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Analysis of Digitally Derived Evidence from the Jurisprudence of International Tribunals:

Cases from the ICC, ICTR, ICTY, IRMCT, SCSL and STL

as part of

THE DIGITALLY DERIVED EVIDENCE PROJECT

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Introduction

The Digitally Derived Evidence (DDE) project was launched in the spring of 2019. Generously sponsored by the Swiss Ministry of Foreign Affairs since 1 January 2020, the project's mandate is to outline the evidentiary framework applicable to DDE in international criminal courts and tribunals as well as in international fact-finding missions.

The research has been split into multiple phases, comprising several different teams of Kalshoven-Gieskes Forum's IHL Clinic researchers. The first phase of research analysed the treatment of digital evidence as expressly articulated in jurisprudence of international criminal tribunals and courts covering various evidentiary considerations such as reliability, relevance, probative value, authenticity, and chain of custody. The respective teams found, however, that final judgments only captured the most prominent or controversial elements of digital evidence, and therefore did not provide many examples from which to extrapolate guidelines for practitioners for the second stage of the project.

The following case summaries therefore track digital evidence from first introduction until final disposition to gain a deeper understanding of how courts and tribunals have incorporated digital evidence into their existing evidence regimes. To standardise the findings, the summaries utilise the following template:

I. CASE DETAILS

- Case name:
- Tribunal:
- The offense charged:
- Stage of the proceedings:

II. DIGITALLY DERIVED EVIDENCE (DDE)

- Type of DDE, where was it obtained and by whom?
- Evidentiary considerations

III. COURT ANALYSIS & LEGAL ARGUMENTS

- What arguments/findings were used to support the admission of DDE?
- Was the DDE admitted and/or relied upon?
- General Legal Submissions on DDE

IV. RULES OF EVIDENCE

- Relevant Rules of Evidence
- Application of Rules of Evidence

V. EXTRAPOLATIONS

VI. CITATIONS

The conscientious work of creating the following summaries—by reviewing thousands of pages of party submissions, transcripts, motions, and rulings—gives us a holistic understanding of the full life cycle of each piece of digital evidence and has allowed us to extrapolate Practitioner Guidelines for various types of digital evidence which can be accessed on our respective DDE Guidelines database website here: <https://leiden-guidelines.netlify.app/> (last accessed 30 March 2022).

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Prosecutor v Ahmad Al Faqi Al Mahdi (ICC-01/12-01/15)

I. CASE DETAILS

- **Case name:** *Prosecutor v Ahmad Al Faqi Al Mahdi* (ICC-01/12-01/15)
- **Tribunal/Court:** International Criminal Court (“ICC”)
- **Offence charged:** Article 8(2)(e)(iv) of the Rome Statute of the ICC – intentionally directing attacks against buildings dedicated to religion/historic monuments¹
- **Stage of the proceedings:** Pre-Trial, Trial, Judgement and Sentence
- **Keywords:** Relevance, Probative value, Prejudice

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. A ‘Consolidated and Updated Joint list of Evidence’ was filed by the Prosecution and Defence as ‘Confidential Annex A’ on 7 September 2016, this is not available in a public form.²
2. 714 items of evidence including photographs, video and satellite images were filed by the Prosecution and agreed by the Defence. Not all evidence was discussed during the trial due to Al Mahdi pleading guilty and because the evidence was previously agreed.³
3. Videos from various media were filmed at the destroyed sites and were located by the OTP on the internet.⁴ Video and audio material from various media was open source and collected from the internet by the OTP during their investigation.⁵ Video Recordings on the internet by various media companies showing the destruction at the time or after the attack⁶, including:
 - a) **France 24 television network**⁷ (0011-0459) with transcript⁸;
 - b) **An Arabic network report**⁹ (0011-0177), with transcript¹⁰;
 - c) **France 2 network excerpt** from the program *Envoyé special* (0009-1749) with transcript;¹¹

¹ *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) [109].

² *Prosecutor v Al Mahdi* (Consolidated and Updated Joint List of Evidence) ICC-01/12-01/15-167 (7 September 2016) (TC VIII) [2].

³ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 41, lines 5-8; *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) [5].

⁴ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 41, lines 7-8.

⁵ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 28, line 25.

⁶ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 28, line 25.

⁷ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 49, line 12.

⁸ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 49, line 11.

⁹ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 49, line 19.

¹⁰ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 49, line 18.

¹¹ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 50, line 5; 51, line 7.

- d) **Arabic news report excerpt** (0015-0495)¹² with transcript;¹³
 - e) **M6 channel excerpt** from Enquête Exclusive (0001-7037);¹⁴
 - f) **TF1 channel excerpt** (0001-6925);¹⁵
 - g) **journeyman.tv excerpt** (0017-0027);¹⁶
4. **A video interview with Al Mahdi as part of the OTP investigation was obtained, along** with a transcript,¹⁷ conducted in 2015.¹⁸ **A video record of interview with Al Mahdi** was conducted by the OTP in Niger while he was detained on national criminal charges.¹⁹ Additionally, there is an **interview with Al Mahdi at mausoleum site** where he justifies the attack, complete with transcript.²⁰ From the trial transcripts it is unclear from where this video originates.
 5. Audio recordings were located on the internet and were recorded in Timbuktu by various media organisations.²¹ Audio recordings on the internet were admitted containing statements from members of armed groups including about UNESCO²², including from Radio France International, along with a transcript.²³
 6. **Geo-localisation report from expert witness P-193**, making it possible to geolocate each video and some images²⁴ with regard to precise mausoleums created by the witness using video provided to them by OTP.²⁵ **Geo-localisation report** was produced by witness P-193 using the various videos obtained by the OTP.²⁶
 7. **Expert witness report by witness P-75** was produced using the videos located on the internet and obtained by the OTP.²⁷ And this **expert witness report P-75** made it possible to state the dates of the videos and ascribe a time frame of June and July 2012 to them.²⁸
 8. **Satellite images** showing mausoleums pre- and post-destruction were obtained²⁹ **having been** collected by a specialised agency.³⁰

¹² *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 50, line 18.

¹³ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 50, line 16.

¹⁴ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 54, line 10; 56, line 25.

¹⁵ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 56, line 18.

¹⁶ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 68, line 6.

¹⁷ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 114, lines 14-15.

¹⁸ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 41, line 19.

¹⁹ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 49, lines 13-19.

²⁰ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 51, line 16.

²¹ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 28, line 25.

²² *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 28, line 23; 45, line 2.

²³ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 59, lines 23-25.

²⁴ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 113, lines 7-8.

²⁵ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 29, line 3.

²⁶ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 46, line 1.

²⁷ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 29, lines 5-6.

²⁸ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 29, lines 5-6.

²⁹ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 28, line 18.

³⁰ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 44, line 24.

9. **Panoramic photographs** were taken from the various sites of destruction by OTP experts.³¹ **360-degree panoramic shots** of various sites were taken by OTP experts.³² **360-degree panoramic shots** were obtained by OTP experts at the sites.³³
10. **Archive photographs** were taken of the various sites in Timbuktu, pre-and post- their destruction, some were obtained from the Malian Ministry of Culture.³⁴ **Archive photographs** were taken of the various sites in Timbuktu, pre-and post- their destruction, some were obtained from the Malian Ministry of Culture.³⁵ **Archive photographs** were obtained by the OTP and some from the Malian Ministry of Culture.³⁶
11. **Sketches and drawings by experts**³⁷ of the sites pre-destruction were obtained, including architectural drawing by Italian Ministry of Culture made years earlier.³⁸ The origin of some of the sketches and drawings are unclear, save the one obtained from the Italian Ministry of Culture.³⁹ **Sketches and drawings** were all obtained by the OTP except the one from the Italian Ministry of Culture.⁴⁰
12. **An interactive platform** was used combining satellite images, 360-degree shots, archival photographs, sketches, drawings, video and audio recordings.⁴¹ **The interactive platform** drew together the satellite images, 360-degree shots, archival photographs, sketches, drawings, video and audio recordings it was produced from evidence collected by the OTP and provided to Situ Research.⁴² **The interactive platform** was produced by Situ research from evidence provided by the OTP.⁴³

³¹ *Prosecutor v Al Mabdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 44, line 24.

³² *Prosecutor v Al Mabdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 44, line 24.

³³ *Prosecutor v Al Mabdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 48, lines 1-3.

³⁴ *Prosecutor v Al Mabdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 45, line 1; 53, line 13; 61, line 4.

³⁵ *Prosecutor v Al Mabdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 45, line 1; 53, line 13; 61, line 4.

³⁶ *Prosecutor v Al Mabdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 45, line 1; 53, line 13; 61, line 4.

³⁷ *Prosecutor v Al Mabdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 45, lines 1-2.

³⁸ *Prosecutor v Al Mabdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 49, line 2.

³⁹ *Prosecutor v Al Mabdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 48, lines 20-21; 49, lines 1-2.

⁴⁰ *Prosecutor v Al Mabdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 48, lines 20-21; 49, lines 1-2.

⁴¹ *Prosecutor v Al Mabdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 44, lines 23-25; 45, lines 1-3.

⁴² Lindsay Freeman, 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials' (2010) 41(2) Fordham International Law Journal 283, 319, fn 142.

⁴³ Lindsay Freeman, 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials' (2010) 41(2) Fordham International Law Journal 283, 319, fn 142.

Evidentiary Considerations

13. During the trial as the defence and the OTP had agreed to the evidence, and Al Mahdi entered a guilty plea at the outset, the OTP did not present each of the over 700 pieces of filed evidence to the court.⁴⁴
14. At trial the OTP relied on the interactive platform and called three witnesses.⁴⁵ At the trial, the OTP focused on presenting their DDE in the form of the interactive platform and interview of Al-Mahdi's record of interview. The evidentiary considerations discussed were primarily surrounding corroboration (of the guilty plea) and authentication.
15. The OTP stated "[The] satellite images, photographs, videos and other material gleaned from the Internet which are included on the list of our evidence material to show the situation of the mausoleums before, during and after the destruction, including the participation of the accused. These elements are *authentic* and have been accepted by the Defence and which are solid proof *corroborating* the plea of guilt entered by the accused." [emphasis added]⁴⁶ The evidence of the state of the sites before, during and after was found to be authentic and accepted by the Defence which corroborated the guilty plea.
16. Witness P-0182 was called by the Prosecution to provide further information about the investigation and the interview with the accused in 2015. Regarding the investigation process and using open-source DDE witness P-0182 stated, "We have collected this type of evidence and then, following from that, bring the investigation into more focus and to approach individuals and organisations that have further, more specific information about the events of interest."⁴⁷ He went on to state: "when we develop the collection from -- from the open-source material, we approach governments and organisations that -- that have conducted activities, that we know have conducted activities in the same area and who can provide more substance to the general information we have. From there on we approach individuals who can explain to us and *authenticate* to us the information that we have -- that we have collected, and this often leads to interviews with witnesses that -- that result in statements."⁴⁸
17. The above paragraph provides that an investigation begins with open-source evidence and subsequently moves to individual and government sources who can provide further information including using expert witnesses to authenticate information gathered.
18. This led the court to ask about examples of expert reports that were obtained, to which the witness stated, "we also have an expert report on the images, such as satellite images and aerial images of the area where an expert can confirm with a -- with a date before and a date after that there was an existing structure and at a later date it does not exist anymore. This is to determine that the construction was actually destroyed."⁴⁹ The witness went on to state, "We have an expert report on metadata of images and video material. This has played an important role for us as far as possible to determine the exact dates of, on the

⁴⁴ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 41, lines 4-5.

