

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/14-01/21**
Date: **9 September 2022**

APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public with Public Annex A

**Prosecution response to the Defence appeal against the Decision on the Use of Audio-
Video Link Technology**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr Karim A. A. Khan KC
Mr Mame Mandiaye Niang
Ms Helen Brady

Counsel for the Defence

Ms Jennifer Naouri
Mr Dov Jacobs

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms Sarah Pellet
Mr Tars Van Litsenborgh

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

INTRODUCTION

1. On 4 August 2022, Trial Chamber VI, by majority, granted the Prosecution’s request to allow witnesses to testify *via* audio-video link (AVL) from the Bangui Field Office.¹ Judge Ugalde Godínez dissented.² The Defence sought leave to appeal the Decision advancing three issues,³ but the Trial Chamber found unanimously that none of those issues met the requirements of article 82(1)(d) of the Statute.⁴ Instead, the Trial Chamber—in its discretion—formulated a single different issue to define the parameters of this appeal.⁵
2. The Defence filed its appeal on 29 August 2022.⁶ Rather than addressing the issue certified for appeal, the Defence raises the same three issues that were rejected by the Trial Chamber, and only tangentially refers to the core issue on appeal.⁷ This is sufficient to dismiss the Defence appeal summarily. Nonetheless, given the importance of the certified issue to this case and to the Court in general, the Prosecution responds on the merits of the Defence’s arguments so as to assist the Appeals Chamber.
3. Even on the merits, the Defence submissions show no error in the Trial Chamber Majority’s approach. The Majority correctly interpreted the law and properly assessed the facts. It correctly exercised its discretion to authorise AVL testimony from the Bangui Field Office, according to the Statute, the Rules of Procedure and Evidence (RPE) and the consistent practice of Trial Chambers of this Court and other international criminal tribunals.
4. The Court’s legal framework recognises AVL testimony as a form of *viva voce* (oral) testimony. When the conditions of rule 67 of the RPE are met, AVL testimony is generally equivalent to in-court testimony given in The Hague. While a Chamber must consider the rule 67 RPE criteria as minimum essential criteria to authorise AVL testimony (as the Majority

¹ [Decision](#), paras. 9-19. For the purposes of this appeal, the Prosecution refers to testimony by video-conference link as “AVL testimony”. It refers to testimony given in the courtroom in The Hague as “in-court testimony” or “in-person testimony”, but equally acknowledges that AVL testimony may also amount to appearing “in person” before the Chamber.

² [Dissenting Opinion](#), paras. 1-18.

³ [Defence ALA](#).

⁴ [ALA Decision](#), paras. 7-9.

⁵ [ALA Decision](#), para. 10 (“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 its discretion, in general or on a case-by-case basis, before authorising the use of audio-visual technology?”)

⁶ [Appeal](#) or [Defence Appeal](#). The Office of the Prosecutor (OTP) was notified pursuant to regulation 31(2) of the Regulations of the Court (“[RoC](#)”) on 1 September 2022. Nonetheless, the Prosecution files its response by the original deadline elapsing today.

⁷ Compare [Appeal](#), paras. 26-64 with [Defence ALA](#), paras. 15-36.

correctly did), a Chamber may consider other factors in the proper exercise of its discretion, if deemed relevant. These factors, however, depend on the circumstances of the case and are neither mandatory nor determinative. In authorising AVL testimony, a Chamber's overarching duty is to ensure that the testimony is neither prejudicial to nor inconsistent with the accused's rights, and that it exercises its oversight over the testimony. Within these broad parameters, while conducting an individual case-by-case assessment is one method to authorise AVL testimony, a Chamber may equally consider other approaches to authorise AVL testimony in a fair, expeditious and efficient manner. The Majority in this case, and the Chambers in recent trials such as *Ongwen*, *Al Hassan* and *Yekatom & Ngaïssona* have correctly taken such approaches. Any other view would unduly constrain the legitimate exercise of discretion of Chambers overseeing trials and their ability to ensure the fair and efficient administration of justice. The Defence merely disagrees, but shows no error.

5. Therefore, the Prosecution respectfully requests the Appeals Chamber to dismiss the Defence Appeal.

SUBMISSIONS

A. Preliminary Issues

I. Scope of the Appeal

6. Regarding appeals under article 82(1)(d) of the Statute, Chambers have consistently held that it is for the relevant Pre-Trial Chamber or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent.⁸ When a party has raised grounds of appeal or submissions that go beyond the scope of the issue for which leave was granted, the Appeals Chamber has generally declined to consider them.⁹ In some instances, the Appeals Chamber considered arguments raised outside the scope of the appeal when they were “intrinsically linked” to the issue as certified as appeal.¹⁰ The Appeals Chamber has not found arguments to be “intrinsically linked” to the issue when they are unnecessary to review in order to determine

⁸ [Said Victims Participation AD](#), para. 42; [Said Contact Restrictions AD](#), para. 37; [Gbagbo & Blé Goudé Rule 68 AD](#), para. 13; [Gbagbo Confirmation Adjournment AD](#), para. 63; [DRC Extraordinary Review AD](#), para. 20; [DRC Victim Participation AD](#), para. 38; [Gbagbo & Blé Goudé Regulation 55 AD](#), para. 18; [Mangenda Compensation AD](#), para. 12; [ALA Decision](#), para. 6.

⁹ [Said Victims Participation AD](#), paras. 42, 44-47; [Ntaganda Restrictions AD](#), para. 85; [Lubanga Intermediaries AD](#), para. 45; [Kony et al. Victims Participation AD](#), paras. 32-33.

¹⁰ [Said Victims Participation AD](#), para. 42; [Said Contact Restrictions AD](#), paras. 37-40; [Ntaganda Restrictions AD](#), para. 85; [Gbagbo & Blé Goudé Rule 68 AD](#), paras. 13-19; [Gbagbo Confirmation Adjournment AD](#), fn. 142.

the central question before it.¹¹ Further, when a Pre-Trial or Trial Chamber had refused leave to appeal because the alleged errors/issues did not arise from the decision, the Appeals Chamber recalled that it is not an advisory body, and declined to address the issues in the abstract.¹² In an earlier appeal in this case, the Appeals Chamber dismissed several Defence arguments for exceeding the scope of the appeal.¹³

7. In this instance, the Defence adopts the same approach, raising three grounds of appeal based on issues for which the Trial Chamber had expressly denied leave to appeal.¹⁴ By definition therefore, they fall outside the scope of the appeal. Significant sections of the grounds of appeal are similarly—if not identically—worded to those rejected issues.¹⁵ The Trial Chamber found that the first and third issues did not arise from the Decision, and the second issue was a mere disagreement with its findings.¹⁶ The Defence merely repeats those issues on appeal—only the third ground of appeal expressly refers to the certified issue, and that too only cursorily.¹⁷ Despite this brief reference to the certified issue, it is unclear if several aspects of the Defence’s submissions are “intrinsically linked” to the appeal.¹⁸ Nor has the Defence argued that they are. In these circumstances, several aspects of the Defence Appeal should be dismissed summarily.

8. Nonetheless, given the importance of the certified issue to this case and others at the Court, the Prosecution respectfully requests the Appeals Chamber to address those relevant aspects to provide greater legal clarity.

¹¹ [Said Victims Participation AD](#), paras. 43-47 (dismissing arguments on the exercise of the Chamber’s discretion, when the issue concerned a question of law; likewise when the appeal concerned the procedure for the admission of victims under rule 89(1) RPE, dismissing arguments on the modalities of victim participation under rules 90-93 and reparations under rules 94-99 RPE); [Gbagbo Confirmation Adjournment AD](#), para. 64 (dismissing arguments on the evidentiary threshold for confirmation of charges, when the issue on appeal related to the interpretation of charges in the case); [Lubanga Intermediaries AD](#), para. 45 (dismissing arguments challenging prior orders on disclosure, when the appeal concerned the refusal to comply with orders of the Chamber and the propriety of the decision to impose a stay of proceedings).

