not be prejudicial to or inconsistent with the rights of the accused”. Thus, the Statute affords the Chamber broad discretion to permit the giving of *viva voce* (oral) testimony by means of video or audio technology “in accordance with the Rules”.²²

27. In so ruling, the Chamber disregards the fact that article 69(2) clearly prescribes the legal rule that “the testimony of a witness at trial shall be given **in person**”, and instead, turns the discussion into one of just a technical issue of the feasibility of establishing an audio-video connection in accordance with the technical conditions prescribed by rule 67 of the Rules of Procedure, casting aside any issue of the fairness of the proceedings.²³

28. The drafters of the Statute took the trouble to spell out the in-person testimony rule, which is consistent with the lessons learned from a line of authority from the other international criminal courts, which was established when testimony by audio-video link already existed. The international criminal courts and tribunals have consistently held that testimony in person is the rule and, in that body of authority, the courts conclude as a matter of course that the party wishing a witness to testify other than “in person” must establish that it is impossible to have the witness brought in person.

29. Thus, at the ICTY, as early as the *Tadic* case, the following point was made: 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.²⁴

30. Also at the ICTY, in *Karadzic*, the Trial Chamber stated: Rule 81 *bis* of the Rules provides that “[a]t the request of a party or *proprio motu*, a Judge or a Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link”. The Chamber has previously outlined the criteria it considers when assessing whether to allow testimony via video-conference link, namely: i. the witness must be unable, or have good reasons to be unwilling, to come to the Tribunal; ii. the witness’s testimony must be sufficiently important to make it unfair to the requesting party to proceed without it; and iii. the accused must not be prejudiced in the exercise of his or her right to confront the witness. If these criteria are satisfied, then the

²² ICC-01/14-01/21-442, para. 9.

²³ ICC-01/14-01/21-442, para. 10.

²⁴ ICTY, *Tadic*, IT-94-I-T, “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. [Emphasis added].

Chamber must “determine whether, on the basis of all the relevant considerations, it would be in the interests of justice to grant the request for a video conference link”.²⁵

31. The same rule was applied at the ICTR:

[T]he general principle articulated in Rule 90(A) [is] that “witnesses shall [...] be heard directly by the Chamber. Nonetheless, the Chamber has the discretion to hear testimony by video-link in lieu of physical appearance for purposes of witness protection under Rule 75, or where it is in the interests of justice to do so. In determining the interests of justice, the Chamber has to assess the importance of the testimony, the inability or unwillingness of the witness to travel to Arusha, and whether a good reason has been adduced for that inability and unwillingness. The burden of proof lies with the party making the request.”²⁶

32. At the Special Court for Sierra Leone, “the onus is on the party applying for an order [...] to give evidence by video-link to establish to the satisfaction of the Trial Chamber that the witness concerned is unable to give evidence directly in court”.²⁷

33. The same situation applies at the International Criminal Court: while the Chamber has discretion to decide whether to have a witness brought before the Court, that discretion is necessarily limited by the letter of article 69(2) which lays down the presumption that every witness must testify in person. The Court has, moreover, had occasion to specify in its decisions the criteria to be fulfilled for an audio-video link to be approved. For instance, such a measure has been granted owing to the extreme vulnerability of a witness²⁸ or owing to proven difficulties in arranging transportation for the witness to The Hague.²⁹ Irrespective of the situation, it is for the party requesting the video-link to prove that it is the only way for the witness to testify.

34. Judge Ugalde Godinez so underscored in his dissenting opinion:³⁰ the wording of article 69(2) of the Statute leaves no doubt that the Chamber’s permission for use of audio-video link is an exception to the principle of orality of proceedings. Use of the verb “shall” by the drafters in the English version so attests, as does the verb “may” in article 68(2), which provides for the **possibility** for the bench to allow the presentation

²⁵ ICTY, Karadzic, IT-95-5/18-T, “Decision on Motion for Video-Conference Link Testimony for Srbojub Jovicinac”, 27 January 2014, paras. 4-6.

²⁶ ICTR, Rukundo, Case No. ICTR-2001-70-A, “Judgement”, 20 October 2010, para. 221.

²⁷ *Prosecutor v. Taylor*, TC, “Decision on Prosecution Motion to Allow Witnesses to Give Testimony by Video-Link”, 30 March 2007, para. 26.