⁴⁵ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 41, lines 6-16.

⁴⁶ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 41, lines 7-12.

⁴⁷ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 99, lines 4-6.

⁴⁸ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 99, lines 10-16.

⁴⁹ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 100, lines 14-17.

one hand, the so-called occupation of the city, but also the exact events that are the subject of this case”⁵⁰

19. The witness was also asked by the prosecution about whether Mr Al Mahdi had been played several videos of the destruction of the sites during his record of interview and whether he was able to identify himself as participating in the videos. The witness confirmed that Mr Al Mahdi was able to identify himself and did so a number of times.⁵¹
20. The above quotes in paragraph 18 confirm the geo-localisation report (witness P-193) and the expert report on the videos (P-75). They were used to confirm the location of the attacks on the sites and at what date they occurred. This corroborated the open-source material and was used to confirm its authenticity.

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

21. On 24 May 2016 at a Status Conference, the Pre-Trial Chamber referred to Article 65 of the Rome Statute and asked the Prosecution and Defence whether the previously filed list of evidence could be accepted as having been presented by the Prosecutor and accepted by the Defence. Both parties agreed that it could.⁵²
22. On 22 July 2016, during the Directions on the Conduct of the Proceedings, the presiding Judge stated that he “considers it unnecessary to regulate how evidence is presented if an admission of guilt is made, as the parties have already submitted the evidentiary materials for the Chamber to consider pursuant to Article 65(1)(c)(ii) of the Statute.”⁵³
23. The Trial Judge went on to state, “the Chamber will consider the relevance, probative value and potential prejudice of evidence, along with testimony of the three Prosecution witnesses, in deliberating whether to convict the accused pursuant to Article 65(2) of the Statute.”⁵⁴
24. The Chamber therefore at trial considered the probative value and potential prejudice of the evidence (including the DDE) and evidence of the three witnesses called by the OTP when deciding on whether to convict Al Mahdi. However, the Chamber did not elaborate on these considerations at trial or in the final judgment.

⁵⁰ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 99, lines 18-21.

⁵¹ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-5-Red-ENG (23 August 2016) (TC VIII) 14, lines 15-25.

⁵² *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-3-Red-ENG (24 May 2016) (TC VIII) 21, lines 13-25; 22, lines 1-14.

⁵³ *Prosecutor v Al Mahdi* (Direction on the Conduct of the Proceedings) ICC-01/12-01/15-136 (22 July 2016) (TC VIII) [16].

⁵⁴ *Prosecutor v Al Mahdi* (Direction on the Conduct of the Proceedings) ICC-01/12-01/15-136 (22 July 2016) (TC VIII) [16].

25. The Court did not consider the evidence beyond the above considerations as its admissibility was unchallenged.⁵⁵⁵⁶
26. Article 65 of the Rome Statute regarding proceedings on an admission of guilt requires that the court determine, *inter alia* that an accused's "admission of guilt is supported by the facts of the case including from any materials presented by the Prosecutor which supplements the charges and which the accused accepts".⁵⁷
27. The Trial Chamber stated, "in order to assess whether 'the admission of guilt is supported by the facts of the case', the Chamber heard three witnesses and considered the hundreds of documentary evidence items presented by the Prosecution and accepted by the Accused. For each of the established facts, the Chamber has relied upon: (i) the admissions of the Accused; (ii) the supplementary material presented by the Prosecution and accepted by the Accused and (iii) the testimony of the witnesses who appeared before this Chamber."⁵⁸
28. The evidence, including the DDE before the Trial Chamber, is thus used to determine the 'established facts of the case' as required under Article 65(1) of the Rome Statute.
29. The Court referred to Rule 63(4) of the Rules of Procedure and Evidence of the ICC: "a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court".⁵⁹
30. The Trial Chamber further stated: "although there is no corroboration requirement when assessing evidence, the Chamber paid particular attention to whether evidence could establish the facts independently of the Accused's admissions."⁶⁰
31. The Article 65(2) of the Rome Statute states, "once satisfied the admission of guilt is supported by the facts of the case, the Trial Chamber should consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime."⁶¹
32. The Chamber found that 'the established facts of the case' supported the admission of guilt.⁶² The Chamber also found "beyond reasonable doubt that the admission of guilt, together with the additional evidence presented, satisfies the essential facts to prove the crime charged"⁶³
33. The Chamber went on to emphasise "it considers the Agreement and Mr Al Mahdi's admissions to be both credible and reliable in full. Mr Al Mahdi went into extensive detail

⁵⁵ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 28, line 25; 40, line 25.

⁵⁶ Lindsay Freeman, 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials' (2010) 41(2) *Fordham International Law Journal* 283, 317.

⁵⁷ Article 65(1)(b)(ii) of the Rome Statute.

⁵⁸ *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) [29].

⁵⁹ *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) [29], fn 51.

⁶⁰ *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) [29].

⁶¹ Article 65(2) of the Rome Statute.

⁶² *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) [42].

⁶³ *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) [43].

as to the events in question, often volunteering specific information not strictly necessary in order to prove the charge. The Chamber has been able to independently corroborate almost all of Mr Al Mahdi's account with the evidence before the Chamber, strongly indicating that the entire account is true."⁶⁴

34. The Court thus used the DDE to corroborate Mr Al Mahdi's admission of guilt and to assist in determining the established facts of the case.

Was the DDE admitted and/or relied upon?

35. The Court appears to admit all 714 items of evidence that were agreed between the Prosecution and Defence. The Court says it has 714 items before it which it will consider in its determinations.⁶⁵ However, it is unclear what evidence was specifically relied upon by the Court in coming to its determinations.
36. The Chamber used the DDE to come to a determination under Article 65(1)(c) of the Rome Statute, regarding whether "the admission of guilt is supported by the facts of the case", it used the three witnesses called and considered "hundreds of documentary evidence items presented by the Prosecution and accepted by the Accused".⁶⁶
37. The Chamber stated it used the evidence before it (which would include the DDE), to determine the established facts of the case and to independently corroborate Al Mahdi's evidence.⁶⁷

General Legal Submissions on DDE

38. Prior to Trial, the Prosecution filed "*Version publique expurgée du Document présentant les conclusions factuelles et juridiques du Bureau du Procureur au soutien du Chef d'accusation*"⁶⁸. This document is subject to redaction and only available in French but outlines the nature and types of evidence collected that support the legal and factual allegations alleged and charged. The document alleges Al Mahdi was present at certain sites and corroborates this with:
- a) the geo-localisation report by witness P-0193;
 - b) the 360-degree panorama shot from witness P-0127 document MLI-OTP-0025-0006;
 - c) the expert report of P-0104475; and
 - d) reports of P-0055, P-0057 476 and P-0102477 which contain the report of expert witness IT P-75. P-75's expert report used aerial imagery and knowledge of the sites to provide the precise indication of the dates of the attack and destruction in June and

⁶⁴ *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) [44].

⁶⁵ *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) [5].

⁶⁶ *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) [29].

⁶⁷ *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) [29], [44].

⁶⁸ Public redacted version of the Document setting out the factual and legal findings of the Office of the Prosecutor in support of the Indictment

July 2012. It also assisted in refining the dates mentioned by witnesses including the date ranges provided by expert P-0064 on the basis of the satellite images.⁶⁹

39. At trial the Prosecutor stated “in view of the guilty plea entered, the public must understand, therefore, today that the Prosecution does not intend to deal with each of the 700 pieces of evidence that have been filed before the Court, we will deal only with specific aspects; namely, starting with an interactive platform, the Prosecution will use satellite images, photographs, videos and other material gleaned from the internet which are included on the list of our evidence material to show the situation of the mausoleums before, during and after the destruction, including the participation of the accused. These elements are authentic and have been accepted by the Defence and which are solid proof corroborating the plea of guilt entered by the accused.”⁷⁰
40. Outside of corroborating the guilty plea, the Prosecution did not seek to discuss evidentiary considerations relating to the DDE.

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

41. Article 65 of the Rome Statute ‘Proceedings on an admission of guilt’, specifically 65(1)(c)(ii), once an accused makes an admission of guilt, the Court must determine whether that admission is supported by the facts of the case including by evidence (including DDE) agreed between the Prosecution and Defence.
42. Rule 63(4) of the Rules of Procedure and Evidence, a Chamber should not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court.
43. Rule 23*bis* of the Regulations of the Court allows a party or the Registrar to mark evidence as “*ex parte*”, “under seal” or “confidential” provided the legal or factual basis is also stated for the classification. Unless otherwise ordered by the Chamber this classification remains until the basis no longer exists and whoever instigated the classification seeks to have it reclassified. Any replies to “*ex parte*, confidential or under seal” documents should also have the same classification as the original document.

Application of Rules of Evidence

44. Article 65 was applied: DDE was used to determine the established facts of the case and whether the admission of guilt was supported by those established facts.⁷¹

⁶⁹ *Prosecutor v Al Mahdi* (Version publique expurgée du « Document présentant les conclusions factuelles et juridiques du Bureau du Procureur au soutien du Chef d'accusation dans l'affaire contre Ahmad AL FAQI AL MAHDI » ICC-01/12-01/15-66-Conf, 17 décembre 2015) ICC-01/12-01/15-66-Red (17 December 2015) (PTC) [137]-[138].

⁷⁰ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 41, lines 4-12.

⁷¹ *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) [29], [44].

45. Rule 63(4) was applied but the Court still elected to independently corroborate Al Mahdi's plea using the evidence before the Court including DDE (see paragraph 71 above).⁷²
46. Rule 23*bis* the Court's Regulations was applied in respect of the confidential list of evidence and prevented it from being disclosed to the public. This was in order not to compromise the safety of witnesses and continuing investigative operations of the OTP.⁷³

V. EXTRAPOLATIONS

47. When counsel indicates at the pre-trial that a guilty plea is to be entered at the trial and have submitted all evidentiary materials to the Chamber and those evidentiary items are agreed, the Pre-Trial Judge can apply Article 65(1)(c)(ii) and may find it unnecessary to regulate how that evidence will be presented.⁷⁴ This is because the Trial Chamber rather than Pre-Trial Judge must determine if the admission is supported by the facts of the case at the trial; any DDE before the Trial Chamber may assist in determining the facts of the case.⁷⁵
48. As evidence is agreed and already admitted before the Trial Chamber, it is not required that all items of evidence are presented orally at court. The OTP may present only those important items in order to give the Court an overall picture of the events.⁷⁶
49. Where the Court is satisfied that an admission of guilt is voluntarily made by the accused; after consultation with the Defence counsel; understanding the nature and consequence of the admission; and supported by the facts of the case put forward by the Prosecution, under Article 65(2) of the Rome Statute; the Court need only consider the relevance, probative value and potential prejudice of evidence, including photographs presented on the digital platform, along with any live testimony heard, when deliberating on whether to convict an accused.⁷⁷

VI. CITATIONS

Prosecutor v Al Mahdi (Transcript) ICC-01/12-01/15-T-3-Red-ENG (24 May 2016) (TC VIII) <https://legal-tools.org/doc/80b091>;

Prosecutor v Al Mahdi (Direction on the Conduct of the Proceedings) ICC-01/12-01/15-136 (22 July 2016) <https://legal-tools.org/doc/617987>;

Prosecutor v Al Mahdi (Transcript) ICC-01/12-01/15-T-4-Red -ENG (22 August 2016) (TC VIII) <https://legal-tools.org/doc/14e68e>;

⁷² *Prosecutor v Al Mahdi* (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) [29].

