

Dissenting Opinion of Judge Sergio Gerardo Ugalde Godínez

1. On this occasion, I respectfully disagree with the decision of the respected Judges of the majority.
2. In its filing of 12 July 2022, the Prosecutor asks the Chamber for guidance on whether the Prosecution can call 33 trial witnesses who are included on its List of Witnesses (“LoW”) through audio-video link (‘AVL’). Even though the request is framed as a request for “guidance”, what the Prosecutor is really seeking is the Chamber’s authorisation to call 33 trial witnesses through AVL. In justifying its request, the Prosecutor avers that “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. This also extends to rule 68(3) witnesses.”¹ The Prosecutor then goes on to state that “Chambers have consistently held that AVL is not an exception to in-court live testimony, but rather an alternative equivalent option to it.”²
3. The majority agrees with this proposition, thereby effectively accepting that AVL is not an exception to in-court live testimony and can therefore be resorted to extensively. In so deciding, the majority accepts all five reasons advanced by the Prosecutor, all of a general character, to wit: “(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’); (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; (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; (iv) may ‘contribute to the uninterrupted order of appearance of the witnesses and an overall smooth operation of the trial’

¹ Prosecution’s Submissions on Audio-Video Link Testimony, 12 July 2022, ICC-01/14-01/21-403-Conf (the ‘Prosecution Submissions’), para. 4.

² Prosecution Submissions, para. 5.

especially given that travel restrictions during the autumn and winter are likely on account of COVID-19; and (v) is the most cost efficient option.”³

4. I find that the wholesale and systematic use of AVL technology without any meaningful oversight by the Chamber, as ostensibly requested by the Prosecutor, to be untenable under the current law. I disagree with the notion that the current legal framework is indifferent to whether a witness testifies via AVL or in person in the courtroom and therefore permits both equally, and that a general authorisation can be issued to allow about 75% of the witnesses who will testify *viva voce* to do so via this mode without a case by case analysis.

5. As a consequence of the principle of orality, which is enshrined in articles 67, 68(2) and 69(2) of the Statute, the principle of immediacy has an objective meaning during the trial phase. This principle presupposes that the presentation of the evidence must occur before the judge or tribunal responsible for issuing the judgment. 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.

6. In my view, 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 follows from what has been termed “the substantive view” of the immediacy principle, which promotes the use of the most original form of the evidence in the physical presence of the judges and the accused. 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.

7. I acknowledge the fact that it is now accepted practice that the use of technology is permissible to facilitate the conduct of proceedings, but what appears to not be settled is under which circumstances and to what extent technology may be used and what the legal

³ Majority Decision, para. 12.

underpinnings of such use are. I will not enter into that broader discussion here, but it is my view that the wholesale use of technology at Trial is a matter for consideration that is yet to be judicially tested and determined under the current law.

8. Before us is a case concerning the extent of the use of a particular form of electronic mean or technology, namely the use of audio-video link technology for receiving live witness testimony. The question here is whether the extensive use of audio-video link technology for witness testimony can be considered as having been adopted as a matter of standard practice in all instances at the International Criminal Court, as appears to be asserted by the Prosecution and accepted by the majority.⁴

9. While article 69(2) of the Statute permits the use of technology, the fact is that its use is clearly an exception, as the wording of article 69(2) on its own, and especially when read together with article 68(2) of the Statute, does not treat remote testimony through AVL and in-court testimony as expressly being “an alternative equivalent”, as the Prosecutor stated.

10. In my view, it is patent from the Statute that the physical presence of witnesses in the courtroom is currently the rule. The wording in article 69(2) “The testimony of a witness at trial **shall** be given in person [...]” means in person and physically present in the courtroom. This is compounded by article 68(2) “[t]he Chambers of the Court **may**, to protect victims and witnesses or an accused, [...] **allow the presentation of evidence by electronic** or other special means”, which clearly suggests that evidence via electronic means constitutes an exception to the rule of physical in-court appearance, otherwise this exception would not have any logical meaning. AVL is a form of presenting evidence by electronic means. Concerning witnesses, article 69(2) indeed provides for an exception, when it states that “The Court **may** also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology [...], subject to this Statute and in accordance to the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused”.⁵

⁴ Majority Decision, paras 9 and 14.

⁵ Emphasis added.

