

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **26 July 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 *PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

**Public**

**Public Redacted Version of "Prosecution's Submissions on Audio-Video Link  
Testimony", ICC-01/14-01/21-403-Conf, dated 12 July 2022**

**Source:** Office of the Prosecutor

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

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## I. INTRODUCTION

1. Pursuant to the instruction of Trial Chamber VI (“Chamber”) on 21 June 2022,<sup>1</sup> the Prosecution hereby informs the Chamber that regrettably the *inter partes* discussion about the use of audio-video link technology (“AVL”) for the testimony of certain Prosecution witnesses has not resulted in agreement on the applicable procedure. The Prosecution therefore respectfully asks the Chamber’s guidance on whether the Prosecution can call the 33 trial witnesses indicated on its List of Witnesses (“LoW”)<sup>2</sup> through AVL.

## II. CONFIDENTIALITY

2. Pursuant to regulation 23bis(1) of the Regulations of the Court, this motion is filed as confidential as it references *inter partes* communications between the Prosecution and the Defence, which are confidential. A public redacted version will be filed as soon as practical.

## III. URGENCY

3. The Chamber’s determination is requested on an urgent basis. With the start of the trial set for 26 September 2022, the Prosecution and the Victims and Witnesses Section (“VWS”) are required to plan the mode of testimony imminently. If the approach taken by the Prosecution on the basis of established practice is deemed insufficient by the Chamber, then a whole range of additional planning for the travel of witnesses to the seat of the Court would have to proceed. Guidance by the Chamber is therefore respectfully requested on an expedited basis. The Chamber’s urgent disposition of this filing would serve the interest of justice by allowing all stakeholders involved in advancing the necessary logistical preparation to have sufficient time to

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<sup>1</sup> Email from the Chamber to the Parties, on 21 June 2022 at 17:16.

<sup>2</sup> ICC-01/14-01/21-354.

ensure an orderly presentation of evidence and avoidance of unnecessary delays in the proceedings.

#### IV. APPLICABLE LAW

4. Article 69(2) of the Statute and rule 67 of the Rules of Procedure and Evidence (“Rules”) set out a Chamber’s discretionary power to receive the testimony of *viva voce* witnesses by means of AVL, provided that such technology permits the Parties and the Chamber to examine the witness, and that it is not prejudicial to or inconsistent with the rights of the accused.<sup>3</sup> This also extends to rule 68(3) witnesses.<sup>4</sup>

5. Chambers have consistently held that AVL is not an exception to in-court live testimony, but rather an alternative *equivalent* option to it.<sup>5</sup> In fact, both in-court and AVL witnesses: (i) give live testimony directly to a Chamber in real-time; (ii) take the oath; and (iii) can be examined by the non-calling party without constraints.<sup>6</sup> If the remote connection is of good quality, (iv) a Chamber can observe the demeanor and composure of video-link witnesses no differently than in-court witnesses.<sup>7</sup> Further, testimonies received in court and by means of AVL are equal in terms of evidential weight.<sup>8</sup> They cause no disadvantage to the non-calling party, nor do they affect the Chamber’s ability to assess the witness’s testimony.<sup>9</sup>

6. For these reasons, the use of AVL does not require *ad hoc* justification<sup>10</sup> and parties are given a *degree of deference* in whether they wish for witnesses to appear in-

<sup>3</sup> Article 69(2) of the Statute and rule 67(1) of the Rules.

<sup>4</sup> ICC-01/05-01/13-1697, para. 10; ICC-02/11-01/15-721, paras. 11-12.

<sup>5</sup> ICC-01/05-01/13-1697, para. 11; ICC-01/14-01/18-631, para. 29; ICC-02/11-01/15-721, para. 16; ICC-01/05-01/13-1697, paras. 10-11; ICC-02/11-01/15-T-103-Red2-ENG CT, p. 82, lns. 5-6.

<sup>6</sup> ICC-01/05-01/13-1697, para. 12.

<sup>7</sup> ICC-01/05-01/13-1697, para. 12. This approach has been endorsed more recently by other Chambers that confirmed that there are no significant differences between in-court and AVL testimonies. *See also* ICC-01/14-01/18-631, para. 29; ICC-01/12-01/18-789-AnxA, para. 54; ICC-02/04-01/15-497, para. 17.

<sup>8</sup> ICC-01/05-01/13-1697, paras. 15, 20; ICC-02/11-01/15-1079, para. 15. *See also* ICC-01/14-01/18-631, para. 29.

<sup>9</sup> ICC-01/04-02/06-2011-Red, para. 6; ICC-02/11-01/15-1079, paras. 15-16.

<sup>10</sup> ICC-01/14-01/18-631, para. 30; ICC-01/04-02/06-2175, para. 3.

court in person or via video-link.<sup>11</sup> Consistently, it has been held that for AVL testimony no formal request is necessary, it being sufficient for the calling party to provide a timely advance notice.<sup>12</sup> This is without prejudice to the Chamber's inherent power to reassess the mode of testimony chosen by the calling party when necessary in order to ensure the fair and expeditious conduct of the proceedings.<sup>13</sup> Whether in the past Parties have specifically requested for witnesses to testify via AVL does not change the above standard, which solidified in recent practice and corresponds to the wording of rule 67 of the Rules.