²⁸ ICC-01/04-01/06-431-Conf. A public redacted version was filed on 1 August 2022 (ICC-01/04-01/06-431-Red).

²⁹ ICC-01/05-01/08-2863-Red.

³⁰ ICC-01/14-01/21-442-Anx1, para. 10. See also paras. 11 and 12.

of evidence by electronic means “[a]s an exception to the principle of public hearings”.³¹

35. Judge Ugalde Godinez, in his dissenting opinion, links the principle of orality to that of immediacy, which

presupposes that the presentation of the evidence must occur before the judge or tribunal responsible for issuing the judgement. Its purpose is to establish proximity between the judge or tribunal and the evidence, so that the adjudicator can form an opinion about the value and scope of the evidence that has been presented when determining the accused’s responsibility beyond reasonable doubt.³²

36. Ultimately, by relying exclusively on generic reasons (such as the availability of technology or the general logistical challenges of transporting witnesses to The Hague) to grant wholesale permission for testimony by audio-video link, the Chamber is making testimony by audio-video link the rule, thereby profoundly altering the nature of trial before the ICC. Put specifically, the act of giving testimony is not banal: by its nature, the act commits the witness to complying with the procedural requirements, in particular the requirements of a fair trial. Any foreseeable arrangement to cater for witnesses’ comfort must be understood in terms of that very specific procedural framework and so must be exceptional. Giving testimony in a trial is an act of significance and courage and must happen under transparent and solemn conditions, before a chamber and in the presence of the parties. The aim is to participate in the endeavour of justice – international justice, in this instance – and that is why witnesses must make themselves available in person to engage in the exercise in conditions conducive to testifying as openly as possible.

37. Logistical difficulties are intrinsic to the International Criminal Court as an institution located thousands of kilometres away from the situations in which the Court is brought to bear. To concur with the rule laid down in the impugned decision risks calling into question the very creation of the Court, as the drafters of the Statute were well aware, when founding the Court, that witnesses would have to be brought to The Hague with all that it entails in terms of logistics. This fact cannot now prevent

³¹ Rome Statute, article 68(2). [Emphasis added].

³² ICC-01/14-01/21-442-Anx1, para. 5.

the Court from introducing measures so that it operates as a true court of law; otherwise it will pave the way for no witness to ever again testify in The Hague.

38. So Judge Ugalde Godinez highlighted: “the wholesale and systematic use of AVL technology without any meaningful oversight by the Chamber, as ostensibly requested by the Prosecutor, [is] untenable under the current law”.³³

39. By permitting the Prosecution to have 75% of its witnesses testify by audio-video link without fulfilling its statutory obligations to ascertain, on a case-by-case basis, that the exceptional nature of this measure is warranted in the light of the personal circumstances of each witness, the Chamber committed an error of law that invalidates the impugned decision.

1.2. Second ground of appeal: the Chamber erred in fact by considering that there is no “qualitative difference” between testimony in person and testimony by audio-video link

40. In the impugned decision the Chamber states that it is 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. Also the use of AVL technology allows the Chamber to observe closely witnesses’ reactions and facial expressions and to adapt the examination accordingly. Thus, following the approach of Trial Chamber VII and others, the Chamber will evaluate video-link witnesses in the same way as in-court witnesses and does not accord different weight based on the mode of testimony.³⁴

41. By so ruling, the Chamber committed an error of fact which invalidates the impugned decision as the relationship which forms between a witness, the bench and the various parties will clearly not be the same in the event of physical interaction as it will be for just an audio-video link. Examination (or cross-examination) by video-link is no substitute for the relationship that arises between the witness and examining (or cross-examining) party and allows the discussions to be conducted in an optimal manner for the truth to emerge. Examination or cross-examination by video-link

³³ ICC-01/14-01/21-442-Anx1, para. 4.

³⁴ ICC-01/14-01/21-442, para. 14.

cannot be expected to produce the same result as examination or cross-examination conducted when the key figures are present in person. The witness is not under the same conditions and is not affected in the same way as he or she would be by the decorum and solemnity of the courtroom. The witness cannot even observe the key persons he or she can only see a particular judge or lawyer from the angle that the courtroom camera operator provides. This technological intermediary between the witness and the other figures central to the trial inevitably affects his or her perception of things.