⁷³ *Prosecutor v Al Mahdi* (Consolidated and Updated Joint List of Evidence) ICC-01/12-01/15-167 (7 September 2016) (TC VIII) [4].

⁷⁴ *Prosecutor v Al Mahdi* (Direction on the Conduct of the Proceedings) ICC-01/12-01/15-136 (22 July 2016) (TC VIII) [16].

⁷⁵ Article 65(1)(c) of the Rome Statute.

⁷⁶ *Prosecutor v Al Mahdi* (Transcript) ICC-01/12-01/15-T-4-Red-ENG (22 August 2016) (TC VIII) 41, lines 4-5.

⁷⁷ *Prosecutor v Al Mahdi* ([Direction on the Conduct of the Proceedings](https://legal-tools.org/doc/617987)) ICC-01/12-01/15-136 (22 July 2016) (TC VIII) [16].

Prosecutor v Al Mahdi (Transcript) ICC-01/12-01/15-T-5-Red-ENG (23 August 2016) (TC VIII) <https://legal-tools.org/doc/c1dd49>;

Prosecutor v Al Mahdi (Transcript) ICC-01/12-01/15-T-6-Red-ENG (24 August 2016) (TC VIII) <https://legal-tools.org/doc/22129c>;

Prosecutor v Al Mahdi (Consolidated and Updated Joint List of Evidence) ICC-01/12-01/15-167 (7 September 2016) (TC VIII) <https://legal-tools.org/doc/279a77>;

Prosecutor v Al Mahdi (Judgement and Sentence) ICC-01/12-01/15-171 (27 September 2016) (TC VIII) <https://legal-tools.org/doc/042397>;

Prosecutor v Al Mahdi (Version publique expurgée du «Document présentant les conclusions factuelles et juridiques du Bureau du Procureur au soutien du Chef d'accusation dans l'affaire contre Ahmad AL FAQI AL MAHDI » ICC-01/12-01/15-66-Conf, 17 décembre 2015) ICC-01/12-01/15-66-Red (17 December 2015) (PTC) <https://www.legal-tools.org/doc/2ac52a/>;

Lindsay Freeman, 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials' (2010) 41(2) *Fordham International Law Journal* 283. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=i2696&context=ilj>.

Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (ICC-01/12-01/18)

I. CASE DETAILS

- **Case name:** *Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (ICC-01/12-01/18)
- **Tribunal/Court:** International Criminal Court (ICC)
- **Offence charged:** Al Hassan Ag Abdoul Aziz is an alleged member of Ansar Eddine and de facto chief of Islamic police. He is alleged to have been involved in the work of the Islamic court in Timbuktu, Mali. Al Hassan is suspected of crimes against humanity and of war crimes allegedly committed in Timbuktu between April 2012 and January 2013. He was surrendered to the ICC on 31 March 2018 and is currently in the Court's custody.
- **Stage of the proceedings:** Trial
- **Keywords:** Prejudice, reliability, probative value, voluminous data, expert witness, admissibility, admissibility, cross-examination, corroboration

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. CDs with maps were collected¹ and can be found in the Prosecution's confidential Annex.²
2. Call Data Records ("CDRs") submitted by the Prosecutor into evidence, can also be found in the Prosecution's confidential Annex.³ These CDRs are related to mobile phone numbers used in and around Timbuktu at the time relevant to the charges.⁴ Expert witnesses (P-0587 and P-0617) used them to produce graphics to illustrate the communications between various phone numbers attributed to several members of the

¹ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 26.

² *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(3) to introduce Witnesses MLI-OTP-P-0587 and MLI-OTP-P-0617's report and associated material into evidence, and regulation 35 request", 2 November 2020, ICC-01/12-01/18-1136-Conf, available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01118.PDF>, Confidential Annex A.

³ *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(3) to introduce Witnesses MLI-OTP-P-0587 and MLI-OTP-P-0617's report and associated material into evidence, and regulation 35 request", 2 November 2020, ICC-01/12-01/18-1136-Conf, available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01118.PDF>, Confidential Annex A.

⁴ *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(3) to introduce Witnesses MLI-OTP-P-0587 and MLI-OTP-P-0617's report and associated material into evidence, and regulation 35 request", 2 November 2020, ICC-01/12-01/18-1136-Conf, available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01118.PDF>, para 2.

Groups in and around Timbuktu at the time of the occupation of the city by the Groups.⁵ They also specifically looked at the activity of a phone number known to be used by the accused for the entire period of the occupation as well as on specific dates of relevant incidents.⁶

3. In this case, a DVD containing tables was also created.⁷ It can be found in the Prosecution's confidential Annex.⁸
4. Photographs were also important DDE collated. 80 photographs were shown to witness P-0114, which he commented on in his prior recorded testimony.⁹ Similarly, 32 photographs were shown to witness P-0595 during his interview.¹⁰ 33 photographs were used for identification purposes. The photographs were submitted by the Prosecution and Prosecution stated that Witness P-0639 identified individuals in seven of these photographs (described as persons of interest).¹¹
5. 4 videos were submitted by the Prosecution.¹² The videos were shown to witness P-0639 by the Prosecution investigators (during the interview).¹³ 16 videos or video extracts were submitted by the Prosecution in addition to the transcripts and translations that

⁵ *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(3) to introduce Witnesses MLI-OTP-P-0587 and MLI-OTP-P-0617's report and associated material into evidence, and regulation 35 request", 2 November 2020, ICC-01/12-01/18-1136-Conf, available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01118.PDF>, para 2.

⁶ *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(3) to introduce Witnesses MLI-OTP-P-0587 and MLI-OTP-P-0617's report and associated material into evidence, and regulation 35 request", 2 November 2020, ICC-01/12-01/18-1136-Conf, available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01118.PDF>, para 2.

⁷ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 26.

⁸ *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(3) to introduce Witnesses MLI-OTP-P-0587 and MLI-OTP-P-0617's report and associated material into evidence, and regulation 35 request", 2 November 2020, ICC-01/12-01/18-1136-Conf, available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01118.PDF>, Confidential Annex A.

⁹ *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(3) to introduce MLI-OTP-P-0114's statement and associated material into evidence", 13 October 2020, ICC-01/12-01/18-1106-Conf, 5 February 2021, ICC-01/12-01/18-1106-Red, Available at: <<https://www.legal-tools.org/doc/jvkw6/pdf>>. paras 4.

¹⁰ *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(3) to introduce MLI-OTP-P-0595's prior statement and associated material into evidence", 4 February 2021, ICC-01/12-01/18-1131-Red, para. 18. Available at: <https://www.legal-tools.org/doc/y16qf1/pdf>.

¹¹ *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(3) to introduce MLI-OTP-P-0639's prior statement and associated material into evidence" with confidential Annex A, 27 November 2020, ICC-01/12-01/18-1166-Conf, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01081.PDF>. paras 12 and 28.

¹² *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(3) to introduce MLI-OTP-P-0639's prior statement and associated material into evidence" with confidential Annex A, 27 November 2020, ICC-01/12-01/18-1166-Conf, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01081.PDF>. para 12.

¹³ *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(3) to introduce MLI-OTP-P-0639's prior statement and associated material into evidence" with confidential Annex A, 27 November 2020, ICC-01/12-01/18-1166-Conf, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01081.PDF>. para 12.

accompany the videos or video extracts.¹⁴ They were shown to witness P-0125 and discussed in his statement.¹⁵ The videos are related to the destruction of mausoleums and mosques [rest of sentence is redacted].¹⁶ The witness recognised some of the individuals, objects and/or locations mentioned in his Statement in videos or extracts shown.¹⁷

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

6. With regards to the admission of the CDRs, the Chamber concluded that matters raised by the Defence do not prevent the submission of the evidence at this stage.¹⁸ The Chamber was of the view that the concerns raised by the Defence (i.e., experts' capacity to testify on the authenticity and reliability of the data and local variables) can be duly addressed in the cross-examination, which remains unaffected.¹⁹
7. The Chamber was of the view that it is through technical experts (such as P-0587 and P-0617) that such data becomes legible for the purpose of trial proceedings.²⁰ The Chamber decided that matters raised by the Defence do not prevent the submission of the said items. It stated that at this stage, in line with the approach taken by the Chamber in its Directions on the conduct of proceedings, it was necessary to adopt a system that recognises submission of items of evidence 'without a prior ruling on relevance and/or admissibility'

¹⁴ *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(2)(c) to introduce into evidence the prior recorded testimony and associated material of Prosecution Witness MLI-OTP-P-0125", 11 December 2020, ICC-01/12-01/18-1202-Conf available at: <https://www.icc-cpi.int/CourtRecords/CR2021_03597.PDF>. para 39.

¹⁵ *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(2)(c) to introduce into evidence the prior recorded testimony and associated material of Prosecution Witness MLI-OTP-P-0125", 11 December 2020, ICC-01/12-01/18-1202-Conf available at: <https://www.icc-cpi.int/CourtRecords/CR2021_03597.PDF>. para 39.

¹⁶ *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(2)(c) to introduce into evidence the prior recorded testimony and associated material of Prosecution Witness MLI-OTP-P-0125", 11 December 2020, ICC-01/12-01/18-1202-Conf available at: <https://www.icc-cpi.int/CourtRecords/CR2021_03597.PDF>. para 40.

¹⁷ *The Prosecutor v. Al Hassan*, Public redacted version of "Prosecution application under rule 68(2)(c) to introduce into evidence the prior recorded testimony and associated material of Prosecution Witness MLI-OTP-P-0125", 11 December 2020, ICC-01/12-01/18-1202-Conf available at: <https://www.icc-cpi.int/CourtRecords/CR2021_03597.PDF>. para 41.

¹⁸ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/181267-Red, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 31.

¹⁹ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/181267-Red, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 31.

²⁰ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/181267-Red, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 31.

and considering ‘relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused’.²¹

Was the DDE admitted and/or relied upon?