## V. SUBMISSIONS

7. Based on the above, the Prosecution submits that it has chosen the appropriate procedure concerning the use of AVL by giving *timely advance notice* to the Chamber and the Parties and Participants of its intention to use AVL for testimony by indicating in the LoW which witnesses are proposed for AVL testimony. This notice allows for the necessary preparation also by the VWS and will contribute to an uninterrupted order of appearance. Contrary to the Defence position, specific witness-by-witness requests together with justification by the calling party for hearing testimony through AVL is neither required by the law nor practical. However, the Prosecution has set out the factors it considered when proposing AVL in the *inter partes* communications.<sup>14</sup>

### A. The Parties do not agree on the procedure related to AVL

8. On 21 June 2022, the Chamber informed the Parties that it has not yet adopted a specific procedure for the use of AVL and expressed its view that it will await the outcome of the *inter partes* discussions and expects the Parties to collaborate in good

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<sup>11</sup> ICC-02/04-01/15-497, para. 17; ICC-01/14-01/18-631, para. 30; ICC-01/05-01/13-1697, paras. 14, 16.

<sup>12</sup> ICC-01/14-01/18-631, para. 30; ICC-02/04-01/15-497, para. 17; ICC-01/12-01/18-789-AnxA, para. 54; ICC-01/12-01/18-990, para. 5.

<sup>13</sup> ICC-01/14-01/18-631, para. 31; ICC-01/05-01/13-1697, para. 16; ICC-01/12-01/18-789-AnxA, para. 54.

<sup>14</sup> See below, paras. 8-10.

faith.<sup>15</sup> Subsequently, between 23 June and 8 July 2022, the Prosecution and Defence had a number of collegial exchanges on the legal parameters and practical implications of the use of the AVL technology for witness testimony.

9. On 23 June 2022, the Prosecution provided the Defence with additional information about its position on the proposed use of AVL, including the main factors it considered, such as impact on witnesses' well-being, efficiency of the proceedings, logistical and operational steps to be taken, and the applicable legal framework as set out above. The Prosecution emphasised that based on its analysis of the Court's jurisprudence, AVL is generally considered equal to in-person testimony and that a degree of discretion is generally given to the calling party.<sup>16</sup> On 29 June 2022, the Defence enquired if it could have additional time to provide its views to the Prosecution, suggesting 5 July 2022.<sup>17</sup> The Prosecution responded to the Defence, recalling the importance of a speedy resolution of this logistical matter but ultimately agreeing to that response date.<sup>18</sup> On 5 July 2022, the Defence expressed that in-court testimony is the basic principle and that the use of AVL must be justified on a case-by-case basis by the calling party. The Defence further added that it cannot express its views on AVL unless more specific witness-by-witness justifications are provided by the Prosecution to the Defence.<sup>19</sup> On 6 July 2022, the Prosecution replied asking whether the Defence could provide the legal basis for its understanding that individual justification is needed for the use of AVL. The Prosecution also reiterated the practical considerations and justifications for the witnesses, especially those from the Central African Republic ("CAR") and the region, including also the potential for renewed COVID-19 restrictions in the fall, when the trial is due to start. The Prosecution also noted that it could not divulge protected personal information of

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<sup>15</sup> Email from the Chamber to the Parties, on 21 June 2022 at 17:16.

<sup>16</sup> Email by Prosecution, on 23 June 2022 at 12:15.

<sup>17</sup> Email by Defence, on 29 June 2022 at 13:21.

<sup>18</sup> Email by Prosecution, on 29 June 2022 at 17:06.

<sup>19</sup> Email by Defence, on 5 July 2022 at 18:39.

witnesses such as place of residence, medical conditions, and family situations of witnesses and that this would also not be necessary under the applicable legal standard relating to AVL.<sup>20</sup>

10. On 8 July 2022, the Parties held a phone call, where among other issues, the Prosecution indicated that as there does not seem to be an agreement on the AVL procedure, the Chamber's determination would need to be sought in the following week urgently. By email on that same day, the Defence stated that it maintains its position that the use of AVL must be justified on a witness-by-witness basis and that there is precedent for this approach in past cases such as the *Gbagbo* case where the Prosecution justified such requests individually.<sup>21</sup> Noting the Prosecution's position, the Defence informed that it could not agree to AVL at this point for any witnesses.<sup>22</sup> On 11 July 2022, the Prosecution informed the Defence that since an agreement of the applicable process is not materialising it will have to urgently seek determination by the Chamber.<sup>23</sup>

**B. AVL is the preferred mode of testimony for the majority of Prosecution witnesses**

11. AVL is the preferred proposed mode of testimony for 33 trial witnesses, 25 of which may testify pursuant to rule 68(3) of the Rules. As the Defence has taken a critical approach to the use of AVL, the Prosecution set out its underlying reasons in the *inter partes* communications. When proposing a witness for AVL, the Prosecution has considered the following factors:

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<sup>20</sup> Email by Prosecution, on 6 July 2022 at 19:36.