42. Moreover, the Defence notes, in that vein, that the “applicable law” section of the impugned decision says that “[a]t the same time, the witness must be able to see whomever is addressing or questioning him or her during the hearing, the Judges and the accused, subject to any particular protective measures that may be ordered”³⁵ and yet the Bench fails to act accordingly since, in practice, what it specifies as a condition for testimony by audio-video link is simply an impossibility: the person testifying remotely will either never be able to see everyone at the same time or only in a very wide angle shot that precludes any meaningful human interaction with the person putting the questions.

43. As Judge Ugalde Godinez emphasizes, the presentation of the evidence must occur before the judge or tribunal responsible for issuing the judgement. Its purpose is to establish proximity between the judge or tribunal and the evidence, so that the adjudicator can form an opinion about the value and scope of the evidence that has been presented when determining the accused’s responsibility beyond reasonable doubt [...] This proximity between the judge and the evidence requires that the judicial process must be conducted directly and immediately by the judging person or persons, avoiding, where possible, distance between the persons subject to jurisdiction, the elements of the judicial proceedings and the judicial body. (...) This means that the primary source must, in principle and subject to statutory exceptions, be produced in the courtroom, so as to allow the adjudicator to independently examine the evidence through his or her own observation. In particular, the adjudicator must be able to observe the witnesses when they are being examined by the opposing party, who may confront them with other evidence.³⁶

44. Moreover, the impugned decision does not address the fact raised by the Defence that the Prosecution itself submitted in *Gbagbo*, in support of the proposition

³⁵ ICC-01/14-01/21-442, para. 11.

³⁶ ICC-01/14-01/21-442-Anx1, paras. 5 and 6.

that the VWU interview witnesses “in person” when evaluating their vulnerability and the protective measures needed, that this type of evaluation “demands a process designed to enhance the witness experience and should be as unthreatening as possible”,³⁷ therefore showing the qualitative difference between virtual and in-person interaction with witnesses. The same is true of testimony during which “the most sensitive and potentially re-traumatising aspects of the witness’s psyche are brought up”.³⁸ The Prosecution even went so far as to explain that

[v]ideo-link can also create a particularly daunting and intimidating barrier for witnesses who are not accustomed to modern communications technology. Moreover, there can be technical interferences such as difficulties with the connection, synchronicity of image or sound distortion. Eye-contact can also be more difficult to make or maintain at a comfortable enough level for the witness via video-link. In addition, the lack of in-person contact can pose particular difficulties where there is also a need for interpretation.³⁹

45. This matter is therefore not solely a technical issue about the ability to set up a reliable audio-video link connection, but one of determining how to provide a setting conducive to putting witnesses at ease and to fostering a rapport that is personal, human and trusting between the witness and the person questioning him or her, and at the same time a setting that allows the bench to assess the witness’s demeanour and non-verbal communication while he or she is being heard under conditions optimal to ensuring that the parties and the bench are able to play their role in a fair trial. Otherwise said, even were there to be advances and improvements in audio-video link technology, the fact remains that the exercise is different from in-person testimony: the person giving testimony sees only one speaker at a time or people at a great distance, on a screen, in a remote room, and what he or she sees does not depend on him or her, but rather on the camera operator or the control room, which chooses what to show. Similarly, irrespective of the technology used, it is impossible to establish the all-important eye contact with the examiner or the other figures central to the trial.

46. The idea, therefore, is also to allow all the courtroom dynamics at play in a trial to be factored in, e.g. interpretation into another language, responses to overall body

³⁷ ICC-02/11-01/15-385-Red, para. 10.

³⁸ ICC-02/11-01/15-385-Red, para. 10.

³⁹ ICC-02/11-01/15-385-Red, para. 12.

language, eye contact with the person putting the question and with the bench, representatives of the calling party, representatives of the Registry, interpreters, etc. The witness should be able to observe of all these dynamics in order to take in the setting in which he or she is being questioned, to get his or her bearings and understand his or her surroundings. The idea is also to enable the parties to react in order to perform their duties (the witness may look at one of the parties, be it the calling party or non-calling party, because he or she needs a break or it is necessary to deal with his or her nerves, to react to a reaction in case of an objection, etc.) and to allow the Judges not only to observe the witness for the purpose of analysing and understanding his or her testimony, but also to be able to respond to his or her questions or needs during examination, should a witness look at them or attempt to make eye contact with a judge, whereas video conferencing prevents the witness from looking at a judge or any other person not putting the questions.