¹² [Gbagbo Confirmation Adjournment AD](#), para. 65.

¹³ [Said Victims Participation AD](#), paras. 39-47.

¹⁴ Compare [Appeal](#), paras. 26-64 with [Defence ALA](#), paras. 15-36.

¹⁵ See [Appeal](#), paras. 26-27, 34-36, 38-39 (Ground 1), 40-44, 48-49 (Ground 2), 60-64 (Ground 3) and [Defence ALA](#), paras. 15-16, 19-23 (Issue 1), 24-28, 29-30 (Issue 2), 31-36 (Issue 3).

¹⁶ [ALA Decision](#), paras. 7-9.

¹⁷ [Appeal](#), paras. 19, 59 (referring to the certified issue, in the context of the procedural history and earlier submissions on the use of rule 68(3), RPE). *Contra* [Mangenda Compensation AD](#), para. 23 (dismissing the certified issue formulated *proprio motu* when the appellant did not address it and requested the Appeals Chamber to disregard it). Here, the Defence cursorily addresses the certified issue, implying that it asks the Chamber to consider it.

¹⁸ See *above* para. 6.

II. Expedited Decision

9. In granting leave to appeal, the Trial Chamber noted that the trial was scheduled to commence and that the certified issue had significant legal and practical implications for the case.¹⁹ The trial in this case is scheduled to begin on 26 September 2022.²⁰ Ordinarily, a decision in this appeal would be due by early January 2023.²¹ However, giving the imminent start of trial, the need to ensure a smooth trial without interruptions and the potential significance of the Appeals Chamber's judgment to several ongoing trials that use AVL testimony (for instance, *Yekatom & Ngaïssona*, *Al Hassan*, *Abd-Al Rahman*), the Prosecution respectfully requests the Appeals Chamber to expedite its decision in this instance.

B. Merits of the Appeal

10. The Defence fails to show that the Trial Chamber Majority erred. It misinterprets article 69(2) of the Statute (ground 1), misunderstands the nature of AVL testimony and overlooks the experience of professional judges hearing international cases (ground 2), and misstates rule 68(3) of the RPE and its rationale (ground 3). The Appeal should be dismissed.

I. Response to the First Ground of Appeal: The Majority correctly interpreted article 69(2) of the Statute in relation to AVL testimony

11. The Defence claims that in allowing witnesses to be heard *via* AVL in the case, the Trial Chamber Majority erred in its legal interpretation of article 69(2) of the Statute.²² It argues that the Majority overlooked the legal principle in article 69(2) that requires that witness testimony be given in person, and considered only the technical feasibility of the audio-video connection required by rule 67 of the RPE.²³ The Defence further argues, relying on the drafting history of the Rome Statute and the case law of other international tribunals, that the use of AVL testimony should be "exceptional" and justified on a case by case basis.²⁴ The Defence submissions are incorrect and should be rejected.²⁵

¹⁹ [ALA Decision](#), para. 11. The Defence did not seek suspensive effect of the appeal pursuant to article 82(3) of the Statute. The Appeals Chamber, therefore, need not consider this issue.

²⁰ [Trial Scheduling Decision](#), p. 13; [Prosecution Notification](#), paras. 1-7 (where the Prosecution submitted a revised order of appearance of witnesses for the first three blocks, on its own initiative, to allow for reliable planning and handling of challenging logistics, pending the appeal). Of 44 witnesses, 18 are proposed for the first three blocks until December 2022, leaving approximately 25-26 to be heard in 2023.

²¹ [Chambers Practice Manual](#), para. 93 (requiring decisions in article 82(1)(d) appeals to be rendered within four months from the filing of the response to the appeal brief).

²² [Appeal](#), paras. 26-39.

²³ [Appeal](#), para. 27.

²⁴ [Appeal](#), paras. 28-39.

²⁵ [Ntaganda AJ](#), paras. 36, 46.

12. *First*, in claiming that the Majority overlooked the legal principle in article 69(2) of the Statute, the Defence misreads the Decision.²⁶ The Majority clearly noted article 69(2) and found that it may permit AVL testimony only if it was not prejudicial to or inconsistent with the accused's rights.²⁷ Further, rather than limiting itself to merely the technical feasibility of the audio-video connection, the Majority correctly considered a broad range of factors and entered properly nuanced findings.²⁸ Moreover, contrary to the Appeal, the Majority exercised meaningful oversight: not only did it limit its authorisation of AVL testimony to the Bangui Field Office where rule 67 RPE criteria could be met, it also held that if the examination of witnesses *via* AVL was compromised at any stage, it would take necessary measures to avoid prejudice to the accused's rights.²⁹

13. *Second*, in arguing that the phrase "in person" in article 69(2) implies that AVL testimony must be used exceptionally, the Defence misinterprets that legal provision (and several others).³⁰ As its plain text shows, article 69(2) requires that witness testimony at trial shall be given in person, subject to measures provided in article 68 of the Statute (to protect victims and witnesses and to allow their participation in the proceedings) and otherwise in the RPE.³¹ It also recognises that Chambers may permit the giving of *viva-voce* (oral) testimony by a witness by means of video or audio technology, among other measures, according to the Statute and the RPE.³² Such measures shall not be prejudicial to or inconsistent with the accused's rights.³³

²⁶ [Appeal](#), para. 27; ALA Decision, para. 7; [Prosecution ALA Response](#), paras. 7-8.

²⁷ [Decision](#), para. 9.

²⁸ *Contra* [Appeal](#), para. 27; [Decision](#), para. 12 (AVL testimony (i) causes the least disruption to the witnesses' daily lives; (ii) avoids the need for a prolonged absence from their country of residence which could negatively affect their well-being and expose their cooperation and identity as witnesses; (iii) avoids the logistical challenges in transferring the witnesses to the seat of the Court, only exacerbated by the tense and volatile security situation in the CAR; (iv) may contribute to the smooth operation of the trial, especially given the likely COVID-related travel restrictions during the autumn and winter; and (v) is cost-efficient); 13-14 (the recent practice of several other Trial Chambers and important advances in AVL technology that allowed the Chamber to closely observe witnesses' reactions and facial expressions and to adapt the examination accordingly); 15 (regardless of whether the witnesses testified from inside the courtroom or *via* AVL, the Defence's right to confront the witnesses would be guaranteed); 16-18 (the AVL technology had generally functioned well in other cases, that the technical conditions and physical venue at the ICC Field Office in Bangui fully met the requirements of rule 67 RPE, that the conditions at the Bangui Field Office are conducive to giving truthful and open testimony and are adequate to safeguard the safety and well-being of the witnesses, and that the Registry staff at the Field Office can monitor the witnesses so as to avoid undue influence).

²⁹ [Decision](#), paras. 18-19. *Contra* [Appeal](#), para. 38 and [Dissenting Opinion](#), para. 4.

³⁰ [Appeal](#), paras. 26-39.

³¹ Article 69(2), [Statute](#): The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva-voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

³² Article 69(2), [Statute](#).

³³ Article 69(2), [Statute](#).