8. The DVD evidence was admitted without discussion; it was not objected to by the Defence.²²
9. The CD with maps was admitted without discussion; it was not objected to by the Defence.
10. The submission of 80 photographs was authorised following the application under “Rule 68(3) [...] in respect of P-0114” and they were added into the submission of the associated material.²³ Regarding the set of 80 photographs, the Chamber found that the objections made by the Defence “refer more to the weight to be given to the photographs and P-0114’s comments on them. The Chamber is of the view that these issues can be addressed by the Defence in its cross-examination, which remains unaffected by introduction of this material through Rule 68(3) of the Rules. Thus, the matters raised by the Defence do not prevent the submission of the said items at this stage. This is in line with the approach taken by the Chamber in its Directions on the conduct of proceedings, adopting a system that recognises submission of items of evidence ‘without a prior ruling on relevance and/or admissibility’ and considering ‘relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused’”.²⁴ The same reasoning was used in relation to the other sets of photographs.
11. The submission of 32 photographs was authorised by the Chamber citing the application under “Rule 68(3) [...] in respect of P-0595” and they were added into the submission of the associated material.²⁵ Regarding the set of 32 photographs, the “Chamber considers the matters raised by the Defence (i.e., that the witness statement is confusing) refer more to the weight to be given to P-0595’s testimony. The Chamber is of the view that these issues can be addressed by the Defence in its cross-examination, which remains unaffected. Moreover, the matters raised by the Defence do not prevent the submission of the said items at this stage. This is in line with the approach taken by the Chamber in its Directions

²¹ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/181267-Red, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 31.

²² *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/181267-Red, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, paras 31-32.

²³ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 26 January 2021, ICC-01/12-01/18-1267-Red1267-Red, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 15.

²⁴ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 26 January 2021, ICC-01/12-01/18-1267-Red, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 13.

²⁵ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 26 January 2021, ICC-01/12-01/18-1267-Red1267-Red, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 25.

on the conduct of proceedings, adopting a system that recognises submission of items of evidence ‘without a prior ruling on relevance and/or admissibility’ and considering ‘relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused’²⁶.

12. Regarding the submission of the set of 33 photographs, the Chamber granted “the Rule 68(3) Application in respect of P-0639” and authorized the submission of the associated material.²⁷ Regarding the set of 33 photographs, the Chamber considered that the objections raised by the Defence refer more to the weight to be given to the associated material and the witnesses’ (P-0639) comments to them. The Chamber was of the view that these issues can be addressed by the Defence in its cross-examination, which remains unaffected.²⁸
13. Regarding the set of 4 videos, the Chamber decided that the matters raised by the Defence do not prevent the submission of the items at this stage in line with the approach taken by the Chamber in its Directions on the conduct of proceedings.²⁹ Regarding the set of 4 videos, the Chamber considered that the objections raised by the Defence refer more to the weight to be given to the associated material and the witnesses’ (P-0639) comments to them. The Chamber was of the view that these issues can be addressed by the Defence in its cross-examination, which remains unaffected.³⁰
14. Regarding the set of 16 videos or video extracts, the Chamber authorized the introduction into evidence of the prior recorded testimony (of P-0125) and the 16 videos or video extracts (associated material).³¹ Regarding the set of 16 videos or video extracts, the Chamber considered that in the absence of specific reasons not to do so, the associated material identified by the Prosecution can be introduced into evidence via this witness pursuant to Rule 68(2)(c).³² The Chamber was not convinced by the Defence’s argument. It noted that the witness (P-0125) was presented all the associated material submitted and

²⁶ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 26 January 2021, ICC-01/12-01/18-1267-Red, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 24.

²⁷ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 26 January 2021, ICC-01/12-01/18-1267-Red, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 43.

²⁸ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18-Red, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 42.

²⁹ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18-1267-Red, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 42.

³⁰ *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18-1267-Red, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 42.

³¹ *The Prosecutor v. Al Hassan*, Decision on the introduction into evidence of P-0125’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 14 April 2021, ICC-01/12-01/18-1413, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_03443.PDF>, para 11.

³² *The Prosecutor v. Al Hassan*, Decision on the introduction into evidence of P-0125’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 14 April 2021, ICC-01/12-01/18-1413, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_03443.PDF>, para 18.

that he discussed, at least to a certain extent, their content.³³ The Chamber stated that the absence of cross-examination, which is due to the witness's unavailability, is a factor which will be considered by the Chamber in its ultimate assessment of the probative value and weight, if any, to be attributed to this evidence.³⁴ The Chamber also fails to see how the fact that certain material was not sought to be introduced by the Prosecution, because the witness did not recognise persons or places, is prejudicial, noting that, should it wish to do so, the Defence can itself seek to have it introduced into evidence or seek to have admitted other related evidence.³⁵

General Legal Submissions on DDE

15. In addition to the findings mentioned above, the Court also established general rules regarding the use of audio-video materials. Since this is not related to a particular type of DDE, but the Court's sayings are relevant to the research conducted, the discussions are presented in this section of the case summary. The Chamber stated that "If parties or participants wish to present audio-visual material to a witness, they must establish the relevance of this exercise, for example that the witness has personal knowledge of the making of the recording or its contents. This may be achieved by playing a brief excerpt of the audio-visual material to the extent strictly necessary, and without sound where appropriate, for the witness to confirm his/her personal knowledge of it. Once this has occurred, the party or participant may play the excerpt(s) of the recording it intended to present to the witness".³⁶ Additionally, the Chamber determined that "In principle, video or audio recordings may only be used in court if a transcript, and translation if applicable, are available. The party or participant intending to use a video or audio recording shall indicate in its List of Material the sections of the transcript, if any, corresponding to the excerpts of the material it intends to use; as well as, if applicable, the corresponding sections of the translation".³⁷

IV. Rules of Evidence

16. Rule 68(2)(c) of the Rules of Procedure and Evidence: "If the witness who gave the previously recorded testimony is not present before the Trial Chamber, the Chamber may

³³ *The Prosecutor v. Al Hassan*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 14 April 2021, ICC-01/12-01/18-1413 Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_03443.PDF>, para 18.

³⁴ *The Prosecutor v. Al Hassan*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 14 April 2021, ICC-01/12-01/18-1413, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_03443.PDF>, para 18.

³⁵ *The Prosecutor v. Al Hassan*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 14 April 2021, ICC-01/12-01/18-1413, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_03443.PDF>, para 18.

³⁶ *The Prosecutor v. Al Hassan*, Public Annex A of the Decision on the Conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 58. Available at: https://www.icc-cpi.int/RelatedRecords/CR2020_01808.PDF.

³⁷ *The Prosecutor v. Al Hassan*, Public Annex A of the Decision on the Conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 59. Available at: https://www.icc-cpi.int/RelatedRecords/CR2020_01808.PDF.

allow the introduction of that previously recorded testimony in any one of the following instances: (c) The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. In such a case: (i) Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability. (ii) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.”

17. Rule 68(3) of the Rules of Procedure and Evidence: “If the witness who gave the previously recorded testimony is present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony if he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.”

V. Extrapolations

Call Data Records (‘CDRs’) Intercepted Radio Communications

18. The Chamber decided that the experts’ capacity to testify on the authenticity and reliability of the CDRs, as part of materials relied on in their report, can be addressed in the cross-examination.³⁸ The Chamber noted that it is through technical experts that the data becomes legible for the purpose of trial proceedings, against the Defence’s argument that the CDRs are unintelligible without further analysis.³⁹ The Chamber adopted in an earlier decision a system that recognises submission of items of evidence without a prior ruling on the relevance and probative value as it will be part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.⁴⁰ Thus, the Defence’s arguments did not prevent the submission at this stage.⁴¹

Photographs

19. The Chamber considered that the objections raised by the Defence, that it cannot be introduced via Rule 68(3) of the Rules because the witness did not author some items or did

³⁸ Section V.b.ii.2 of the present summary; *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 31.

³⁹ Section V.b.ii.2 of the present summary; *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 31.

⁴⁰ Section V.b.ii.2 of the present summary; *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 31.

⁴¹ Section V.b.ii.2 of the present summary; *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 31.

not recognise individuals shown to him in photos, can be addressed by the Defence in its cross-examination.⁴² The Chamber also decided that the matters raised by the Defence do not prevent the submission of the items at this stage is in line with the approach taken by the Chamber in its Directions on the conduct of proceedings (a holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused).⁴³

Videos

20. The Chamber decided that the issue raised by the Defence, namely the weight to be given to the materials, can be addressed by the Defence in its cross-examination.⁴⁴ The Chamber decided that the matters raised by the Defence do not prevent the submission of the items at this stage in line with the approach taken by the Chamber in its Directions on the conduct of proceedings (a holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused).⁴⁵
21. The Chamber considered that in the absence of specific reasons not to do so, videos, as part of the associated material identified by the Prosecution, can be introduced into evidence via this witness pursuant to Rule 68(2)(c).⁴⁶ The Chamber stated that the absence of cross-examination, which is due to the witness's unavailability, is a factor which will be considered by the Chamber in its ultimate assessment of the probative value and weight to be attributed to the videos.⁴⁷ The Chamber stated that the fact that certain material was not sought to be introduced by the Prosecution, because the witness did not recognise persons or places in them is not prejudicial, noting that, should the Defence wish to do so, it can seek to have it introduced into evidence or seek to have admitted other related evidence.⁴⁸

⁴² Section V.b.iv.2 of the present summary; *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 42.

⁴³ Section V.b.iv.1 of the present summary; *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 42.

⁴⁴ Section V.b.vi.2 of the present summary; *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 42.

⁴⁵ Section V.b.vi.1 of the present summary; *The Prosecutor v. Al Hassan*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF>, para 42.

⁴⁶ Section V.b.vii.2 of the present summary; *The Prosecutor v. Al Hassan*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 14 April 2021, ICC-01/12-01/18, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_03443.PDF>, para 18.

⁴⁷ Section V.b.vii.2 of the present summary; *The Prosecutor v. Al Hassan*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 14 April 2021, ICC-01/12-01/18, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_03443.PDF>, para 18.

⁴⁸ Section V.b.vii.2 of the present summary; *The Prosecutor v. Al Hassan*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 14 April 2021, ICC-01/12-01/18, Available at: <https://www.icc-cpi.int/CourtRecords/CR2021_03443.PDF>, para 18.