47. Similarly, in a report by the International Bar Association (IBA), the Prosecution's position on testimony by audio-video link was presented thus: "due to the distance between the witness and counsel, video-link testimony makes it difficult to, 'connect with the witness, get the evidence out or challenge the witness'"⁴⁰ and so it is odd that the Prosecution should now revisit this clear factual observation, as the distance remains regardless of the mode of videoconferencing used.⁴¹ In the same report, the IBA considered that audio-video link should only be used when "the witness' credibility is not in contention and only factual information is provided".⁴²

48. The impugned decision also makes no distinction between the position of the examiner and that of the cross-examiner, which constitutes an error of fact that invalidates the impugned decision. It is important to act upon the difference in nature between examination-in-chief and cross-examination. This is because, during examination-in-chief, the witness is not hostile to the examining party, as the witness has given consent to the party to come to testify in the party's case, and the aim,

⁴⁰ IBA, "Witnesses before the International Criminal Court", July 2013, p. 18.

⁴¹ ICC-01/14-01/21-403-Conf, para. 19.

⁴² IBA, "Witnesses before the International Criminal Court", July 2013, p. 18.

therefore, as the calling party sees it, is for the witness to present “his or her evidence” to the court. As the calling party considers that evidence to be of sound quality, meaning reliable and truthful, the witness will by definition be cooperative and more at ease. This applies all the more so in the case *sub judice* as a witness-preparation protocol affording much latitude was granted to the calling party.⁴³ Under that protocol, the Prosecution may prepare its witnesses before they testify, including by explaining to them how the hearing will proceed, by discussing their previous statement with them, by being able to go over with them contradictions in their previous statement or by discussing with them the possibility of adding to their previous statement. In this scenario, the calling party has the leeway to assess the risks of testimony by videoconference, and the witness, having been prepared, will be well-placed to deal with the examination-in-chief which will have been mapped out.

49. However, the situation is different for the non-calling party. Cross-examination entails a form of hostility or wariness on the part of the witness towards the person putting the questions and it will be important therefore for the cross-examiner to create a rapport with the witness that will allow his or her evidence to be tested. The cross-examiner will, among other things, have to compare the witness’s account with the witness’s previous statement and/or account given in court, confront the witness with contradictions or inconsistencies in his or her account, put questions to the witness about other evidence available to the parties, hence ask the witness unexpected questions, etc. In such circumstances, it is the non-calling party who may be prejudiced by the use of audio-video link, especially when considering the witness’s previous statement. On top of this issue is the obstacle that may arise from interpretation. Consequently, the non-calling party ought to be afforded the means of weighing the risk that video-link testimony may entail against the reasons that may warrant that exceptional measure in the specific case of each witness.

50. Moreover, many sources attest to the fact that the hearing of a witness by audio-video link is not qualitatively equivalent to hearing the witness in person.

⁴³ ICC-01/14-01/21-251-AnxA.

51. For example, numerous studies have shown that examination by videoconference has a **negative impact on the quality of examination**.⁴⁴ In that regard, the Bar Council of England and Wales, the Bar of Ireland, the Bar Council of Northern Ireland and the Faculty of Advocates of Scotland note in their “Statement on the administration of justice post-pandemic” that

[e]xperience shows that judicial interaction is different and less satisfactory in remote hearings from that experienced in “real life” with the result that hearings can be less effective at isolating issues and allowing argument to be developed. The management of witnesses, **especially in cross-examination**, is far less satisfactory when conducted remotely and we are concerned that it may have an adverse impact on the quality of the evidence given.⁴⁵

52. Similarly, in its report entitled “The psychological impact of remote hearings”, the Berkeley Research Group reports that

[e]xpert witnesses who had undergone intensive cross-examination during the past year found traditional techniques deployed by barristers and other lawyers in an attempt to place pressure on and unnerve them during tribunals were significantly less effective in a virtual courtroom setting compared to in person.⁴⁶

53. In addition, a study undertaken by Backer Mackenzie and KPMG on virtual hearings reveals a general consensus among respondents that virtual hearings are not suitable for every hearing, which could be explained by the fact that virtual hearings may be best suited to disputes involving technical or substantive legal issues, as opposed to disputes with a greater evidential content, where physical presence, e.g. for cross-examination of witnesses of fact, might take on more significance.⁴⁷ Of interest is that 65.5% of respondents considered that, in future, all hearings lasting less than one day, **provided that they do not involve a jury, cross-examination of witnesses or very complex documentation**, should be virtual hearings⁴⁸ and 55.6%

⁴⁴ The Law Society Gazette, “Online hearings take edge off cross-examination, study finds”, 23 August 2021, <https://www.lawgazette.co.uk/news/online-hearings-take-edge-off-cross-examination-studyfinds/5109586.article>

⁴⁵ The Bar Council, “Four Bars statement on the administration of justice post-pandemic”, 5 May 2021, <https://www.barcouncil.org.uk/resource/four-bars-statement-on-the-administration-of-justice-post-pandemic.html> [Emphasis added].