As the Appeals Chamber has held, the first sentence of article 69(2) implies that witnesses must appear before the Trial Chamber in person and give their evidence orally.³⁴ But it equally held that “in-court personal testimony” is not the exclusive mode by which a Chamber may receive witness testimony, noting the Chamber’s discretion to receive witness testimony by other means, consistent with the Court’s legal framework.³⁵ Although the Trial Chamber Majority correctly noted these different aspects of article 69(2),³⁶ the Defence submissions disregarded them, unduly focussing only on a single phrase in article 69(2).³⁷

14. Moreover, the Court’s legal framework expressly considers that AVL testimony is *viva voce* (oral) testimony, and equivalent to a witness being present before a Chamber.³⁸ In this context, and contrary to the Appeal,³⁹ Chambers have consistently noted that the phrase “given in person” in article 69(2) of the Statute does not imply that witness testimony should always be given by way of live testimony in court—but rather that a Chamber has broad discretion to hear witnesses *via* AVL provided certain conditions are met.⁴⁰ Consistent with these numerous decisions, the Trial Chamber Majority correctly noted that it had broad discretion to authorise AVL testimony.⁴¹ While the exercise of this discretion must be consistent with the Statute and the RPE (rule 67 RPE in particular) so as to ensure the accused’s rights (as the Majority

³⁴ [Bemba Admissibility AD](#), para. 76; [Ruto & Sang Rule 68 AD](#), para. 84; [Gbagbo & Blé Goudé Rule 68 AD](#), para. 65; [Al Hassan Rule 68 AD](#), paras 76-77; [Al Hassan Judge Ibáñez Dis Op](#), para. 2.

³⁵ [Bemba Admissibility AD](#), para. 77; [Gbagbo & Blé Goudé Rule 68 AD](#), para. 65; [Al Hassan Judge Ibáñez Dis Op](#), para. 2.

³⁶ [Decision](#), para. 9.

³⁷ [Appeal](#), para. 27; [ALA Decision](#), para. 7 (noting that the Defence had mischaracterised these aspects).

³⁸ See article 69(2), [Statute](#) (“the giving of *viva voce* (oral)...testimony of a witness by means of video or audio technology”); rule 67(1), [RPE](#) (“to give *viva voce* (oral) testimony before the Chamber by means of audio or video technology); by analogy, rule 134bis(1) RPE (“to be allowed to be present through the use of video technology during part or parts of his or her trial”); [Bemba et al. 4 March 2016 Decision](#), para. 10 (noting that rule 68(3) governs the introduction of prior recorded testimony for a witness who is “present before the Trial Chamber”, and that such witnesses appear *via* video link); [Bangladesh-Myanmar Hearings Decision](#), para. 24 (“[W]hen proceedings take place *via* video link, with the Chamber remaining in The Hague, there is no change of venue.”)

³⁹ [Appeal](#), paras. 27-28.

⁴⁰ [Bemba 12 October 2010 Decision](#), para. 10 (“The term ‘given in person’ used by [a]rticle 69(2) of the Statute, does not imply that witness testimony shall necessarily, under any circumstances, be given by way of live testimony in court. Instead, the Statute and Rules give the Court broad discretion...to permit evidence to be given *viva voce* (orally) by means of video or audio technology whenever necessary...”); [Bemba 3 April 2013 Decision](#), para. 8; [Ntaganda 12 October 2015 Decision](#), para. 12; [Ntaganda 17 August 2017 Decision](#), para. 5; [Gbagbo & Blé Goudé Rule 68\(3\) Decision](#), para. 16 (“In fact, as noted by [r]ule 67 of the Rules, video-link is not an exception to live testimony, but a means to give *viva voce* live testimony by means of audio or video technology.”); [Gbagbo & Blé Goudé Rule 68\(3\) Decision Judge Henderson Dis Op](#), paras. 1-2 (“There is little dispute that the Statute and the Rules give the Chamber a wide discretion to permit the *viva voce* testimony of witnesses to be given by means of video link technology, whenever this becomes necessary and appropriate, and is not prejudicial to or inconsistent with the rights of the Accused.”); [Bemba et al. 4 March 2016 Decision](#), para. 14; [Ongwen Conduct of Proceedings Decision](#), para. 17; [Al Hassan Conduct of Proceedings Decision](#), para. 54; [Yekatom & Ngaïssona Conduct of Proceedings Decision](#), paras. 29-31.

⁴¹ [Decision](#), paras. 9-11.

correctly noted),⁴² article 69(2) places no other limits on this discretion. In incorrectly arguing that a Chamber's discretion to rely on AVL measures is further limited, in principle, by the phrase "given in person" in article 69(2), the Defence overlooks the Statute and case law.⁴³

15. There is also no reason why the phrase "given in person" in article 69(2) should limit the exercise of this discretion in practice. When AVL witnesses are "present" before the Chamber and give "viva voce" testimony, there is simply no statutory imperative to treat their testimony significantly differently from in-court testimony.⁴⁴ In particular, the circumstances of AVL testimony are largely similar to in-court testimony and fulfil the requirements set out by the Appeals Chamber for in-court testimony — (i) AVL witnesses testify directly before the Chamber in real time and (ii) under oath.⁴⁵ Moreover, with the general advances in AVL technology, (iii) non-calling parties can examine witnesses without constraints, respecting the accused's right to confront witnesses under article 67(1)(e) of the Statute; and (iv) the Chamber can observe the demeanour and composure of AVL witnesses (and seek clarifications on aspects of testimony) just as it can for in-court witnesses.⁴⁶ Further, based on the recent experiences of AVL in several cases before the Court (including after hearing witnesses *via* AVL during the COVID-19 pandemic), trial judges have unequivocally endorsed the practice.⁴⁷ Rather than "fundamentally changing the nature of an ICC trial" as the Defence alleges, AVL testimony has been routinely used in trials at the Court, consistent with the accused's rights.⁴⁸

⁴² [Decision](#), paras. 9-11.

⁴³ [Appeal](#), paras. 27-28, 33.

⁴⁴ [Bemba et al. 4 March 2016 Decision](#), para. 11.

⁴⁵ [Bemba Admissibility AD](#), para. 76 ("The importance of in-court personal testimony is that the witness giving evidence under oath does so under the observation and general oversight of the Chamber. The Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded."); [Bemba et al. 4 March 2016 Decision](#), para. 12.

⁴⁶ [Bemba et al. 4 March 2016 Decision](#), para. 12.

⁴⁷ See e.g., [Bemba et al. 4 March 2016 Decision](#), para. 14; [Ongwen Conduct of Proceedings Decision](#), para. 17; [Al Hassan Conduct of Proceedings Decision](#), para. 54; [Yekatom & Ngaïssona Conduct of Proceedings Decision](#), para. 29; [Abd-Al-Rahman Oral Decision](#), 4:23-5:8 (Presiding Judge Korner: "[...] the Trial Chamber in *Tadić*—over 20 years ago now—obviously wasn't aware of recent investigations into credibility of witnesses and how misleading physical presence can be. But equally, the Trial Chamber in *Tadić* has not spent the last two years as a result of a pandemic watching nothing but witnesses on video link...[Evidence] by video link, which, as I say, has these days become so common and so used to it are all parties to criminal cases that it does not seem to me that it causes...any prejudice at all.")

⁴⁸ Of the ongoing cases: in *Al Hassan*, 33 of 52 Prosecution witnesses testified *via* AVL (of which 13 were also rule 68(3) RPE witnesses), all the LRV witnesses, and 9 of 15 Defence witnesses also testified *via* AVL (of which 4 were also rule 68(3)); in *Yekatom & Ngaïssona*, 29 of 95 Prosecution witnesses testified *via* AVL so far (of which 23 were also rule 68(3) witnesses); and in *Abd-Al-Rahman*, at least 9 Prosecution witnesses have testified or are planned to testify *via* AVL so far. Of these 9, at least 4 are also planned as rule 68(3) witnesses (all approximate numbers). *Contra* [Appeal](#), para. 36.