11. The use of “shall” twice in the same article denotes a legal obligation which is certain. The use of “may” implies the need for permission,⁶ a possibility which involves a choice and is qualified by the need to safeguard the fairness of the trial; therefore an exception.

12. The exceptional character of the use of AVL technology for trial witness testimony is further highlighted by rule 67 of the Rules, which imports the language from article 69(2). The rule requires the Chamber’s prior authorisation and the exceptionality of its use is also stressed by the use of the word “witness” in singular, and not “witnesses” in plural. This means that the assessment of the Chamber in deciding whether or not to authorise the use of AVL technology is on a case by case basis.

13. In some previous cases, Chambers of this court did authorise the use of AVL technology, but did so as an exceptional measure and on the basis of specific facts and circumstances. This was the finding in Ntaganda: “The assessment of whether or not the use of video-link technology is appropriate in any particular case is fact specific and requires consideration of a range of different factors, such as, non-exhaustively, a witness's age, vulnerability, state of health, psychological well-being, as well as procedural and logistical considerations. At all times, the Chamber has to consider whether using this form of testimony comports with the requirements of a fair trial.”⁷ In Lubanga a determination was made with a similar effect.⁸

14. This means that the general request of the Prosecutor to provide him with a blanket authorisation to use his discretion as to which witnesses may be brought physically to the courtroom and which ones he may call to testify via video-link is not permissible. This requires a fact-specific determination witness by witness and it is for the Chamber to decide, based on verifiable facts, if it is permissible for a witness to testify via AVL as an exceptional alternative to doing so physically present in the courtroom. In so deciding, the Chamber has a duty to determine, for each case, that this measure shall not be prejudicial to or inconsistent with the rights of the accused.

⁶ See Oxford Dictionary: 3 (formal) used to ask for or give permission.

⁷ 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

⁸ Trial Chamber I, *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. Trial Chamber II adopted a similar approach in the Katanga and Ngudjolo case; *see*, Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on a number of procedural issues raised by the Registry, 14 May 2009, ICC-01/04-01/07-1134, paras 36-37.

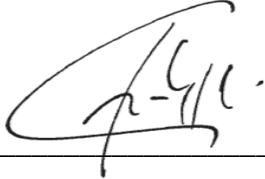
15. However, in the majority decision the Chamber has accepted the Prosecutor's generic approach. In addition, I observe that the effect of the decision is to bestow upon the Prosecutor a discretionary power whereby he decides which of his witnesses will be testifying via AVL and which are to be presented physically in the courtroom, a discretionary power which is reserved for the Chamber to exercise and not for the Prosecutor to assume. This begs the question as to why if, as the majority affirmed "[t]he 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",⁹ any witnesses would need to be physically present in the courtroom at all, if there are no differences between these modes of testimony. No explanation is offered in the request for guidance from the Prosecutor, therefore depriving the Chamber of relevant information concerning the specific reasons why some witnesses will be physically present in the courtroom whilst others will not.

16. As to the criteria to be employed by the Chamber in authorising the use of AVL technology for witness testimony, my view is that such authorisation can be granted if the physical presence of the witness is not reasonably possible, or needed under the circumstances of the case, which can only be determined by the Chamber on a case by case basis. It is for the calling party to provide a full account of the reason or reasons for why a witness proposed by them is unable to be physically present in the courtroom, or why such presence is unnecessary. Such reasons could be linked to, for example, the witness' health or to *force majeure* circumstances. Thereafter it is for the Chamber to evaluate each case individually and determine the reasonableness of the grounds provided, balance them against the rights of the accused and the overall fairness of the trial, prior to authorising, or not, the use of the AVL technology for that case.

17. For sake of clarity, my view is that the use of AVL for witness testimony is an exception to the physical in-court appearance, and therefore needs to be authorised on a case by case basis. This view neither opposes the use of technological means at Trial, insofar as these may be permitted by the legal framework, nor implies that different weight would be given to evidence presented by AVL or any other electronic means.

⁹ Majority Decision, para. 14.

18. Therefore, in my decision I would reject the Prosecutor's request to the extent that the guidance requested amounts to a general authorisation to present all 33 trial witnesses through AVL, and I would order the Prosecution to provide valid reasons for the request to use AVL technology for each of the witnesses the Prosecution intends to call in via this medium.



Judge Sergio Gerardo Ugalde Godínez