⁴⁶ Berkeley Research Group, “The psychological impact of remote hearings”, 2021, p. 5.

⁴⁷ Baker McKenzie, “KPMG The Future of Disputes: Are Virtual Hearings Here To Stay?”, p. 5.

⁴⁸ Baker McKenzie, “KPMG The Future of Disputes: Are Virtual Hearings Here To Stay?”, p. 7.

specifically believe that the impact of witness cross-examination is diminished by virtual hearings.⁴⁹

54. Furthermore, as a result of examination conducted by videoconference, **the witness may have a fragmented view of the proceedings in the courtroom.** This is because to a certain extent, the witness may feel “isolat[ed]” from the courtroom, struggle to follow the proceedings or instructions given to him or her and have problems concentrating – all difficulties which may be worsened by the lack of physical assistance. The effects of isolation may be greater for vulnerable witnesses.⁵⁰

55. In addition, numerous studies confirm that the ability to build a rapport with the witness is reduced when the witness is heard by audio-video link. According to one study in 2007,

[v]ideo technology, as currently used in courts around Australia, sometimes isolates witnesses, restricts effective communication and increases stress amongst people who are already vulnerable. It can encourage disinhibited or inappropriate behaviour. It may make it harder to effectively test the evidence, or assess the plausibility of the person appearing on the screen. Speakers may be unable to make eye contact; they often miss verbal or non-verbal cues and may be disoriented when the sound seems to come from a different place than the image on the screen⁵¹

and “subtle facial movements, non-verbal cues and peripheral actions, important for interpreting speech, are hard to detect in videomediated communication”. Similarly,

[t]here are **three areas in which technology inevitably skews the perception of others. First, choices about camera shots influence perceptions of others. Second, video presentations always either strip some nonverbal cues from the communication or overemphasize them. Finally, video presentations do not replicate normal eye contact.**⁵²

Also, along the same lines,

[k]ey findings from observations and experiences: The image of remote participant is often distorted; There are difficulties with simulating eye-contact; There are difficulties displaying multiple images; There is often an unnatural dislocation of the sound of the voice from image of speaker; Audio quality is often poor with voices sounding unnatural and lacking in clarity.⁵³

⁴⁹ Baker McKenzie, “KPMG The Future of Disputes: Are Virtual Hearings Here To Stay?”, p. 9.

⁵⁰ Ilze Tralmaka, “Defence Rights in Remote Justice Procedures”, <https://www.unodc.org/dohadecaration/en/news/2020/06/defence-rights-in-remote-justice-procedures.html>

⁵¹ D. Tait, B. McKimmie, R. Sarre, D. Jones, L. W. McDonald, K. Gelb, “Towards a distributed courtroom” (2017) *Western Sydney University*.

⁵² A. Bowen Poulin, “Criminal Justice and Videoconferencing Technology”: *The Remote Defendant*, 78 *Tul. L. Rev.* 1089 (2004), p. 1108.

⁵³ E. Rowden, A. Wallace, D. Tait, M. Hanson, D. Jones, “Gateways to Justice: design and operational guidelines for remote participation in court proceedings”, *University of Western Sydney* (2013), p. 30.

56. Lastly, because examination via video call might seem less formal, there is a risk that both witness and accused person perceive it as less serious and less legitimate than examination in the courtroom,⁵⁴ which may **adversely affect the solemnity of proceedings**.⁵⁵ As stated by Transform Justice in its report entitled “Defendants on video – conveyor belt justice or a revolution in access?”,

[t]he principles of procedural justice suggest that the **way defendants and witnesses** are treated has a profound effect on whether they perceive the system and the outcome of their case to be fair. Our qualitative research suggests that video hearings reduce defendants’ understanding of, and respect for, the process.⁵⁶

57. It is therefore critical for the accused to be present, live, to observe the course that examination of witnesses takes and their reactions to the parties, the participants and the Chamber. Presence at the hearing allows the accused to keep track of the proceedings and have a sense of how statements by witnesses are delivered and received. Were the accused person to see the witness only on a screen – and even then with an obstructed view of the body language – without being able to observe his or her reactions, the accused will be ill-equipped to comprehend how his or her trial is proceeding, how the charges are being understood and how the case is being heard. An accused person cannot be a spectator at his or her trial.