In addition, Judges have found that AVL testimony promotes the efficient administration of justice more than in-person testimony in some instances.⁴⁹

16. In this specific context, there should be no concern, in principle or in practice, that AVL testimony violates the principle of orality as such.⁵⁰ As above, an AVL witness is present before the Chamber, and testifies directly before the Judges.⁵¹ The witness and the Court are made “proximate” through the use of technology, and the proper application of rule 67 RPE criteria.⁵² When the criteria in rule 67 RPE are met, the AVL witness can be examined by the parties and the Chamber when he or she testifies.⁵³ Moreover, it ensures that the venue chosen is conducive to the giving of truthful and open testimony and to the witness’s safety, physical and psychological well-being, dignity and privacy.⁵⁴ Further, as the Appeals Chamber recently held, while the principle of orality in article 69(2) gives effect to the opportunity for an accused to examine a witness directly, this right to confront a witness is not absolute and may be restricted by law—as underscored by the recognition in article 69(2) that a Chamber may receive testimony other than in-court personal testimony, to the extent the Statute and Rules allow.⁵⁵ Judge Ibáñez has observed that testimony in forms other than *viva-voce*, reflected in article 69(2) of the Statute, also comply with the principles of orality, confrontation, immediacy and publicity, when the accused, parties and participants have the opportunity to discuss and submit on the introduction and eventual admission of the testimony.⁵⁶ Further, as the Appeals Chamber has held, respect for the principle of orality “cannot be reduced to a purely mathematical calculation of the percentage of witnesses [...]”.⁵⁷ While these Appeals Chamber pronouncements were made in the context of prior recorded testimony under rules 68(2) and 68(3) RPE (full or partial non-oral evidence), they are equally—if not more—relevant to AVL testimony, a statutory recognised form of *viva-voce* (oral) testimony.

⁴⁹ [Bemba et al. 4 March 2016 Decision](#), para. 13; [Yekatom & Ngaïssona Conduct of Proceedings Decision](#), para. 29.

⁵⁰ *Contra* [Appeal](#), paras. 34-35; [Dissenting Opinion](#), paras. 4-6.

⁵¹ *See above* para. 15.

⁵² *Contra* [Dissenting Opinion](#), paras. 4-6.

⁵³ Rule 67(1), [RPE](#).

⁵⁴ Rule 67(3), [RPE](#).

⁵⁵ [Al Hassan Rule 68 AD](#), paras. 77-78 (“[...] the right to confront a witness, as also recognised in human rights law, is not absolute. It can be restricted by law if the limitation is directed at a legitimate aim and only so far as is strictly necessary to achieve that aim. Article 69(2)...recognises that in some cases a chamber may receive testimony other than in-court personal testimony, to the extent that the Statute and Rules so allow.”); [Al Hassan Judge Ibáñez Dis Op](#), para. 3 (“The right to cross-examine witnesses is a procedural fair trial right that...may be subject to procedural rules, especially when other human rights are at stake.”)

⁵⁶ [Al Hassan Judge Ibáñez Dis Op](#), paras. 2-3.

⁵⁷ [Gbagbo & Blé Goudé Rule 68 AD](#), para. 78.

17. *Third*, the Defence misinterprets the drafters' intent behind article 69(2) of the Statute.⁵⁸ Contrary to the Defence's claim, the drafters of the Statute did not intend to make AVL testimony "exceptional".⁵⁹ Rather, the principle that a witness shall be heard directly and in person (now in article 69(2)) was first discussed in the context of *depositions* in the 1996 Preparatory Committee session.⁶⁰ The drafters did not mention AVL testimony in this context. Although the proposal was further defined in the 1997 session, with a specific reference to AVL testimony being added in the 1998 session, the final decision on when and how technology could be used to hear witnesses was left to the Rules or for a Chamber to elaborate.⁶¹ Rule 67 RPE then elaborated the safeguards for the use of such technology to hear witnesses.⁶² Thus, as the drafting history confirms, neither the Statute nor the Rules mandate that the use of AVL testimony be "exceptional".⁶³

18. Moreover, contrary to the Appeal, article 68 of the Statute does not limit a Chamber's use of AVL testimony either.⁶⁴ As article 69(2) makes clear, its reference to article 68 was meant to enhance the protective function of the Statute, not to limit AVL testimony to only those situations allowed under article 68.⁶⁵ This is apparent in that article 68 is not the only relevant factor in article 69(2); the latter also provides for AVL testimony separately subject to other conditions. Likewise, merely because article 69(2) gives Chambers discretion in authorising

⁵⁸ [Appeal](#), paras. 28, 34.

⁵⁹ [Appeal](#), para. 28. See Piragoff/Clarke, pp. 2039-2040 (mns. 2-3).

⁶⁰ Piragoff/Clarke, pp. 2039-2040 (mn. 2); [PrepCom Report II 1996](#), pp. 217, 220 (on the proposals from Japan and France).

⁶¹ Piragoff/Clarke, p. 2040 (mn. 3) ("At the Rome Conference, there was again some discussion about including within the Statute the justifications for the use of technologically transmitted or recorded testimony, but the final decision was to confirm that there were matters of detail for the Rules or the Court to elaborate"); Stahn/Da Silva, p. 1905 ("Plusieurs délégations à la Conférence de Rome ont estimé que l'utilisation des moyens électroniques devrait être incluse dans le Statut, mais il a finalement été décidé que cette question pourrait être examinée ultérieurement dans le RPP."); [PrepCom Decisions 1997](#), pp. 30-31.

⁶² Brady, pp. 454-455 ("Pursuant to [r]ule 67 a witness may be enabled to give live oral testimony from his or her home territory, or another location, which is then 'beamed' live to the Court by means of audio or video technology").

⁶³ *Contra* [Appeal](#), paras. 28, 34. See [Al Hassan Judge Ibáñez Dis Op](#), para. 33 ("...the reference to [the RPE] in article 69(2)...was included by the drafters to promote 'the greatest possible access to evidence of probative value consistent with the rights of the accused'").

⁶⁴ [Appeal](#), para. 34; [Dissenting Opinion](#), para. 10.

⁶⁵ Piragoff/Clarke, pp. 2040 (mn. 3), 2054 (mn. 30) ("The second sentence of article 69(2)...is separate from the authority provided in the exceptions in the first sentence of paragraph 2... This redundancy clarifies the availability of this type of technology for circumstances where the protection of vulnerable victims and witnesses is not at issue"), 2055 (mn. 31); Stahn/Da Silva, p. 1906; Brady, p. 455 ("While [r]ule 67 could be especially useful in cases where protection for a witness is needed, it should be noted that use of the rule is not confined to situations where protection is in issue. For example, it may also be invoked when it is physically impossible for the witness to come to Court."); [Gbagbo & Blé Goudé Rule 68\(3\) Decision](#), para. 16 ("[Video-link] should not be viewed as a protective measure. Although it is a possible protective measure, it is also a method that facilitates live testimony when other issues arise."); [Al Hassan Judge Ibáñez Dis Op](#), para. 31 (on the interplay between article 69(2) and article 68).

AVL testimony (through the use of the word “may”, also in article 68(2)) does not necessitate that such discretion be exercised exceptionally.⁶⁶ Further, the reference to “witness” in rule 67 RPE, as opposed to its plural form “witnesses”, does not imply that the decision to authorise AVL testimony must always be taken on a case-by-case basis.⁶⁷ Several provisions in the RPE use that formulation, without limiting the purpose of those provisions.⁶⁸ Moreover, considering that the details of AVL testimony were intentionally left to the Rules, if the drafters had intended to make all AVL assessment on a case-by-case basis, they would have said so.⁶⁹ But they did not.