Audio-visual materials

22. The relevance of showing audio-visual material to a witness during the trial must be established beforehand (e.g., the witness has personal knowledge of the making of the recording or its contents).⁴⁹
23. Video or audio recordings may only be used in court if a transcript, and translation if applicable, are available.⁵⁰

VI. Citations

All the relevant documents filed by the Defence were confidential

The Prosecutor v. Al Hassan, Public redacted version of “Prosecution application under rule 68(3) to introduce Witnesses MLI-OTP-P-0587 and MLI-OTP-P-0617’s report and associated material into evidence, and regulation 35 request”, 2 November 2020, ICC-01/12-01/18-1136-Conf, available at: https://www.icc-cpi.int/CourtRecords/CR2021_01118.PDF

The Prosecutor v. Al Hassan, Public redacted version of “Prosecution application under rule 68(3) to introduce MLI-OTP-P-0639’s prior statement and associated material into evidence” with confidential Annex A, 27 November 2020, ICC-01/12-01/18-1166-Conf, Available at: https://www.icc-cpi.int/CourtRecords/CR2021_01081.PDF

The Prosecutor v. Al Hassan, Public redacted version of “Prosecution application under rule 68(2)(c) to introduce into evidence the prior recorded testimony and associated material of Prosecution Witness MLI-OTP-P-0125”, 11 December 2020, ICC-01/12-01/18-1202-Conf. Available at: https://www.icc-cpi.int/CourtRecords/CR2021_03597.PDF

The Prosecutor v. Al Hassan, Public redacted version of “Prosecution application under rule 68(3) to introduce MLI-OTP-P-0114’s statement and associated material into evidence”, 13 October 2020, ICC-01/12-01/18-1106-Conf, 5 February 2021, ICC-01/12-01/18-1106-Red. Available at: <https://www.legal-tools.org/doc/jvkw6/pdf>

The Prosecutor v. Al Hassan, Public redacted version of “Prosecution application under rule 68(3) to introduce MLI-OTP-P-0595’s prior statement and associated material into evidence”, 4 February 2021, ICC-01/12-01/18-1131-Red. Available at: <https://www.legal-tools.org/doc/y16qf1/pdf>.

The Prosecutor v. Al Hassan, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, 17 February 2021, ICC-01/12-01/18-1267-Red, Available at: https://www.icc-cpi.int/CourtRecords/CR2021_01354.PDF

The Prosecutor v. Al Hassan, Decision on the introduction into evidence of P-0125’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 14 April 2021, ICC-01/12-01/18-1413, Available at: https://www.icc-cpi.int/CourtRecords/CR2021_03443.PDF

The Prosecutor v. Al Hassan, Decision on the Conduct of proceedings (Public With one public annex and two confidential annexes), ICC-01/12-01/18-789. Available at https://www.icc-cpi.int/CourtRecords/CR2020_01806.PDF. Public Annex A: https://www.icc-cpi.int/RelatedRecords/CR2020_01808.PDF.

⁴⁹ *The Prosecutor v. Al Hassan*, Public Annex A of the Decision on the Conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 58. Available at: https://www.icc-cpi.int/RelatedRecords/CR2020_01808.PDF.

⁵⁰ *The Prosecutor v. Al Hassan*, Public Annex A of the Decision on the Conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 59. Available at: https://www.icc-cpi.int/RelatedRecords/CR2020_01808.PDF.

Prosecutor v Salim Jamil Ayyash et al (STL-11-01)

I. CASE DETAILS

- **Case name:** *Prosecutor v Salim Jamil Ayyash et al* (STL-11-01)
 - **Tribunal/Court:** Special Tribunal for Lebanon (“STL”)
 - **Offence charged:** Conspiracy aimed at committing a terrorist act; Committing a terrorist act by means of an explosive device; Intentional homicide of Rafik Hariri with premeditation by using explosive materials; Intentional homicide of 21 other persons with premeditation by using explosive materials; Attempted intentional homicide of 226 persons with premeditation by using explosive materials.⁵¹
 - **Stage of the proceedings:** Trial, Judgement, Sentence and Appeal
1. On 12 January 2021, the STL Prosecution and the Defence Counsel for Mr Ayyash filed notices of Appeal against the Trial Chamber’s Judgment of 18 August 2020, and the Defence against the Sentencing Judgment of 11 December 2020, in the *Ayyash et al.* case.⁵²
 2. On 29 March 2021, the Appeals Chamber ruled that the Defence for Mr Ayyash have no standing to appeal his conviction in his absence. The convicted Accused Mr Ayyash, as an individual, retains all the safeguards required under international human rights standards including the right to appeal the Judgments if he appears, or request a retrial.⁵³
 3. On 29 March 2021, the Prosecution submitted the Appeal Brief comprising eight grounds of appeal, all built towards finding Mr Merhi and Mr Oneissi guilty of counts 1 and 6-9 of the amended consolidated indictment.⁵⁴
 4. The Appeal judgement is to be delivered on 10th March 2022.⁵⁵

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

Primary source: Call Data Records (‘CDRs’)

⁵¹ *Prosecutor v Ayyash et al* (Case Info Sheet) STL-11-01.

https://www.stl-tsl.org/sites/default/files/documents/cis/Ayyash_Case_Info_Sheet_EN.pdf

⁵² *Prosecutor v Ayyash et al* ([Notice of Appeal on behalf of Mr Ayyash against Conviction and Sentence](#)) STL-11-01/Al-AC (12 January 2021) (AC).

⁵³ *Prosecutor v Ayyash et al* ([Decision on Admissibility of "Notice of Appeal on Behalf of Mr Ayyash against Conviction and Sentence"](#)) STL-11-01/ Al-AC (29 March 2021) (AC).

⁵⁴ *Prosecutor v Ayyash et al* ([Prosecution Appeal Brief](#)) STL-11-01/A-2/AC (29 March 2021) (AC).

⁵⁵ *Prosecution v Ayyash et al* ([Scheduling Order for Pronouncement of Appeal Judgment](#)) STL-11-01/A-2/AC (24 February 2022) (AC) [3].

5. CDRs are metadata that do not contain content of the calls and communications but provide information contextualizing them.⁵⁶ This could be, for example, the phone number a call originated from and to what number that phone communicated with, the date and time of phone calls and text messages (as the type of communication, whether text message or call, is tracked within the metadata), the duration of any calls; the IMEI number⁵⁷ of the hand set connected with the communications; and the cell sectors⁵⁸ which were engaged at the beginning and end of a call.
6. Cell sectors engaged at the beginning and end of each call were vital for the Chamber to determine whether they accepted the Prosecution case regarding the various locations of the Accused; the reliance on cell sector data was approved by both the Trial Chamber and the Appeal's Chamber.⁵⁹
7. CDR metadata is routinely collected by national service providers (CSPs). The main "three Lebanese CSPs [are] Ogero, the government subsidiary responsible for the administration of landline telephones, Mobile Interim Company 2 SAL (MIC2) trading as 'Mobile Telecommunication Company' ("MTC"), and Mobile Interim Company 1 SAL (MIC1) trading as Alfa ("Alfa").⁶⁰" CDRs are generated and maintained by CSPs as electronic business records in the usual and ordinary course of business.⁶¹ In this case, the Lebanese CSPs, specifically Ogero, MTC/Touch, and Alfa, had all collected metadata for customer billing and systems management which the Prosecution sought to admit when presenting their case. According to the Prosecution, the CDRs would assist in establishing locations of the accused through the cell sectors which were used to place each call.⁶²
8. "The CDRs were obtained by the UNIIC [United Nations International Independent Investigation Commission], and later by the Prosecution, either directly from the three

⁵⁶ See the [STL Primer on Telecommunications Evidence](#) for an overview of the technical terms and concepts.

⁵⁷ The International Mobile Station Equipment Identity ("IMEI") is a unique number that all mobile phone handsets possess: *Prosecutor v Ayyash et al* ([Redacted Version of "Prosecution Rule 154 Motion for the Admission of Documents relevant to the Acquisition of "Network" Mobile Phones and Handsets"](#)) STL-11-01/T/TC (5 December 2014) (TC) [37].

⁵⁸ "[C]ell IDs and cell sector names correspond to longitudinal and latitudinal coordinates of cell tower locations. Cell sector names are short-form alphanumeric identifiers used by communication service providers for a particular cell identity": *Prosecutor v Ayyash et al* ([Prosecution Motion For the Admission of Red Network-Related Call Sequence Tables and Related Statement](#)) STL-11-01/T/TC (28 January 2015) (TC) [2].

⁵⁹ *Prosecution v Ayyash et al* ([Judgment](#)) TL-11-01/T/TC (18 August 2020) (TC) [373]; *Prosecutor v Ayyash et al* ([Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records](#)) STL-11-01/T/AC (28 July 2015) (AC) [3].

⁶⁰ *Prosecutor v Ayyash et al* (Prosecution Motion for the Admission of Yellow Phone Related Call Sequence Tables and Related Statement) STL-11-01/T/TC (3 February 2015) (TC) fn 2; *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [1].

⁶¹ *Prosecutor v Ayyash et al* (Prosecution Motion for the Admission of Blue Network-Related Call Sequence Tables and Related Statements) STL-11-01/T/TC (2 February 2015) (TC) [2].

⁶² *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [2].

telephone communications providers that operate in Lebanon (Ogero, MTC and Alfa) or pursuant to Requests for Assistance through the Lebanese authorities.”⁶³

Secondary source: Call Sequence Tables (‘CST’)

9. CDRs in their raw format are mostly unintelligible and thus need to be sorted into a decipherable format. Once the metadata from CDRs is correctly arranged, it becomes Call Sequence Tables (CSTs). CSTs are “a readable and searchable format from which relevant extracts have been made for the convenience of the Trial Chamber.”⁶⁴
10. CSTs are useful for the presentation, accessibility and analysis of the core metadata, as CSTs display chronological sequences of calls for specific phone numbers (the ‘target’ number) over a specified period of time and can be organized for analysis.⁶⁵ Being able to track sequences of calls from ‘target’ numbers is particularly useful when searching for calls alleged to have been made or received.
11. The Prosecutor alleged that the Accused “carried out Mr Hariri’s assassination by using groups of mobiles that operated as networks, namely mobile groups with a high frequency of contacts within the group.”⁶⁶ As such, the Prosecution presented the CSTs in five coloured groups, having split the series of calls they linked together into various ‘networks’ for presentation of the case and for utility: “The Green network of three mobiles, allegedly monitored and coordinated the attack [...]. The Red network of eight mobiles, carried out the assassination of Mr Hariri. The Blue network of 15 mobiles and the Yellow network of 13 mobiles, were used to prepare for the attack, including the surveillance of Mr Hariri. The three mobiles in the fifth group, the purple mobiles, were used to communicate with each other and others outside the group to coordinate the false claim of responsibility.”⁶⁷

a. “Green Network”⁶⁸

CSTs which form the “Green Network” were named Green 023, Green 071, and Green 300. These were produced by two Prosecution analysts (PRH371 and PRH230) who extracted “the relevant information from the underlying material and format[ed] it to

⁶³ *Prosecutor v Ayyash et al* (Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records) STL-11-01/T/AC (28 July 2015) (AC) [4].

⁶⁴ *Prosecutor v Ayyash et al* ([Transcript](#)) STL-11-01/T/TC (16 January 2014) (TC) 48.

⁶⁵ *Prosecutor v Ayyash et al* (Prosecution Motion For the Admission of Red Network-Related Call Sequence Tables and Related Statement) STL-11-01/T/TC (28 January 2015) (TC) [11].

⁶⁶ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2146].

⁶⁷ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2146].