58. Just as critical is that the witnesses can be present, live, so as to participate in the proceedings as they take place, to see the reactions of the parties, the participants and the Chamber and to absorb the solemnity of the trial. The solemnity of the trial is what affects how the witness participates in his or her examination and answers the questions, as the extent of the witness’s engagement and assiduousness are connected to the importance accorded to his or her presence. Attendance in person at the hearing enables the witness to better keep track of the proceedings and not to be disconnected from the trial, which would otherwise resemble a television series, seen from afar, on-

⁵⁴ Lisa Harker, Mary Ryan, “Remote hearings in family courts in England and Wales during Covid-19: Insights and lessons”, *Family Court Rev.* 2022, pp. 215-216.

⁵⁵ The Lawyer’s Daily, “Remote hearings, examination of witnesses: Best practices”, 26 June 2020, <https://www.thelawyersdaily.ca/articles/19720/remote-hearings-examination-of-witnesses-best-practices>

⁵⁶ Transform Justice, “Defendants on video – conveyor belt justice or a revolution in access?”, October 2017, pp. 2-3. [Emphasis added].

screen. Given the point that some witnesses will not feel comfortable with the technology, which will accentuate the remoteness between them and the “virtual courtroom”. The witness would therefore not be aware of the extent to which he or she also plays a central role in the trial and, hence, of the great value his or her statements hold and their impact on the endeavour of justice. Were the witness to see the participants in the trial only on-screen, the witness would be denied the tools need to grasping the setting for his or her testimony, thus creating distance owing to the virtual factor that might take away the sense of participating in a trial as a witness. This loss of a sense of what is concrete may thus affect how the witness will answer questions and detract from the solemnity of the exercise, especially if the witness has to spend hours peering at a screen. In addition, the fact that the camera operator or the control room may only show excerpts of the hearings – the situation *de facto* as the camera operator and/or the control room necessarily make operational choices concerning the footage and cutaways to show on-screen – will also inevitably affect the position the witness adopts and how he or she answers questions.

1.3. Third ground of appeal: by considering that the fact that some of the witnesses to testify by audio-video link would also see their previous statement admitted under rule 68(3) was not an “additional criteri[on]” which it must consider when deciding whether to authorize the hearing of a person by audio-video link, the Chamber erred in fact and in law, invalidating the impugned decision.

59. In the view of the Defence, this ground of appeal stems directly from the appealable issue as formulated by the Chamber in its decision of 16 August 2022, since the Chamber asks: “[A]re 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?”⁵⁷ As the question is that of ascertaining whether there are “additional criteria”, the additional criteria to be considered by the bench

⁵⁷ ICC-01/14-01/21-453.

must be discussed and identified in this appeal. In this instance, the fact of a witness testifying under rule 68(3) is one of the “additional criteria” that the Chamber must factor into any decision to allow a witness to be heard by audio-video link, especially where this argument was raised by one of the parties as an additional criterion for consideration.

60. Regarding this point, the Chamber considers in the impugned decision that

[t]he fact that the Prosecution has been able to question the rule 68(3) witnesses in person when recording their statement, whereas the Defence will be obliged to cross-examine them via AVL does not create any undue prejudice. Indeed, there is no legal requirement that the cross-examining party must be able to question the witness under identical circumstances as the calling party. Any other view would make rule 68(3) of the Rules redundant.⁵⁸

By so ruling, the Chamber committed several errors that invalidate the impugned decision.

61. Firstly, the Chamber asserts, without giving reasons, that “there is no legal requirement that the cross-examining party must be able to question the witness under identical circumstances as the calling party”. This assertion is clearly an error of law because equality of arms and procedural fairness demand, to the contrary, that the calling party and the non-calling party be treated exactly the same during examination and cross-examination of a witness, lest the entire fairness of the proceedings be affected. For instance, it is inconceivable that one party would put questions to a witness in person, while the other would do so by audio-video link.