19. *Fourth*, the Defence’s reliance on case law from international criminal tribunals is selective and inapposite.⁷⁰ The practice of hearing witnesses *via* AVL at international criminal tribunals allows flexibility in this respect (although they may have differently worded legal standards); they have authorised AVL testimony on a broad range of criteria (not limited to exceptional circumstances).⁷¹

- Most recently, at the Kosovo Specialist Chambers (KSC), the rules provide that a Panel may order AVL testimony, subject to conditions similar to those set out in rule 67 of the Court’s RPE.⁷² Once these conditions are met, in-person testimony and AVL testimony are considered as “equal options to give live testimony”.⁷³ Parties have a certain degree of flexibility in deciding on AVL testimony, subject to countervailing considerations, including logistics and the Panel’s overarching duty to ensure that the trial is fair and expeditious.⁷⁴
- At the Special Tribunal for Lebanon (STL),⁷⁵ and the International Criminal Tribunal for the former Yugoslavia (ICTY),⁷⁶ AVL testimony has been considered an extension of the courtroom. Chambers at these tribunals have held that AVL testimony allows for effective cross-examination and protects the accused’s rights.⁷⁷ Moreover, AVL testimony is accorded

⁶⁶ *Contra* [Dissenting Opinion](#), para. 10.

⁶⁷ *Contra* [Dissenting Opinion](#), para. 12.

⁶⁸ See e.g., rules 63-75, [RPE](#).

⁶⁹ See *above* para. 17.

⁷⁰ [Appeal](#), paras. 28-32.

⁷¹ *Contra* [Appeal](#), paras. 28-32.

⁷² Rule 144, [KSC Rules](#).

⁷³ KSC: [Mustafa Decision](#), paras. 24-25.

⁷⁴ [Mustafa Decision](#), paras. 24-25.

⁷⁵ STL: [Ayyash et al. 25 February 2014 Decision](#), paras. 5-14, 21-29; [Ayyash et al. 19 June 2014 Decision](#), para. 12 (“Video-conference link testimony: is merely an extension of the courtroom; protects the rights of the Accused; allows all concerns to assess the credibility and reliability of the witness; and, garners as much probative value as in-person testimony.”); rule 124, [STL Rules](#).

⁷⁶ ICTY: [Stanišić & Simatović 18 June 2010 Decision](#), para. 5; [Gotovina Decision](#), para. 8.

⁷⁷ [Ayyash et al. 19 June 2014 Decision](#), para. 12; [Stanišić & Simatović 18 June 2010 Decision](#), para. 5; [Gotovina Decision](#), para. 8.

as much probative weight as in-person testimony.⁷⁸ Although the Defence relies on a 1996 decision in *Tadić*,⁷⁹ it fails to note that the ICTY AVL practice significantly evolved since then, including by making express changes to the Rules to support AVL testimony.⁸⁰ Chambers at the International Residual Mechanism for Criminal Tribunals (IRMCT) have also broadly authorised AVL testimony in the interests of justice, more so during the COVID-19 pandemic.⁸¹

- At the International Criminal Tribunal for Rwanda (ICTR), a Trial Chamber had discretion to hear AVL testimony either for purposes of witness protection or more broadly, in the interests of justice.⁸² Chambers at the Special Court for Sierra Leone (SCSL) had similar discretion.⁸³ The Extraordinary Chambers in the Courts of Cambodia (ECCC) have also recognised the Chamber's broad discretion to hear AVL testimony.⁸⁴

20. As above, nothing in the practice of international criminal tribunals supports the Defence's view that AVL testimony at the ICC should be limited to only those exceptional circumstances when the witness would not otherwise be heard.⁸⁵ Rather, as international judges have said, arguments to limit AVL testimony as an "exceptional measure" overlook both the historical developments and technological advancements in AVL technology.⁸⁶ The consistent recent trend at international tribunals has been to recognise a Chamber's discretion to authorise AVL testimony on a broad range of criteria⁸⁷—which does not require the calling party to

⁷⁸ *Ayyash et al. 25 February 2014 Decision*, para. 23; *Gotovina Decision*, para. 8.

⁷⁹ Appeal, para. 29, citing *Tadić Decision*, paras. 18-19.

⁸⁰ See rule 81bis, *ICTY Rules*, adopted on 12 July 2007, allowing AVL proceedings to be conducted in the interests of justice. The earliest version of the Rules did not provide for AVL testimony. The first ICTY Rule explicitly authorising video-conference link testimony was adopted in mid-1997, but only in "exceptional circumstances and in the interests of justice". The reference to exceptional circumstances was deleted in late 1999; *Abd-Al-Rahman Oral Decision*, 4:23-5:8; *Ayyash et al. 25 February 2014 Decision*, paras. 5-14.

⁸¹ IRMCT: *Stanišić & Simatović 11 September 2020*, p.1; rule 96, *IRMCT Rules*.

⁸² ICTR: *Rukundo AJ*, para. 221; *Ngirabatware Decision*, para. 22; *Nizeyimana Decision*, paras. 5-6; *Kanyarukiga Decision*, paras. 9-11 (while some case law used the phrase "exceptional circumstances", this does not necessarily imply a higher standard to authorise AVL testimony).

⁸³ SCSL: *Taylor 18 November 2008 Decision*, pp. 2-3; rule 85(D), *SCSL Rules*.

⁸⁴ ECCC: *Case 002 24 April 2013 Order*; *Case 002/01 Decision*, para. 48; *Case 002 12 May 2015 Decision*, para. 5; Internal rule 26, *ECCC Rules*.

⁸⁵ *Contra Appeal*, para. 33.

⁸⁶ *Ayyash et al. 25 February 2014 Decision*, para. 25; *Abd-Al-Rahman Oral Decision*, 4:23-5:8.

⁸⁷ See e.g., *Ayyash et al. 25 February 2014 Decision*, paras. 27-28 (a comprehensive approach to assess the interests of justice, including the accused's rights, the nature of the evidence, the reported views and personal circumstances of the witness, the current situation in Lebanon, the concerns and objections, if any, of the Defence, expeditiousness, and logistical and financial resources); *Mladić Decision*, paras. 3-14 (taking a broad approach to the interests of justice); *Gotovina Decision*, para. 12 (misuse of Tribunal's resources, and incompatible with expeditiousness, to have witnesses travel to The Hague to give brief testimonies); *Nizeyimana Decision*, para. 6 (the reason for refusal to attend need not be objectively justified); *Case 002/01 Decision*, para. 48 (AVL as an alternative to hear an elderly or physically frail witness); *Lubanga 9 February 2010 Decision*, para. 15 (wide range of factors under rule 67 RPE); *Bemba 12 October 2010 Decision*, para. 13 (personal circumstances not limited to well being); *Bemba 3 April 2013 Decision*, para. 12; *Ntaganda 12 October 2015 Decision*, para. 12 (listing non-

demonstrate that AVL is the only mode available to hear their testimony.⁸⁸ Chambers have also allowed “umbrella-type” applications for a group or bloc of witnesses for AVL, when the individual considerations and supporting circumstances are so indistinguishable as to warrant a more general approach.⁸⁹

21. The practice at the ICC, following its legal framework, is similar. In all recent trials since *Ongwen* in 2016, Trial Chambers have uniformly stated that parties need not request or justify that a witness be heard by video-link.⁹⁰ Instead, the calling party or participant must provide clear notice of this in its list of witnesses.⁹¹ While the parties and participants are afforded some flexibility in this respect, it is always subject to the Chamber’s duty to ensure a fair and expeditious trial and oversight.⁹² In any authorisation of AVL testimony, what is essential is to ensure the Chamber’s ability to ensure a fair and expeditious trial. Whether that is achieved by an individual case by case determination, or by adopting an “umbrella approach” for similarly placed witnesses, or by giving parties the initial flexibility to decide in their list of witnesses remains up to the proper exercise of the Chamber’s discretion in the circumstances of a case. The Defence unduly underscores the individual case by case approach, to the exclusion of all others available to a Chamber to ensure a fair and expeditious trial.⁹³ Likewise, although all Chambers must comply with the minimum essential criteria in rule 67 RPE in authorising AVL testimony, they may consider additional factors, if necessary, in the proper exercise of their discretion. Any additional factors will be case-specific. No factor is necessarily determinative. Further, a Chamber is entitled to limit its assessment to rule 67 RPE criteria, if the case so requires. This accords with the approach the Appeals Chamber has recommended for other

exhaustively age, vulnerability, state of health, psychological wellbeing, procedural and logistics considerations); [Ntaganda 17 August 2017 Decision](#), para. 5 (no exceptional justification needed); [Gbagbo & Blé Goudé Rule 68\(3\) Decision](#), paras. 16, 19 (protection, impossibility to obtain visa or illegal migratory status, budget and logistics); [Gbagbo & Blé Goudé Rule 68\(3\) Decision Judge Henderson Dis Op](#), para. 2; [Gbagbo & Blé Goudé 3 November 2017 Decision](#), para. 35 (health, anxiety about travelling, length of testimony).