⁶⁸ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2192]; *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [16]; *Prosecutor v Ayyash et al* (Prosecution Submission of the Consolidated Amended Indictment Pursuant to the Trial Chamber's Order) STL-11-01/T/TC (11 July 2016) (TC) [15(b)].

present the data in an accessible, uniform and comprehensive manner.”⁶⁹ All the Green mobiles operated on the Alfa network.⁷⁰

b. “Red Network”⁷¹

CSTs which form the “Red Network” were named Red 572, Red 636, Red 652, Red 662, Red 678, Red 741, Red 893, and Red 946. The Red Network was “derived from the call data records provided by 'Alpha CS' in relation to a group of eight telephones.”⁷²

c. “Blue Network”⁷³

CSTs which form the "Blue Network" were named Blue 233, Blue 235, Blue 322, Blue 324, Blue 428, Blue 501, Blue 585, Blue 610, Blue 742, Blue 813, Blue 817, Blue 864, Blue 940, Blue 965, and Blue 967. “The Blue mobiles were almost equally divided between the Alfa (seven) and the Touch (eight) provider networks”⁷⁴

d. “Yellow Network”⁷⁵

CSTs which form the "Yellow Network" were named Yellow 024, Yellow 078, Yellow 120, Yellow 170, Yellow 294, Yellow 425, Yellow 457, Yellow 513, Yellow 618, Yellow 669, Yellow 763, Yellow 932, and Yellow 933. “The 13 Yellow mobiles were a mixture of Alfa (seven) and Touch (six) mobiles.”⁷⁶

e. “Purple Telephones”⁷⁷

CSTs which form the "Purple Network" were named Purple 095, Purple 018, and Purple 231 and all the phones were part of the Alfa network.⁷⁸ Unlike the other four colour coded networks, “the purple mobiles [were] alleged neither to be network mobiles nor covert in

⁶⁹ *Prosecutor v Ayyash et al* (Prosecution Motion for the Admission of Green Network Related Call Sequence Tables and Related Statement) STL-11-01/T/TC (29 January 2015) (TC) [5].

⁷⁰ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2196].

⁷¹ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2247] - [2248]; *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [6].

⁷² *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [6].

⁷³ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [33].

⁷⁴ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2294].

⁷⁵ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2342]; *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [39].

⁷⁶ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2346].

⁷⁷ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [23].

⁷⁸ *Prosecutor v Ayyash et al* (Prosecution Motion for the Admission of Purple Phone Related Call Sequence Tables) STL-11-01/T/TC (30 January 2015) (TC) [2].

nature. They were used for personal purposes such as to call family and friends and for ‘normal’ non-covert communications.”⁷⁹

Evidentiary considerations

12. The distinction between primary and secondary material proved to be an important evidentiary consideration.⁸⁰ The Defence argued that the secondary material (CSTs) could not be admitted into evidence unless “the Trial Chamber [was] satisfied of the reliability of the underlying data” (CDRs).⁸¹ The Trial Chamber agreed with this sentiment. Initially, the prosecution had sought to admit the CSTs without first providing the CDRs.
13. The Trial Chamber specified the procedural requirements for evidence under Rule 149 (B) and (C) *i.e.*, that evidence “must be relevant and probative, and its probative value must not be outweighed by its prejudicial effect” and “only *prima facie* rather than definite reliability and probative value is required at this stage.”⁸²
14. The Trial Chamber noted the very real and significant challenges of organising the evidence in long and complex cases. “The evidence has accordingly been divided into numerous but sometimes overlapping categories according to evidentiary themes, such as forensics, telecommunications, the political background, the claim of responsibility for the attack and that related to each Accused. Adding to the challenge is the interrelationship between many evidentiary threads such as the voluminous telecommunications evidence, the expert evidence on closed criminal telecommunication networks, that of cell site analysis and of attribution of mobile telephone usage to the four Accused and Mr Badreddine”⁸³
15. “The process of converting the metadata arising from phone calls and messages (the primary material) into CSTs providing “a readable and searchable format from which relevant extracts have been made for the convenience of the Trial Chamber”⁸⁴ rendered the admission of the CSTs contentious for various reasons.”
16. Firstly, the sheer volume of data in this case was significant. At the beginning of the trial, “one of the Prosecution’s exhibit and witness lists against the original four Accused, Mr Ayyash, Mr Badreddine, Mr Oneissi and Mr Sabra, filed in May 2013, had contained some

⁷⁹ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2433].

⁸⁰ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [68].

⁸¹ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [68].

⁸² *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [111].

⁸³ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [187].

⁸⁴ *Prosecutor v Ayyash et al* (Transcript) STL-11/01/T/TC (16 January 2014) (TC) 48.

14,737 exhibits and 587 witnesses,⁸⁵ although this related to all forms of evidence admitted to the bar table. Regarding DDE, the Trial Chamber stated: “adding to the challenge is the inter relationship between many evidentiary threads such as the voluminous telecommunications evidence, the expert evidence on closed criminal telecommunication networks, that of cell site analysis and of attribution of mobile telephone usage to the four Accused and Mr Badreddine.”⁸⁶

17. The Pre-Trial Judge in the pre-trial phase issued five decisions on exhibit lists and witnesses so that by the time the trial began the intended exhibit list had been significantly “reduced to ‘only’ 8,344 documents and the witness list to ‘only’ 540 witnesses, of whom 135 were expected to testify live.”⁸⁷
18. Admission (or exclusion) of evidence at the STL needs to be analysed by the Trial Chamber “taking into account, among other things, the probative value of the evidence; a Chamber is not bound any by national rules of evidence; and, a Chamber may exclude evidence obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”⁸⁸
19. In its report from 2013, the Pre-Trial Judge underlined the importance of appointing an expert with special knowledge on technical aspects of the case given “the need for the judges to have a thorough understanding of [CST and CDR] aspects.”⁸⁹
20. The Trial Chamber stressed that, as CDRs are voluminous “without extraction of the relevant data into a readable format [read: CSTs], [they are] meaningless.”⁹⁰
21. The Trial Chamber allowed Parties to draft ‘mid-trial summaries’ of the evidence given the length and complexity of the trial, but they stressed that these summaries held no evidentiary value nor were they to be considered as submissions as they were explanatory and not argumentative. “These were intended to allow the Parties to provide explanatory arguments on the evidentiary themes during the trial and while the evidence was fresh in the Trial Chamber’s mind. The Trial Chamber found that they could aid it, the Parties, the participating victims and the public to understand ‘the voluminous evidence and how some pieces of evidence relate to other pieces and to the evidence as a whole. [...] These summaries could also clarify how the admitted evidence related to the anticipated evidence

⁸⁵ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [155].

⁸⁶ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [187].

⁸⁷ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [155].

⁸⁸ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [66].

⁸⁹ *Prosecutor v Ayyash et al* (Redacted Version of The Corrected Version of The Pre-Trial Judge’s Report Prepared pursuant to Rule 95(A) of the Rules of Procedure and Evidence) STL-11-01/PT/PTJ (11 December 2013) (PTJ) [71].

⁹⁰ ⁹⁰ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [113].

and the larger context of the case, and hence to better contextualise the evidence.”⁹¹

22. Further, to enable the Trial Chamber to analyse the admissibility and reliability of the data “the Prosecution must provide contextual evidence on its provenance.”⁹² The Trial Chamber furthermore stated that, “[t]o properly evaluate the integrity, value and authenticity of these call sequence tables, the Prosecution must provide contextual evidence on these tables and, in particular, on how they were produced.”⁹³
23. The Prosecution was therefore asked to call at least one witness “who can provide information on:
 - (i) the provenance of the underlying call data records (including the gathering, retrieval and storage of this data), and
 - (ii) the production of the call sequence tables.”⁹⁴
24. The Trial Chamber welcomed expert opinions on the evidence from two key expert witnesses: Mr John Phillips and Mr Gary Platt. Mr Phillips was declared an expert witness in mobile networks and their various aspects, and Mr Platt was a prosecution investigator who had extensive experience in covert networks.⁹⁵
25. Both experts provided the Chamber with extensive explanations on the characteristics of the mobile networks, including organisational factors which indicated whether mobiles could be operating as a network, the setting up of the network, equipment used, usage of the mobiles, closure of the network and other factors which indicate the network is attempting to remain covert.⁹⁶
26. The expert witnesses also needed to link and distinguish the networks from one another. As an example, the personal nature of the usage of the purple telephones set this network slightly apart from the others in that it changed the scope of how the evidence needed to be reviewed and explained by the experts (i.e., there was an increased need to explain how this network of a slightly different nature could prove certain allegations alongside the same reasoning as was deployed by experts referring to the other networks)⁹⁷.

⁹¹ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [192], [193].

⁹² *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [113].

⁹³ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [115].

⁹⁴ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [115].

⁹⁵ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2152].

⁹⁶ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2154] – [2180].

⁹⁷ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [5421], [5275] – [5296], [5298] – [5317].

27. “The Trial Chamber required that call sequence tables, when tendered, were accompanied by witness statements or testimony explaining who prepared them and in what manner, to enable it to review the methodology and thus evaluate their prima facie reliability and probative value. Their relevance was not in issue. As both Prosecution and Defence were using the same data collected from the Lebanese telecommunication companies and utilised the same methodology in extracting the data into call sequence tables, this applied equally to all Parties.”⁹⁸

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of the DDE?

Green Network

28. The prosecution submitted “that the 'green telephones' were managed as a group,” namely that the call sequence tables of the telephones of “Green 023”, “Green 300” and “Green 071” provide evidence that telephones used by Mr Badreddine, Mr Ayyash and Mr Merhi, respectively, were involved in the planning and preparation of the attack against Mr Hariri and in the disappearance of Mr Ahmad Abu Adass.”⁹⁹
29. The Prosecution submitted in relation to probative value and reliability that the Prosecution analyst “is expected to testify that [...] these three telephones formed a closed 'green network' between 13 October 2004 and 14 February 2005.”¹⁰⁰ Indeed, when the Prosecution analyst did testify about the Green Network, he suggested that one could even glean a hierarchy of involvement involving the Accused in the planning of the attack. The Mehri Defence vehemently rejected this analysis, stating that the Prosecution did not explain the purpose of the Green Network, they did not demonstrate its mission was to coordinate Mr Hariri’s assassination, nor did they prove that the Green Network belonged to Hezbollah.¹⁰¹
30. The Trial Chamber nevertheless found most of the Prosecution’s submissions on the Green Network compelling, and they concluded that Green 023, Green 071, and Green 300 operated as a covert network.¹⁰² However, the Trial Chamber only accepted evidence in relation to three specific CSTs within the Green Network and not all 18 mobiles contained within the larger group as it was not proven that there was a conspiracy involving the other 15 phones. Although the Prosecution had tendered evidence claiming all 18 mobiles were involved in the network, this was rejected by the Trial Chamber who held that on the

⁹⁸ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [379].

⁹⁹ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNHCR and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [16].

¹⁰⁰ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNHCR and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [18].

¹⁰¹ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [114], [121], [402], [771], [2228], [2243].