62. Secondly, in reality, the use per se of rule 68(3) creates an imbalance between the parties, which may affect the fairness of the proceedings by the very fact of not placing the parties in the same conditions for examination and cross-examination. That is why use of rule 68(3), and rule 68 in general, must be the exception and not the rule, as it would in any event be in the case *sub judice* should the Prosecution’s approach be adopted.

63. The imbalance arising between the parties from the use of rule 68 and hence the ensuing risk to the fairness of the proceedings cast a duty on the Chamber, should it allow certain witnesses to be heard under this rule, to ensure that the use of rule 68 has

⁵⁸ ICC-01/14-01/21-442, para. 15.

the least possible impact on the proceedings. However, the combination of a witness whose previous statement is admitted under rule 68(3) and testimony by audio-video link is disproportionately prejudicial to the non-calling party. This is because, in the case of a *viva voce* witness, both parties may be considered as being equally affected by the consequences of testimony by audio-video link. However, in the case of a witness whose statement is admitted under rule 68(3), it is mainly the non-calling party, in this instance the Defence, who is disadvantaged by testimony by audio-video link as the Prosecution would use video-link only to ask the witness a few supplementary questions (as an addition to his or her previous statement taken by the investigators face to face, meaning in person, over many hours under conditions of lesser solemnity than those of a trial), whereas the Defence will have to spend some time in court (probably even less than the many hours that were available to the investigators) going over with the witness all of his or her written statements, thus in conditions that are very different from those under which the written testimony was taken, entailing the use of media that sever direct and personal contact with the witness, whereas the Prosecution's investigators met the witness face to face.⁵⁹

64. That being so, the assertion that “[a]ny other view would make rule 68(3) of the Rules redundant”,⁶⁰ aimed at dispensing with consideration of the additional criterion proposed by the Defence, has no legal or factual basis. The existence of rule 68 is one thing, the concrete impact of its implementation on the conduct of the proceedings (regarding how examination and cross-examination are conducted, the decision to hear a witness by audio-video link, etc.) another. It is normal practice to factor in that impact and evaluate its effect on the proceedings as a whole when assessing whether, on the whole, the trial is fair and does not in any way call into question the very existence of rule 68, which, in any event, was not what the Defence was arguing. In failing to explain how the Defence's request – for account to be taken of the impact of using rule 68 on the conditions of cross-examination and, consequently, that such impact necessarily be taken into account as a pertinent criterion in the decision on

⁵⁹ ICC-01/14-01/21-417-Conf, para. 26.

⁶⁰ ICC-01/14-01/21-442, para. 15.

whether to authorize the hearing of persons by audio-video link – would render rule 68(3) “redundant”, the Chamber’s decision is therefore not reasoned.

2. The material impact of the errors of law and of fact argued on the impugned decision

65. The errors stated in this appeal have materially affected the impugned decision. Had the Chamber not considered that to hear a witness by audio-video link is equivalent to hearing a witness in person, it simply could not have rendered the impugned decision, as it should have then required the Prosecution to show, on a case-by-case basis, in accordance with the criteria settled by a line of authority, the need for persons to be heard virtually owing to, for instance, a witness’s inability to come to The Hague for medical or administrative reasons, and on the basis of that information and the Defence’s response, should have undertaken an assessment itself, on a case-by-case basis, so as to rule on the feasibility of hearing a witness by audio-video link in a way that does not cause disproportionate prejudice to the non-calling party.

FOR THESE REASONS, MAY IT PLEASE THE APPEALS CHAMBER TO:

- **Hold** that the impugned decision is affected by the errors of law and of fact as set out in this appeal brief;
- **Hold** that the errors materially affected the impugned decision;

Accordingly:

- **Reverse**, in its entirety, the “Decision on the Use of Audio-Video Link Technology” in which Trial Chamber VI by majority, Judge Ugalde Godinez dissenting,⁶¹ authorized the Prosecution witnesses to testify by audio-video link (ICC-01/14-01/21-442), for lack of legal basis and the factual and legal errors committed;

⁶¹ ICC-01/14-01/21-442-Anx1.

And

- Remand the matter to Trial Chamber VI.

[signed]

Jennifer Naouri

Lead Counsel for Mahamat Said Abdel Kani

Dated this 29 August 2022

At The Hague, Netherlands