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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 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

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**Unrepresented Applicants
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**The Office of Public Counsel
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REGISTRY

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Detention Section

**Victims Participation and
Reparations Section**

Other

TRIAL CHAMBER VI of the International Criminal Court, in the case of *The Prosecutor v. Mahamat Said Abdel Kani*, having regard to articles 64(2), 67, 68, and 69(2) of the Rome Statute (the ‘Statute’) and rule 67 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Use of Audio-Video Link Technology’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 10 June 2022, the Office of the Prosecutor (the ‘Prosecution’) submitted the Prosecution’s List of Witnesses, Proposed Order of Appearance, and Summaries of Anticipated Testimony (the ‘List of Witnesses’).¹ According to the List of Witnesses, the Prosecution intends to call 44 witnesses to testify at least partly in person. Of those 44, the Prosecution intends to call 33 witnesses via audio-video link (‘AVL’).²

2. On 15 June 2022, the Prosecution approached the Chamber, via telephone, for guidance as to which procedure it intended to adopt in relation to testimony via AVL. The Chamber informed the Prosecution that it would not issue any specific guidance at that point but rather left the initiative with the parties to agree on the use of AVL in this case. On 21 June 2022, after receiving a request for clarification from the Defence,³ the Chamber confirmed these instructions in writing.⁴

3. On 12 July 2022, the Prosecution submitted a renewed request for guidance (the ‘Request’).⁵ In the Request, the Prosecution informs the Chamber that the parties were unable to agree on an approach towards the use of AVL in this case.⁶ The Prosecution also advanced the position that it is not a requirement for the calling party to submit specific witness-by-witness justification for why particular witnesses need to appear via AVL. According to the Prosecution, the Court’s recent practice has confirmed that

¹ ICC-01/14-01/21-354, with three confidential annexes.

² ICC-01/14-01/21-354-Conf-AnxB.

³ Demande de la Défense pour que soient éclaircies les instructions de la Chambre concernant ce sur quoi doivent porter les discussions inter partes devant précéder toute demande formelle déposée au dossier de l’affaire concernant la possibilité d’auditionner un témoin par vidéo-link afin de permettre des échanges inter partes utiles et pleinement informés. 17 June 2022, ICC-01/14-01/21-364-Conf.

⁴ Email from Trial Chamber VI to the parties of 21 June 2022 at 17:16.

⁵ Prosecution’s Submissions on Audio-Video Link, ICC-01/14-01/21-403-Conf.

⁶ Request, paras 8-10.

testimony via AVL is qualitatively identical to in-court testimony and that the calling party should therefore enjoy a degree of deference in this regard, subject to the Chamber's inherent authority to decide otherwise in the interest of the fairness and expeditiousness of the proceedings.⁷ The Prosecution also provided the factors it considered in proposing the use of AVL for 33 trial witnesses in this case.⁸

4. On 15 July 2022, the Chamber instructed the Registry to give its view on the Request and to submit any additional observations it wished to bring to the Chamber's attention regarding the use of AVL.⁹

5. On 21 July 2022, the Registry filed its Observations (the 'Registry Observations').¹⁰ The Registry confirmed that it will be ready to accommodate concurrent AVL testimonies in the case of The Prosecutor v Alfred Yekatom and Patrice-Edouard Ngaïssona (the '*Yekatom and Ngaïssona Case*') and the present case which may come up during the same period, from the Central African Republic (the 'CAR') as of 24 October 2022.¹¹

6. Having had regard to the List of Witnesses presented to it by the Prosecution and having considered the most appropriate mode of testimony, the Registry advised that the expected length of the testimony and the amount of time the witness can afford to safely stay away from home are two essential factors that should be considered when determining the mode of appearance as these factors determine the rate of witnesses' turnout for testimonies.¹²

7. The Registry also pointed out that travel in and out of the CAR may be affected by fuel shortages, including aviation fuel, which are already impacting flights in and

⁷ Request, para. 6.

⁸ Request, paras 12-16.

⁹ Email from Trial Chamber VI to the Registry, dated 15 July 2022 at 09:00.

¹⁰ Registry's Observations on the "Prosecution's Submissions on Audio-Video Link Testimony" (ICC-01/14-01/21-403-Conf), ICC-01/14-01/21-418-Conf.

¹¹ Registry Observations, paras 4-5.

¹² Registry Observations, para. 6.

out of the CAR.¹³ The Registry further advises that with use of AVL technology, it does not anticipate any issue regarding cooperation in relation to this mode of testimony.