<sup>21</sup> Email by Defence, on 8 July 2022, at 15:26. The Defence referenced the following filing: *Gbagbo*, ICC-02/11-01/15-1050-Conf-Corr.

<sup>22</sup> Email by Defence, on 8 July 2022 at 15:25.

<sup>23</sup> Email by Prosecution, on 11 July 2022 at 11:56.

12. *First*, the personal circumstances, including the well-being of these witnesses warrant the use of AVL. Generally, in-court testimony is strenuous for witnesses due to the travel and prolonged absences from their homes, families and work. The Prosecution considers that as a judicial institution whose success is largely dependent on the cooperation of witnesses and other stakeholders, it is essential that the Court adopts procedures which provide the least disruptions to their daily lives and allow them to participate in the proceedings as much as possible in a comfortable manner, so long as it is appropriate and permissible under the Court's legal framework. None of the witnesses for whom AVL is envisaged presently reside in the Netherlands, and the vast majority reside in the CAR.<sup>24</sup> Their prolonged absence from their country of residence could have negative impacts on their well-being and the well-being of their relatives even with the Court's framework of mitigating measures and support services in place. Further, the very same absence from their local communities may expose their cooperation and identity as witnesses.

13. *Second*, logistical challenges of ensuring in-person testimony in coordination with the VWS make the use of AVL more suitable over in-court testimony in the present proceedings. The vast majority of Prosecution witnesses currently reside in the CAR and therefore would require passports and visas should they be required to testify at the seat of the Court. Thereafter, flights and lodgings also need to be organized, and [REDACTED]. The tense and volatile security situation due to on-going armed confrontations throughout the CAR territory further exacerbate already complicated logistical planning in the field.<sup>25</sup>

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<sup>24</sup> See e.g., ICC-01/14-01/21-356-Red, para. 12.

<sup>25</sup> See ICC-01/14-01/21-365-Conf-Anx, para. 2.



14. *Third*, it is the Prosecution's understanding that [REDACTED] can professionally support AVL technology to enable the testimony. Witnesses in the *Yekatom and Ngaissona* case have been successfully heard by means of AVL.<sup>26</sup> [REDACTED].<sup>27</sup>

15. *Fourth*, the use of AVL may also contribute to the uninterrupted order of appearance of the witnesses and an overall smooth operation of the trial. The Court would be in position to make the required logistical arrangements while handling multiple ongoing cases concurrently with limited resources. This is particularly important in the event of renewed and highly probable travel restrictions on account of rising COVID-19 cases worldwide in the coming fall and winter.

16. *Finally*, budgetary constraints of the Court, in light of new cases and situations, further justify the use of AVL. This is particularly true in the present case where the vast majority of the Prosecution witnesses presently reside in the CAR, and where [REDACTED]. [REDACTED].

17. This information—which was also provided to the Defence—is considered sufficient for the Chamber to assess whether AVL would be prejudicial or inconsistent with the rights of the Accused pursuant to article 69(2), as further set out below.

### **C. AVL testimony does not cause any prejudice to the Accused**

18. The proposed live testimony via AVL in this case would not be prejudicial to or inconsistent with the rights of the Accused as required under article 69(1). As the Defence's right to cross examine witnesses and the Chamber's ability to assess their testimony are unaffected by AVL, in-court testimony and video-link testimony are both equally viable options for the Chamber. The technology used by the Court to date allows the Parties and the Chamber to fully examine witnesses, satisfying the

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<sup>26</sup> ICC-01/14-01/21-337-Conf, para. 7.

<sup>27</sup> ICC-01/14-01/21-T-007-CONF-ENG ET, p. 13, lns. 7-25.

requirement under rule 67 of the Rules.<sup>28</sup> This has been tested in the ongoing *Yekatom and Ngaissona* case where witnesses testify regularly via AVL, without major issues, [REDACTED].

19. The Defence voiced a preference for in-person testimony but has not set out precisely why in the *inter partes* communications leaving the Prosecution to speculate.<sup>29</sup> As outlined above, there is no hierarchy of testimony via AVL and in-person testimony as both options are viable and have been placed on the same footing so far as the technology works without flaw. Lastly, the Chamber can reassess the calling party's decision at any time.<sup>30</sup>

## VI. RELIEF SOUGHT

20. For the above reasons, the Prosecution respectfully requests the Chamber provide guidance, on an urgent basis, as to whether the Prosecution can call the witnesses so indicated in the LoW via AVL.



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**Karim A. A. Khan QC, Prosecutor**

Dated this 26<sup>th</sup> day of July 2022  
At The Hague, The Netherland

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<sup>28</sup> See *supra*, paras. 9-10.

<sup>29</sup> Email dated 8 July 2022, at 15:26.

<sup>30</sup> See *supra*, para. 6.