¹⁰² *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2246].

evidence provided by the experts, the only phones which had been proven to be actively part of the network and conspiracy were Green 023, 071 and 300.¹⁰³

Red Network

31. The Prosecution argued that the Red Network was the most covert of all the networks¹⁰⁴ and that the Red Network CSTs “provide evidence that these telephones operated as 'mission telephones' - telephones that were operated as a closed group, for a limited time and purpose-in a closed network and were used in the surveillance of former Lebanese Prime Minister Rafik Hariri between 4 January 2005 and his assassination in Beirut on 14 February 2005.”¹⁰⁵
32. The Prosecution argued in favour of the probative value of these CSTs, stating that the expert analysts reviewed the available evidence and determined that it “supports the conclusion that this telephone is attributable to Mr Ayyash.”¹⁰⁶
33. With regard to the reliability of this CST evidence, the Prosecution stated that their analysts “used Microsoft Excel software to produce the call sequence tables by copying, storing and formatting the relevant data from the call data records, [...] performed this standardised and mechanical process and verified call sequence tables against previous versions for consistency and accuracy [and] created separate call sequence tables from each source for cross-checking, for consistency.”¹⁰⁷ The Prosecution submitted this was evidence of sufficient indicia of reliability against the potential prejudice to the fair trial rights of the Accused.¹⁰⁸
34. The Ayyash Defence submitted that the findings of the expert witness, Mr Platt, which the Prosecution relied on, had not been fully substantiated or explained, particularly with respect to how the Network was ‘covert.’¹⁰⁹
35. Mid-trial, the Sabra Defence submitted that the Red Network mobiles were only “bought to create a false lead.”¹¹⁰

¹⁰³ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2245].

¹⁰⁴ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2281].

¹⁰⁵ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [6].

¹⁰⁶ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [8].

¹⁰⁷ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [9].

¹⁰⁸ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [19].

¹⁰⁹ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2282].

¹¹⁰ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2284].

36. However, “the Defence of the four Accused otherwise did not challenge the Prosecution’s argument that the Red mobiles formed a covert network or the facts presented in support of this conclusion.”¹¹¹
37. Based on the evidence of both experts Mr Phillips and Mr Platt, the Trial Chamber found that the Red Network constituted a covert network. The Trial Chamber exercised their discretion to include CSTs which had not been examined by one of the experts: “Mr Philips analysed six of these mobiles; he did not include Red 572 and Red 662. According to Mr Philips, these two were sparsely used, and he considered them ‘spare’ mobiles. Because the Prosecution alleges that the Red network consisted of all eight Red mobiles, including the ‘spare’ mobiles, the Trial Chamber has examined all eight, and not just the six analysed by Mr Philips.”¹¹²
38. “The Trial Chamber notes further evidence—that some Red mobiles displayed sequential patterns for their IMEI numbers, their handsets were basic models, the voice calls between Red mobiles were of short duration and they all operated on the Alfa network—that may be less compelling but nevertheless provides additional support that the Red mobiles were part of a network.”¹¹³

Blue Network

39. The Prosecution declared that the CSTs of fifteen mobiles comprising the “Blue Network” which communicated almost exclusively with each other are of necessary probative value, as “read in conjunction with other evidence, the 'blue network' call sequence tables help prove that the 'blue network' telephones operated as 'mission telephones' in the month preceding the attack on Mr Hariri and that a group of six telephones were used between 21 December 2004 and 14 February 2005 in planning the attack.”¹¹⁴ The alleged purpose of the Blue Network was to plan the attack, including the surveillance of Mr Hariri.¹¹⁵
40. The analysis of the CST conducted by the expert witnesses resulted in the conclusion that telephone “Blue 322” “could be found at the same location as other telephones attributed to Mr Ayyash from 10 January 2005 to 21 September 2005.”¹¹⁶
41. The Prosecution submitted that the purchase of SIM cards and how they were topped up was coordinated, that the network had been setup around the same area and that there was a coordinated shut down of the network. They further alleged that “the Blue mobiles’ ‘low

¹¹¹ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2286].

¹¹² *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2248].

¹¹³ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2290].

¹¹⁴ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNHCR and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [33].

¹¹⁵ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2293], [2327].

¹¹⁶ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNHCR and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [33].

forensic visibility¹¹⁷ enabled the adoption of less rigorous operating measures. Nonetheless, the Blue network adopted a high degree of covertness and discipline to ensure their users' anonymity. Measures that were adopted were: pre-paid subscriptions; false or no subscriber details; virtually complete closed-user group activity; and almost no use of text messaging.¹¹⁸

42. The Sabra Defence argued that “there was no evidence that the [mobile phone registration] forms linked to the Blue mobiles were provided by the buyers of the lines themselves”¹¹⁹ but this was not accepted by the Trial Chamber.
43. The Trial Chamber noted “the Blue mobile users' commitment to secrecy.”¹²⁰ They added, “in terms of covertness, no correct subscriber details were provided for any of the Blue mobiles. Cash was used to make mobile-related payments. There was virtually no text messaging and no voice mails. Thousands of dollars of credit remained when the Blue mobiles were deactivated.”¹²¹
44. The Trial Chamber found “virtually exclusive communications within the mobile group, the coordinated activities of the six ‘core’ mobiles and the lack of subscriber details all point to the existence of a covert Blue network of 15 mobiles, or, at the very least, six ‘core’ mobiles.”¹²²

Yellow Network

45. The Prosecution presented CSTs which they deemed probative as they “help[ed] prove that the 'yellow telephones' operated as a group” and which could be supported by a witness.¹²³ The Prosecution repeated the argument they had submitted for the “Red Network” stating that there was sufficient DDE in terms of the indicia of reliability which outweighed the potential prejudice to the fair trial rights of the Accused.¹²⁴

¹¹⁷ After a mission is over, not all mobiles in a network will be discarded. One of the expert witnesses, Mr Philips, testified that if a mobile is closer to the crime, it will have higher forensic visibility and as such the user will be aware that there is high risk that the mobile's call activity can be associated with the crime, and thus they will be aware that there is a greater need to discard it: *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2170].

¹¹⁸ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2327].

¹¹⁹ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2329].

¹²⁰ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2340].

¹²¹ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2339].

¹²² *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2341].

¹²³ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [41].

¹²⁴ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [43].

46. The analysis from other witnesses showed that “several co-conspirators, until early January 2005, simultaneously held 'blue telephones' and 'yellow telephones', and, from 14 January to 14 February 2005, 'blue telephones' and 'red telephones'.”¹²⁵
47. Originally 18 mobiles and corresponding CSTs constituted the yellow network, however only 13 mobiles were operational and therefore examined by expert Mr Platt. Although the Prosecution did not characterise the Yellow Network as a ‘mission phone network’ in the same way that they did for the way in which the Blue, Green and Red Networks operated, “the Yellow network conveys unusual elements of co-ordination, cohesion and focus indicative of an organised entity.”¹²⁶
48. The Prosecution argued that, “given the Yellow network’s limited role and the fact that it shut down in early January 2005, any forensic association with the attack was very remote, and consequently the need for high covertness was correspondingly low. Nevertheless, the Yellow network retained significant elements of covertness, albeit not to the same level as the three other networks and was therefore classified as ‘semi-covert’.”¹²⁷ The Prosecution therefore suggested a different legal standard to the other CSTs mentioned above should be accepted. However, this was rejected by the Trial Chamber who stated that the expert witness had “classified the Yellow network as ‘semi covert’, because it was ‘on the lower end of the scale’ of covertness. However, the Trial Chamber consider[ed] that a network either is or is not covert, based on Mr Philips’s and Mr Platt’s evidence as to the general characteristics of a mobile network. A label of ‘semi-covert’ therefore does not assist the Trial Chamber in its analysis of the Yellow mobiles.”¹²⁸
49. No Defence counsel specifically addressed the Prosecution’s submissions.¹²⁹
50. In conclusion, the Trial Chamber found that “the Green, Red, Blue and Yellow networks were interconnected and coordinated with each other.”¹³⁰

Purple Network

51. The Purple Network was presented as having a different purpose to the aforementioned networks. Notwithstanding, the focus on the CST evidence remained the same. The Prosecution submitted that the Purple Network CSTs “help[ed] prove that the 'purple telephones' functioned as a group involved in the planning and carrying out of the false claim of responsibility for the attack of 14 February 2005” and “establish[ed] that Mr Merhi,

¹²⁵ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNHIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [42].

¹²⁶ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2368].

¹²⁷ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2369].

¹²⁸ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2377].

¹²⁹ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2371].

¹³⁰ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2423].

Mr Oneissi and Mr Sabra were, respectively, the users of 'Purple 231,' 'Purple 095' and 'Purple 018'.”¹³¹

52. The Prosecution argued, with respect to probative value, that CSTs in connection with other evidence can “prove that the 'purple telephones' were linked together as a group.”¹³² This was also supported by analysis from two of the Prosecution’s witnesses.¹³³ The Prosecution repeated the argument they had submitted for the “Red Network” stating that there was sufficient DDE in terms of the indicia of reliability which outweighed the potential prejudice to the fair trial rights of the Accused.¹³⁴
53. The Mehri Defence argued that the nature of the CSTs, particularly surrounding purple 231, were not determinative of the behaviour alleged, adding that the purple phones alleged to form part of the network were not “exceptional” as the Prosecution had suggested¹³⁵.
54. The Sabra and Oneissi Defence highlighted the “general limitation of the expressed accuracy of sixty to seventy per cent of Alfa’s predicted best server coverage area maps [as well as the fact that] the cell site data is incomplete [all suggesting that the] Prosecution’s inferences that the Purple mobiles’ activity was exceptional are speculative.”¹³⁶
55. The Trial Chamber found that “the evidence establishes that the users of the three Purple mobiles knew each other. The call data records, as extracted into call sequence tables, show 397 contacts between the three Purple mobiles between 26 December 2002 and 22 December 2004.”¹³⁷ It further found “that the call data records before August 2004 [were] incomplete. Until that date there were no records of where Alfa mobiles were when they received calls”¹³⁸ and they also found that “there were also no end cell records available until 1 October 2004, which signifies that only the cells to which a mobile connected at the start of a call was recorded.”¹³⁹
56. The Trial Chamber further held that “the simultaneous discarding of the Purple mobiles over the two days after the attack has similarities to what expert evidence described as ‘the closure of a network’ for covert reasons. The Trial Chamber is satisfied that, at least on first

¹³¹ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [23].

¹³² *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [25].

¹³³ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [25]-[26].

¹³⁴ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [27].

¹³⁵ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2463].

¹³⁶ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2464].

¹³⁷ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2470].

¹³⁸ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2476].