8. On 25 July 2022, the Defence responded to the Request (the ‘Response’).¹⁴ According to the Defence, there is a presumption that witnesses should testify in person in the courtroom and exceptions thereto must be authorised by the Chamber.¹⁵ The Defence argues that this presumption is based on the fact that it is not possible to establish the same sort of relationship with the witness when (cross-)examination has to take place via AVL.¹⁶ According to the Defence, this creates a disadvantage for the Defence, since the Prosecution’s witnesses are by definition hostile to the Defence.¹⁷ The Defence also claims it will be disproportionately disadvantaged because 25 of the 33 witnesses whom the Prosecution wants to call to testify via AVL would have their prior recorded statements introduced via rule 68(3) of the Rules. This means that the Prosecution will have been able to question the witness in person, whereas the Defence can only do so via AVL.¹⁸ The Defence also argues that 23 of the 33 witnesses are expected to give testimony going to the heart of the case.¹⁹ The Defence therefore rejects the Prosecution’s general arguments for wanting to call 33 witnesses to testify via AVL and argues that the use of AVL must be justified on an individual basis.²⁰

II. APPLICABLE LAW

9. At the outset, the Chamber notes 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

¹³ Registry Observations, para. 7.

¹⁴ Réponse de la Défense aux « Prosecution’s Submissions on Audio-Video Link Testimony » (ICC-01/14-01/21-403-Conf), ICC-01/14-01/21-431-Conf.

¹⁵ Response, paras 16-20.

¹⁶ Response, paras 21-27.

¹⁷ Response, paras 28-29.

¹⁸ Response, paras 30-31.

¹⁹ Response, para. 32.

²⁰ Response, paras 33-46.

of viva voce (oral) testimony by means of video or audio technology ‘in accordance with the Rules’.

10. Rule 67 of the Rules sets out the following conditions for provision of live testimony by means of audio or video-link technology: (i) the technology used must permit the witness to be examined by the parties and by the Chamber at the time that the witness testifies;²¹ and (ii) the venue chosen for the conduct of the audio or video-link testimony must be ‘conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness’.²²

11. Accordingly, before authorising the use of AVL, the Chamber must be satisfied that the physical location from where the witness will testify as well as the available technology meet these criteria. For example, the room from where the witness is to give evidence must be quiet and reserved for that purpose during the testimony. Only individuals authorised to participate in the proceedings may enter the room where and when the witness testifies. There should also be adequate control over whether the witness can be influenced during his or her testimony (including during breaks) and that he or she does not consult extraneous documents or other sources of information without authorisation from the Court. In terms of technical requirements, the quality of the sound and image must be of a sufficiently high level to allow the Chamber and parties to observe the witness well. At 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.

²¹ Rule 67(1) of the Rules.

²² Rule 67(3) of the Rules.

III. ANALYSIS

12. In the present case, the Prosecution proposes the use of AVL technology for examination of 33 of its 44 oral witnesses because this option: (i) causes the least disruption to the witnesses' daily lives given that none of them presently reside in the Netherlands and the vast majority reside in the Central African Republic (the 'CAR');²³ (ii) avoids the need for a prolonged absence from their country of residence, which could negatively impact on their well-being and the well-being of their relatives and may expose their cooperation and identity as witnesses;²⁴ (iii) is suitable because of logistical challenges in ensuring the witnesses' transfer to the seat of the Court, which are exacerbated by the tense and volatile security situation in the CAR;²⁵ (iv) may 'contribute to the uninterrupted order of appearance of the witnesses and an overall smooth operation of the trial' especially given that travel restrictions during the autumn and winter are likely on account of COVID-19;²⁶ and (v) is the most cost efficient option.²⁷ The Chamber considers these are valid reasons to permit the use of AVL technology.

13. The Defence argues that the use of AVL must be justified on an individual basis whereas the Prosecution argues that the parties should enjoy a degree of deference in this regard.²⁸ The Chamber notes the practice of other Chambers during the initial years of the Court's functioning, which required the participants in trials to justify on a case-by-case basis their requests to hear witnesses via video-link.²⁹ However, in light of the important developments in AVL technology during the last years and the more recent

²³ Request, para. 12.

²⁴ Request, para. 12.

²⁵ Request, para. 13.

²⁶ Request, para. 15.

²⁷ Request, para. 16.

²⁸ See, para. 8 above.

²⁹ See, for example, Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on various issues related to witnesses' testimony during trial](#), 30 January 2008, ICC-01/04-01/06-1140, para. 41; see also [Decision on the defence request for a witness to give evidence via video-link](#), 9 February 2010, ICC-01/04-01/06-2285-Red, paras 14-16; see, Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ndjolo Chui*, [Decision on a number of procedural issues raised by the Registry](#), 14 May 2009, ICC-01/04-01/07-1134, paras 36-37; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the "Request for the conduct of the testimony of witness CAR-OTPWWW-0108 by video-link"](#), ICC-01/05-01/08-947-Red, paras 10-13; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Public redacted version of Decision on Prosecution's request to hear P-0039's testimony by way of video-link](#), 12 October 2015, ICC-01/04-02/06-897-Red2, para. 12.

practice of several Trial Chambers, as discussed in detail below,³⁰ the Chamber considers that the approach taken in the present decision is warranted in the current circumstances.