⁸⁸ *Contra Appeal*, para. 33.

⁸⁹ See e.g., [Ayyash et al. 7 July 2015 Decision](#), paras. 9, 12 (declining to give a general authorisation, but allowing that “certain categories of personal circumstances and conditions relating to the witnesses could be consistent with....the interests of justice. In those circumstances, a more expeditious, simplified and consensus based approach could be more efficient.”)

⁹⁰ [Ongwen Conduct of Proceedings Decision](#), para. 17; [Al Hassan Conduct of Proceedings Decision](#), para. 54; [Yekatom & Ngaissona Conduct of Proceedings Decision](#), paras. 29-31.

⁹¹ [Ongwen Conduct of Proceedings Decision](#), para. 17; [Al Hassan Conduct of Proceedings Decision](#), paras. 54-55; [Yekatom & Ngaissona Conduct of Proceedings Decision](#), paras. 29-31. See also [Prosecution List of Witnesses](#), para. 3 (for a similar approach in this case).

⁹² [Ongwen Conduct of Proceedings Decision](#), para. 17; [Al Hassan Conduct of Proceedings Decision](#), paras. 54-55; [Yekatom & Ngaissona Conduct of Proceedings Decision](#), paras. 29-31.

⁹³ [Appeal](#), para. 39.

procedural aspects of trial where a Trial Chamber exercises similar discretion (*i.e.*, rule 68 RPE).⁹⁴

22. In this instance, the Trial Chamber Majority correctly authorised AVL testimony for witnesses from the Bangui Field Office, consistent with the Statute (including the drafters' intent), the current practice at the Court and in other international tribunals. It correctly found that the minimum essential criteria in rule 67 RPE were met, and in the proper exercise of its discretion, also considered other relevant additional factors.⁹⁵ Moreover, it was not bound to conduct a case-by-case assessment per witness: it was fair and expeditious to authorise the similarly placed witnesses in CAR and other nearby locations to testify from the Bangui Field Office, since they would be similarly assessed. The Majority was correct to find that the parties retained this flexibility in their assessment, subject to its oversight.⁹⁶

23. The Defence shows no error. The first ground of appeal should be dismissed.

II. Response to the Second Ground of Appeal: The Majority correctly found that witness examination via AVL did not qualitatively differ when rule 67 RPE conditions were met

24. The Defence claims that in finding that there was no “qualitative difference” between in-person and AVL testimony, the Trial Chamber Majority erred in fact.⁹⁷ However, it misreads the Decision and misinterprets the nature of AVL testimony at the Court. Moreover, it presents unsubstantiated arguments to second-guess the wisdom and experience of professional trial judges hearing witnesses in international criminal trials. It contradicts established practice that if certain conditions are met, in-court and AVL testimony are generally equivalent—each mode with its own set of advantages. Likewise, while the Defence relies on several submissions and reports to support its view, they are inapposite. In contrast, the Trial Chamber Majority's findings were reasonable.⁹⁸ The Defence fails to show an error.

25. *First*, in claiming that the Chamber erred, the Defence misreads the Majority's key finding and omits critical nuances.⁹⁹ Rather than setting out a general unqualified equivalence between AVL and in-person testimony, the Majority correctly found that there was no

⁹⁴ [Gbagbo & Blé Goudé Rule 68 AD](#), para. 69 (noting with respect to rule 68(3), that the Chamber's exercise of discretion was governed by factors, not requirements, and that no factor was, in principle, determinative).

⁹⁵ [Decision](#), paras. 12-19.

⁹⁶ [Decision](#), paras. 12-19.

⁹⁷ [Appeal](#), paras. 40-58.

⁹⁸ [Ntaganda AJ](#), paras. 39-43, 46.

⁹⁹ [Appeal](#), paras. 40-41; [ALA Decision](#), para. 8; [Prosecution ALA Response](#), paras. 12-16.

qualitative difference between *examining witnesses* in those two modes of hearing witnesses, *provided the conditions under rule 67 are respected*.¹⁰⁰ Based on the significant practice before the Chambers of this Court and other international tribunals,¹⁰¹ and given that the Defence has raised only generic objections,¹⁰² the Majority's findings were correct and reasonable. Further in implying that AVL witnesses are not "present" before the Court, the Defence misunderstands the nature of AVL testimony in the Court's legal framework.¹⁰³ As shown above, claims that AVL violates the principle of orality under the Statute, or the solemnity of the proceedings are inapposite.¹⁰⁴

26. Likewise, in arguing that the accused should also be "present" during AVL testimony, the Defence fails to note that the accused is, in fact, "present" during all testimony (whether in-person or *via* AVL).¹⁰⁵ An accused is not made a "spectator" at his or her own trial, merely because the Court uses the latest technology (including computer screens) in the courtrooms to facilitate the trial.¹⁰⁶ Judges routinely use screens to observe the parties, participants, witnesses and the accused (whether they are physically present in the courtroom or not), and *vice versa*.¹⁰⁷ None of this makes an accused a "spectator" at his own trial.

27. *Second*, while the Defence assumes that its examination of witnesses will be affected by AVL, it incorrectly advances these submissions to oppose AVL testimony in absolute terms, contradicting the Statute and Rules that empower a Chamber to hear such testimony.¹⁰⁸ Many of the Defence submissions mistakenly imply that AVL testimony should never be used at the Court.¹⁰⁹ Moreover, the Defence overlooks that the Majority stated that the right to confront witnesses would be guaranteed and that it would take necessary measures to avoid prejudice, should the examination be compromised.¹¹⁰ It fails to consider that its stated concerns would be addressed by a proper application of rule 67 RPE and the Chamber's own oversight of the

¹⁰⁰ [Decision](#), para. 14.

¹⁰¹ *See above* paras. 14-16, 19-21.

¹⁰² *See e.g.*, [Defence AVL Testimony Response](#), paras. 28-29.

¹⁰³ [Appeal](#), para. 58; *see above* paras. 14-16.

¹⁰⁴ [Appeal](#), paras. 43, 56, 58; *see above* paras. 14-16.

¹⁰⁵ [Appeal](#), para. 57.

¹⁰⁶ *Contra* [Appeal](#), para. 57.

¹⁰⁷ *See* [Ayyash et al. 25 February 2014 Decision](#), paras. 23-24; [Kupreškić Judge Hunt Sep Op](#), para. 30 ("Such is the geography of the courtrooms used by the Tribunal that the view of the witness and of the witness's demeanour on the television screens provided throughout the courtroom is usually better than that from across the room.")

¹⁰⁸ [Appeal](#), paras. 41, 45-46, 48-50.

¹⁰⁹ [Appeal](#), para. 41 (AVL can never replace in-person connection with a witness, the results of examination will always be different *via* AVL, technology affects perception); 45 (the need to create personal rapport with the witness); 48-49 (cross-examination implies a form of hostility towards the examiner, non-calling party faces prejudice using AVL, additional problems of interpretation).