14. The Defence also invokes the accused's right to examine adverse witnesses as enshrined in article 67(1)(e) of the Statute and objects to the use of AVL technology on the grounds that it puts them at a disadvantage in cross-examination because they cannot establish the same sort of relationship with the witness. The Chamber 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.³¹

15. The fact that a number of the witnesses the Prosecution proposes to call via AVL are expected to testify about central issues in this case or that their testimony will be introduced under rule 68(3) of the Rules does not alter the Chamber's conclusion. In the view of the Chamber, the key consideration is that the Defence has the opportunity to confront the witnesses, i.e. to put questions to them directly to which the witness must respond. This right will be guaranteed regardless of whether the witness testifies from inside the courtroom or via AVL. The 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

³⁰ See, note 31 below.

³¹ Trial Chamber VII, *The Prosecutor v. Jean Pierre Bemba Gombo et al.*, [Decision on Video-Link Testimony for Defence Witnesses](#), 4 March 2016, ICC-01/05-01/13-1697, para. 15; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Initial Directions on the Conduct of the Proceedings](#), 13 July 2016, ICC-02/04-01/15-497, para. 17; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Annex A to the Decision on the conduct of proceedings](#), 6 May 2020, ICC-01/12-01/18-789-AnxA, paras 54-55; Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaiisona*, [Initial Directions on the Conduct of the Proceedings](#), 26 August 2020, ICC-01/14-01/18-631, paras 29-31.

able to question the witness under identical circumstances as the calling party. Any other view would make rule 68(3) of the Rules redundant.

16. Turning to the criteria under rule 67 of the Rules, the Chamber takes note of the fact that AVL technology has generally functioned very well in other cases before the Court. More specifically, the Chamber has considered the experience of Trial Chamber V in the ongoing *Yekatom and Ngaiissona* Case and is satisfied that the technical conditions and the physical venue at the ICC Field Office in Bangui fully meet the requirements set out in the rule. The parties in the *Yekatom and Ngaiissona* Case have been able to examine all witnesses who have so far appeared via AVL and the quality of the audio-visual feed has generally been excellent.

17. The Chamber is also satisfied that the conditions at the Field Office are conducive to the giving of truthful and open testimony and are adequate to safeguard the safety, physical and psychological well-being, dignity and privacy of the witnesses. The Chamber attaches particular importance to the well-being of the witnesses and the need to allow them to participate in the proceedings in a manner that will cause the least possible disruption to their and their family's lives. This will undoubtedly be considerably easier to achieve when not all witnesses have to travel to The Hague, especially considering the current challenges facing international air travel and the possibility of renewed restrictions on account of COVID-19.

18. The Chamber is also confident that the Registry staff at the Field Office can monitor the witnesses during their testimony so as to avoid any undue influence. Since the Registry Observations have confirmed that the same or similar facilities will be available for use in the present case, the Chamber authorises witnesses to appear via AVL from the Bangui Field Office. If, at any stage during the trial, the situation outlined above should change such that the examination of witnesses by AVL is compromised, the Chamber will take the necessary measures to avoid any prejudice to the rights of the accused.

19. The Chamber understands from the Registry Observations that most of the 33 witnesses the Prosecution wants to call to testify via AVL live in the CAR and will

testify from the Bangui Field Office.³² In relation to these witnesses, the Chamber therefore allows their testimony via AVL. To the extent that there are witnesses who would testify from another location, the Chamber instructs the Prosecution to give the necessary information to the Registry as soon as possible. The Registry shall then report to the Chamber on the feasibility of setting up or using facilities that meet the criteria of rule 67 of the Rules in that location. The Chamber shall review the information provided by the Registry and make a determination as to whether or not to authorise the use of AVL from the suggested location.

FOR THESE REASONS, THE CHAMBER, ACTING BY MAJORITY, HEREBY

AUTHORISES witnesses to testify via AVL from the Bangui Field Office.

Judge Sergio Gerardo Ugalde Godínez appends a dissenting opinion.




Judge Miatta Maria Samba

Judge María del Socorro Flores Liera

Judge Sergio Gerardo Ugalde Godínez

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

Dated 4 August 2022

At The Hague, The Netherlands

³² Registry Observations, para. 7.