¹¹⁰ [Decision](#), paras. 15, 18.

witness's examination. In this context, the Defence's generic claims of potential prejudice as a non-calling party must fail.¹¹¹ The Defence also overlooks that several recent trials at this Court (*Ongwen*, *Al Hassan* and *Yekatom & Ngaïssona* for instance) have heard extensive AVL witness testimony—the trials have proceeded smoothly without being hindered by the issues the Defence alleges.¹¹² In addition, Judges have noted several benefits in using AVL: in some cases it has been found to promote the efficient administration of justice more than in-court testimony.¹¹³ In particular, to call a witness to testify in The Hague, the parties, participants and the Registry must take a series of logistically difficult and time-consuming steps, which may not be advisable in every instance. For example, in this case alone, some in-court testimony is contingent on significant documentation (birth certificates, certified proof of nationality, vaccination proof) and the availability of limited flights for international travel, among other factors. In this case, the coordination required to successfully ensure the in-court appearance of many witnesses exceeds what is needed to organise in-country AVL.¹¹⁴ The cost of doing so can also be substantial. In contrast, all the benefits of AVL testimony are equally available to the Defence, should it wish to avail of them.

28. Significantly, the Defence arguments disregard the experience of professional judges overseeing international criminal trials. These Judges have found that, given the significant advances in technology, there are only insignificant differences between in-court and AVL testimony.¹¹⁵ They have also unequivocally found that AVL testimony did not violate the accused's rights.¹¹⁶ Further, they have found that AVL testimony has the same probative value as in-court testimony.¹¹⁷ Moreover, several issues the Defence raises have been previously considered by professional judges and rejected as having no merit.¹¹⁸ While the Defence merely

¹¹¹ [Appeal](#), paras. 48-49.

¹¹² [Appeal](#), paras. 45-46.

¹¹³ [Bemba et al. 4 March 2016 Decision](#), para. 13 ("Witnesses may have travel, health, security or other concerns which militate in favour of their attendance at a video-link location rather than the seat of the Court. The parties may prefer hearing of witnesses via video-link to accommodate witness preferences or overcome logistical obstacles so that witnesses can testify in a specific sequence. The Registry...may also have time and resource constraints which make video-link preferable to in-court testimony").

¹¹⁴ For instance, if a witness travels from the CAR, the main steps needed include requesting a birth certificate, proof of nationality, passport or passport extension, visa for Uganda, transit in Uganda, visa for The Netherlands, proof of yellow fever vaccination, flight and travel arrangements, and lodging during testimony. When all these steps are needed, it takes a total of 11-12 weeks to prepare.

¹¹⁵ See e.g., [Bemba et al. 4 March 2016 Decision](#), paras. 12, 14; [Ongwen Conduct of Proceedings Decision](#), para. 17; [Al Hassan Conduct of Proceedings Decision](#), para. 54; [Yekatom & Ngaïssona Conduct of Proceedings Decision](#), para. 29; [Abd-Al-Rahman Oral Decision](#), 4:23-5:8; [Ayyash et al. 25 February 2014 Decision](#), para. 21.

¹¹⁶ See above paras. 15, 19.

¹¹⁷ See above paras. 15, 19. See also [Dissenting Opinion](#), para. 17.

¹¹⁸ For e.g., compare [Appeal](#), para. 42 (claiming that the witness cannot see everyone in the courtroom at the same time) with [Ayyash et al. 25 February 2014 Decision](#), para. 24 (the available technology allows witness testifying

disagrees with these judicial findings rendered across cases and across tribunals, this fails to show error.

29. *Third*, the Defence is not assisted by its reliance on the Prosecution's views in other contexts, or on the reports it cites.¹¹⁹ While the Defence relies on the Prosecution's 2016 submissions in *Gbagbo & Blé Goudé*,¹²⁰ those submissions related to the witness familiarisation process conducted by the Victims and Witnesses Unit (VWU) in that case, and not to witness testimony (a different aspect of the proceedings)¹²¹—a distinction the Appeal fails to make. In particular, in *Gbagbo & Blé Goudé*, the Prosecution had addressed the practice of conducting vulnerability assessments of witnesses by the VWU psychologist *via* video-link, and the importance of conducting these specific assessments in person.¹²²

30. Similarly, while the Defence relies on the view of representatives of the OTP in 2013 expressed in a report for the International Bar Association (IBA),¹²³ it takes them out of their wider context. In particular, the Defence fails to acknowledge that the IBA Report was critical of the Court's excessive reliance on "live" witnesses testifying in The Hague.¹²⁴ While considering views of the OTP and the Defence, the IBA had also noted that there were several practical advantages of AVL testimony for the Court and witnesses.¹²⁵ Moreover, the Defence fails to note that the OTP views it cites were expressed almost a decade ago. Since then, noting the obvious advances in and quality of AVL technology (including as was evident during the remote court hearings during the COVID-19 pandemic), the OTP's position has naturally evolved,¹²⁶ as have the views of the Judges. When the Court has demonstrated its ability to conduct fully remote or partly remote hearings,¹²⁷ there is little doubt that it can properly sustain AVL testimony for individual witnesses.

remotely to see different speakers in the courtroom with dynamic camera views); [Gbagbo & Blé Goudé 3 November 2017 Decision](#), para. 36 (with basic preparation, presentation of documents *via* AVL can be smooth).

¹¹⁹ [Appeal](#), paras. 44, 50-58.

¹²⁰ [Appeal](#), para. 44, relying on [Prosecution Gbagbo Submissions](#); [Prosecution ALA Response](#), para. 15.

¹²¹ [Prosecution Gbagbo Submissions](#), paras. 7-12.

¹²² [Prosecution Gbagbo Submissions](#), paras. 7-12 (10: Vulnerability assessments entail a process of gathering in-depth information on the vulnerability of an individual, to ensure that appropriate measures are taken, or put in place, in order to facilitate their testimony at trial, without causing re-traumatisation...[the] very focus of the enquiry demands a process designed to enhance the witness experience and should be as unthreatening as possible.")

¹²³ [Appeal](#), para. 47, referring to [IBA 2013 Report](#), p. 18.

¹²⁴ [IBA 2013 Report](#), pp. 14, 18.

¹²⁵ [IBA 2013 Report](#), p. 18.

¹²⁶ [Prosecution AVL Submissions](#), paras. 4-7.

¹²⁷ [ICC Pandemic Hearing Guidelines](#), paras. 1-4, 6 (recognising a Chamber's autonomy to decide on fully or partly remote hearings); [Al Hassan 29 April 2020 Order](#), para. 7 (feasibility of hearing AVL testimony, among other issues); [Registry Al Hassan Submissions](#), paras. 12-14 (on remote or partly remote hearings); [Gbagbo & Blé](#)

31. Likewise, although the Defence presents various reports on the experience of “virtual hearings” in diverse domestic settings, given the significant differences in context, they are not necessarily comparable to the Court’s established experience.¹²⁸ Some of the cited reports expressly exclude the experience of criminal trials from their purview.¹²⁹ Most note the overall positive experience of virtual hearings.¹³⁰ Notwithstanding, these reports or individual views on domestic proceedings (including on the experience of remote hearings during the pandemic) do not assist the Defence in its views on AVL testimony at the Court.

32. For the reasons above, the Defence shows no error. The second ground of appeal should be dismissed.

III. Response to the Third Ground of Appeal: The Majority correctly rejected the Defence submissions on rule 68(3) RPE

33. The Defence argues that—in finding that the testimony of a number of witnesses would be heard under rule 68(3) RPE did not alter its authorisation of AVL testimony—the Trial Chamber Majority erred in fact and in law.¹³¹ Addressing the certified issue, the Defence claims that the fact that witnesses were heard under rule 68(3) RPE should have been an “additional criteria” that the Majority should have considered.¹³² In claiming that the Majority’s findings were incorrect and poorly reasoned, the Defence mistakes the law and practice relating to rule 68(3) RPE. Likewise, it misreads the Decision.¹³³ The Majority’s findings are correct, reasonable and reasoned. The Defence fails to show error.

34. *First*, consistent with a Chamber’s broad discretion to authorise AVL testimony for a range of factors, the circumstances of the testimony (including whether it is introduced under rule 68(3) RPE) *may* be a relevant factor, depending on the circumstances of the case, to assess if the AVL measure accords with the Statute and does not prejudice the accused’s rights. However—consistent with the Statute, RPE and the Appeals Chamber’s approach to discretionary decisions on trial matters—such a factor is not a mandatory requirement.¹³⁴ Only

[Goudé Hearing AD](#), paras. 15-21 (scheduling a partially virtual appeal hearing); [Abtahi](#), 1076 (noting the Court’s ability to conduct fair and expeditious hearings at the pre-trial, trial and appeal stages during the pandemic).

¹²⁸ [Appeal](#), paras. 51-58, referring to [Slingo](#); [Bars Statement](#); [BRG Report](#); [Baker McKenzie Survey](#); [Tralmaka](#).

¹²⁹ See e.g., [Baker McKenzie Survey](#), p. 3 (limited to users of the English civil and commercial courts and international arbitrations, excluding criminal trials *inter alia*). *Contra* [Appeal](#), para. 53.

¹³⁰ [Slingo](#) (noting the BRG research that virtual hearings have been ‘largely positive’, often exceeding expectations); [Bars Statement](#) (support the continuing use of technology in courts); [BRG Report](#), p. 3; [Baker McKenzie Survey](#), p. 4.

¹³¹ [Appeal](#), paras. 59-64.

¹³² [Appeal](#), para. 59.

¹³³ [Appeal](#), paras. 59-64.

¹³⁴ See e.g., [Gbagbo & Blé Goudé Rule 68 AD](#), para. 69.

the criteria in rule 67 RPE are mandatory, being the minimum essential criteria to authorise AVL testimony.¹³⁵

35. In this instance, the Majority considered *inter alia* that the testimony of a number of witnesses would be introduced under rule 68(3) of the Statute—but found that it did not alter its authorisation of the AVL testimony.¹³⁶ On the alleged prejudice, the Majority found that the key consideration was that the Defence must be able to confront the witnesses—a right that would be guaranteed, whether the witness testifies in the courtroom or *via* AVL.¹³⁷ Further, it found that there was no *undue* prejudice to the Defence because they would cross-examine *via* AVL.¹³⁸ In so finding, the Majority correctly rejected the Defence’s view that a cross-examining party must be *identically* placed to the examining party.¹³⁹

36. In the circumstances of the case, the Majority was correct and reasonable to consider and find that the fact that several witnesses were rule 68(3) ones did not alter its AVL authorisation, *once the right to confront them was guaranteed*. This accords with the Appeals Chamber’s recent guidance on article 67(1)(e) of the Statute.¹⁴⁰ Moreover, if it is considered that the examination could be affected, the Majority is prepared to take measures to avoid any prejudice¹⁴¹—a fact the Defence does not mention. At that stage, if any undue prejudice should materialise, several measures are available to the Chamber (including the possibility to call witnesses before the Chamber on a case-by-case basis). At this stage, however, the Defence’s general arguments alleging unfairness are premature, especially since the Chamber has yet to determine the total number of rule 68(3) witnesses to be called.¹⁴² The Majority was also correct to dismiss the Defence’s “in principle” opposition since it misinterprets rule 68(3) RPE and would, indeed, make that legal provision redundant.¹⁴³ The Defence’s position also overlooks that several Chambers have heard rule 68(3) witnesses *via* AVL.¹⁴⁴

37. *Second*, the Defence misinterprets rule 68(3) RPE in several ways.

¹³⁵ See above paras. 20-22.

¹³⁶ [Decision](#), para. 15.

¹³⁷ [Decision](#), para. 15.

¹³⁸ [Decision](#), para. 15.

¹³⁹ [Decision](#), para. 15.

¹⁴⁰ [Al Hassan Rule 68 AD](#), paras. 75-78; [Al Hassan Judge Ibáñez Dis Op](#), paras. 2-3, 39-45.

¹⁴¹ [Decision](#), para. 18.

¹⁴² [Appeal](#), paras. 49 (Ground 2), 61-64 (Ground 3). See [Prosecution Rule 68\(3\) Request](#), paras. 5-12 (for the benefits of using rule 68(3)).

¹⁴³ [Decision](#), para. 15.

¹⁴⁴ See e.g., [Bemba et al. 4 March 2016 Decision](#), para. 10. See above fn. 48.

- While the Defence incorrectly claims that rule 68(3) RPE should be used “exceptionally”,¹⁴⁵ the Appeals Chamber has not limited it in this manner.¹⁴⁶ Rather, the Appeals Chamber has found that several factors in a non-exhaustive list may be legitimately considered for introducing testimony under rule 68(3).¹⁴⁷ Although Chambers must carefully consider factors allowing the use of rule 68(3) on a case by case basis, they are not limited to making such use “exceptional”.¹⁴⁸ In particular, rule 68(3) is a particular tool to enhance the expeditiousness of proceedings.¹⁴⁹
- While the Defence alleges “*un déséquilibre*” in the rule 68(3) mechanism and that the equality of arms would be affected if the Defence were to cross-examine witnesses *via* AVL,¹⁵⁰ it fails to note that the Defence may exercise its right to conduct a full cross-examination of all rule 68(3) witnesses (whether in-person or *via* AVL), while the Prosecution’s examination of those witnesses is necessarily curtailed under rule 68(3) RPE. The relevant question, therefore, is not whether the examining parties are in *identical* circumstances under rule 68(3) (they are not expected to be)—but rather whether the right to confront witnesses is respected. As the Appeals Chamber has held, this right, as an extension of the principle of equality of arms, requires that an accused is given an effective opportunity to question and challenge the witness giving incriminating evidence.¹⁵¹ But it is not absolute.¹⁵² Further, a Trial Chamber must make the questioning of witnesses fair and effective for the determination of truth.¹⁵³ As stated above, the Majority has guaranteed this right and has expressed that it will intervene to avoid any prejudice. There is no error.

38. For the reasons above, the Defence fails to show error. The third ground of appeal should be dismissed.

IV. No material impact on the Decision

39. Since none of the grounds of appeal demonstrate error, there is also no impact on the Decision. Notwithstanding, the Defence submissions alleging impact are based on a series of

¹⁴⁵ [Appeal](#), para. 62.

¹⁴⁶ See [Gbagbo & Blé Goudé Rule 68 AD](#), paras. 57-84.

¹⁴⁷ [Gbagbo & Blé Goudé Rule 68 AD](#), para. 61.

¹⁴⁸ [Gbagbo & Blé Goudé Rule 68 AD](#), para. 69; [Bemba Admissibility AD](#), paras. 74-81 (with respect to the earlier version of rule 68 RPE).

¹⁴⁹ See e.g., [Gbagbo Rule 68 AD](#), paras. 60-61; [Ntaganda Rule 68\(3\) Decision](#), para. 13; [Al Hassan Rule 68 AD](#), para. 55.

¹⁵⁰ [Appeal](#), paras. 61-63.

¹⁵¹ [Al Hassan Rule 68 AD](#), para. 75.

¹⁵² [Al Hassan Judge Ibáñez Dis Op](#), paras. 2-3, 39-45.

¹⁵³ [Al Hassan Rule 68 AD](#), para. 75.

mistaken assumptions¹⁵⁴—which the Prosecution has addressed in its responses to the grounds of appeal. For those same reasons, the Defence submissions on impact should also be dismissed.

CONCLUSION

40. For the foregoing reasons, the Prosecution respectfully requests the Appeals Chamber to dismiss the Appeal and to confirm the Decision. The Defence has shown neither error nor any material impact on the Decision.



Karim A. A. Khan KC., Prosecutor

Dated this 9th day of September 2022

At The Hague, The Netherlands.

¹⁵⁴ [Appeal](#), para. 65.