¹³⁹ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2477].

impression, the Purple mobiles share this characteristic with network or ‘mission’ mobiles. As Mr Platt stated, after a crime, and to lower the likelihood of an investigation identifying their users, such mobiles may simultaneously cease operations.”¹⁴⁰ However the Trial Chamber did also find that “while simultaneously ceasing activity is an organisational characteristic of a covert network, the Purple mobiles were otherwise not used covertly. This is unlike covert users who distance themselves from their mobiles to prevent their identification.”¹⁴¹

General Legal Submissions on DDE

57. The Prosecution indicated that “the practice of tendering an extract of a large record has been accepted by the International Criminal Tribunal for the former Yugoslavia (ICTY).”¹⁴²
58. **Premature motions** – The Defence accused the Prosecution of premature motions. It stated, “the Prosecution has not tendered into evidence the call data records and, consequently, has failed to demonstrate the admissibility of the call data records from which the call sequence tables derive. The Prosecution has failed to provide sufficient information about the provenance, relevance, reliability, accuracy, integrity and authenticity of the call data records and the call sequence tables.”¹⁴³
59. The Counsel for Mr Ayyash and Mr Sabra argued that “the Prosecution should lead the evidence on the creation, storage, and retrieval of the call data records, as it states that it will do, before tendering the call sequence tables” for the reason, for example, that “the call sequence tables include information not found in the call data records derived from other sources, such as the name of the cell towers.”¹⁴⁴
60. **Unreliable CDRs and CSTs** – The Counsel for Mr. Sabra asked the Trial Chamber to “satisfy itself that the process of transforming call data records into call sequence tables is reliable.”¹⁴⁵ The Counsel for Mr Oneissi submitted that “it is not possible to ascertain the

¹⁴⁰ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2484].

¹⁴¹ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [2485].

¹⁴² *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [11].

¹⁴³ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [50].

¹⁴⁴ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [51].

¹⁴⁵ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [54].

reliability of the communications evidence before hearing the testimony of the relevant witnesses.”¹⁴⁶

61. **CSTs must be tendered through Prosecution witnesses who must be cross-examined** – the Defence submitted that CSTs “should be tendered through the witnesses who produced them,” otherwise “They have no probative value without the explanations provided by their author.”¹⁴⁷ It furthermore submitted, “[d]iscrepancies in one specific call sequence table confirm the importance of cross-examination” as they “raise serious doubts about the reliability of the call sequence tables and their underlying call data records.”¹⁴⁸
62. **Collecting CDRs breached Lebanese and international human rights law** – Counsel for Mr Oneissi and Mr Badreddine argued “the data used to produce the call sequence tables was gathered in breach of the international standards on human rights and the applicable Lebanese law governing the collection of such evidence” and “their admission would consequently be antithetical to, and would seriously damage, the integrity of the proceedings.”¹⁴⁹
63. This argument was subsequently rejected by the Trial Chamber, which stated that it had not relied on material that it ha[d] not received into evidence, thus rendering its practice consistent with principles of international law.¹⁵⁰ Exploring this point further, the Trial Chamber stated that:
 - a. The transfer of the call data records was legal as “[t]he two Security Council Resolutions [...] provide the necessary legal authorisation for the transfer of the call data records. The transfer of the records was necessary in the circumstances; without these records the Prosecutor could not have constructed his case and filed an indictment against the first four, and then the fifth Accused.” Furthermore, “[t]ransferring call data records, and strictly limiting access to them, was proportionate to this legitimate aim” (*i.e.* – the investigation of the attack of 14 February 2005).¹⁵¹ In summary, the Trial Chamber held that the transfer of evidence in the form of CSTs does not violate international human rights standards nor the right to privacy as long as such evidence serves a legitimate aim.

¹⁴⁶ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNHIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [54].

¹⁴⁷ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNHIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [56].

¹⁴⁸ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNHIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [57].

¹⁴⁹ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNHIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [61].

¹⁵⁰ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [190].

¹⁵¹ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNHIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [109].

- b. The Trial Chamber agreed with the Defence that it “has to be satisfied of the reliability of the underlying data.”¹⁵² However, the Chamber determined it would not “summarily exclude the evidence under Rule 149 (D)” (*i.e.* “[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. In particular, the Chamber may exclude evidence gathered in violation of the rights of the suspect or the accused as set out in the Statute and the Rules”).¹⁵³
- c. The Appeals Chamber supported the view of the Trial Chamber and dismissed the appeal by counsel for Mr. Oneissi with respect to both issues of the appeal: (1) did the Trial Chamber err in concluding that the UNIIIC and the Prosecutor could legally request and obtain CDRs from Lebanese telecommunications companies without either Lebanese or international judicial authorization?; and (2) did the Trial Chamber err in concluding that the absence of judicial control does not violate any international human rights standard on the right to privacy, justifying the exclusion of the call data records under Rule 162?.¹⁵⁴
64. With regard to the CDRs, “the Trial Chamber declined to admit into evidence the raw call data records given that they are voluminous—comprising billions of entries—and unreadable in their raw form. To be comprehensible, the records must be extracted and converted into a readable format. Receiving the call data records onto the trial record in their raw format would have been a pointless exercise, and moreover, almost all of them would have been irrelevant to the case.”¹⁵⁵
65. During the early stages of the proceedings none of the CST DDE was admitted. However, the Trial Chamber left open the possibility for further admission, stating “it will defer a decision on the admissibility of the call sequence tables and related witness statements until at least one witness has testified about: (i) the provenance of the underlying call data records (including the gathering, retrieval and storage of this data); and (ii) the production of the call sequence tables.”¹⁵⁶

¹⁵² *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [68].

¹⁵³ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [67]-[69].

¹⁵⁴ *Prosecutor v Ayyash et al* (Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber’s Decision on the Legality of the Transfer of Call Data Records) STL-11/01/T/AC (28 July 2015) (AC) [36], [61].

¹⁵⁵ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [375].

¹⁵⁶ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [115], Disposition.

66. The Trial Chamber in its decision from 31 October 2016 reaffirmed its findings that the evidence in the form of CSTs presented by the Court was relevant and *prima facie* reliable.¹⁵⁷ The evidence presented by the Prosecution was found to be probative by the Chamber after it was satisfied with information on cell sites, geographic location and movement of the target mobile phones.¹⁵⁸ The Prosecution demonstrated how the evidence fits into the case by providing information from experts and witnesses which included:
- (i) demonstration of the organization and covertness of the colour-coded telephone networks;
 - (ii) the comparison of the call activity with the occurrence of concurring relevant events pleaded in the indictment, and
 - (iii) attribution of some of the color-coded telephone numbers.¹⁵⁹

Was the DDE admitted and/or relied upon?

67. “Both the Prosecution and counsel for all Accused tendered call sequence tables into evidence—extracted from the same set of call data records that the Lebanese companies had provided to the UNIIC and the Prosecution.”¹⁶⁰
68. The Prosecution used statements from experts and witnesses and called them to the Court to testify on the production of the CSTs.¹⁶¹ The Trial Chamber was satisfied with much of this evidence and it was admitted as witness testimony. “The Trial Chamber found that a number of witnesses qualified as experts and admitted into evidence their reports within their respective areas of expertise. These were: [...] Mr John Edward Philips, an expert in telecommunications and cell site analysis, which includes the co-location and dislocation of mobiles, and on the workings of the global system for mobile telecommunication generally as applied to cell site analysis [and] Mr Gary Platt, an expert in the surveillance of criminal networks and the identification and organisation of covert communication networks. His expertise extends to providing expert opinion evidence on the group of ‘purple phones’. Specifically, his expertise lay in analysing many pieces of evidence, explaining their significance, and identifying covert telecommunication networks and their organisation.”¹⁶²
69. CSTs presented by the Prosecution which were mentioned above as having been accepted by the Trial Chamber were admitted into evidence on 31 October 2016, but they were only

¹⁵⁷ *Prosecutor v Ayyash et al* (Decision on the Prosecution Motions for the Admission of the Call Sequence Tables Related to the Five Colour-Coded Mobile Telephone Groups and Networks) STL-11-01/T/TC (31 October 2016) (TC) [39], [42].

¹⁵⁸ *Prosecutor v Ayyash et al* (Decision on the Prosecution Motions for the Admission of the Call Sequence Tables Related to the Five Colour-Coded Mobile Telephone Groups and Networks) STL-11-01/T/TC (31 October 2016) (TC) [43].

¹⁵⁹ *Prosecutor v Ayyash et al* (Decision on the Prosecution Motions for the Admission of the Call Sequence Tables Related to the Five Colour-Coded Mobile Telephone Groups and Networks) STL-11-01/T/TC (31 October 2016) (TC) [44].

¹⁶⁰ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [380].

¹⁶¹ *Prosecutor v Ayyash et al* (Decision on the Prosecution Motions for the Admission of the Call Sequence Tables Related to the Five Colour-Coded Mobile Telephone Groups and Networks) STL-11-01/T/TC (31 October 2016) (TC) [47]-[48].

¹⁶² *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [331].

admitted after the Trial Chamber examined the statements made by witnesses of the Prosecution on generation, storage and retrieving data from CDRs.¹⁶³

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

70. **Rule 149 (C) and (D)** - The Trial Chamber relied primarily on its own Statute and Rules of Procedure and Evidence that contain summarised general principles and rules in international criminal law on admission and exclusion of evidence. “Article 21 (2) of the Statute and Rule 149 (C) and (D) allow a Chamber to admit any relevant evidence which it deems to have probative value, unless its probative value is substantially outweighed by the need to ensure a fair trial.”¹⁶⁴
71. The general principles also hold that: “a Chamber is not bound any by national rules of evidence; and a Chamber may exclude evidence obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”¹⁶⁵
72. The Trial Chamber replied to the submission by Defence that CSTs must be excluded on the basis of this Rule. The Trial Chamber did not summarily exclude the evidence under the Rule 149 (D) as the Defence did not meet the timing requirements.¹⁶⁶ The Trial Chamber specified the procedural safeguards for the admission of evidence and noted that according to Rule 149 “it must be relevant and probative, and its probative value must not be outweighed by its prejudicial effect.”¹⁶⁷
73. Evidence which is not relevant to the proceedings should not be admitted and for the evidence, which is relevant and related to the proceedings, it should have probative value, “that is, to prove a fact it must have some reliability.”¹⁶⁸ However, the Trial Chamber specified that only “prima facie - rather than definite - reliability and probative value is

¹⁶³ *Prosecutor v Ayyash et al* (Decision on the Prosecution Motions for the Admission of the Call Sequence Tables Related to the Five Colour-Coded Mobile Telephone Groups and Networks) STL-11-01/T/TC (31 October 2016) (TC) [40]-[48], Disposition.

¹⁶⁴ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [175]; Rule 149 of the STL Rules of Procedure and Evidence.

¹⁶⁵ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [66].

¹⁶⁶ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [67]-[70].

¹⁶⁷ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [111].

¹⁶⁸ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [177].

required at this stage.”¹⁶⁹

74. When admitting evidence, the practices must always be consistent with long-standing principles of international criminal procedure as the tendering party demonstrates that evidence is relevant and, for later assessing its probative value, prima facie reliable.¹⁷⁰
75. The party tendering the evidence bears the evidentiary burden, regardless of whether this is the Prosecution or Defence – the rules do not distinguish between them for the purpose of establishing the prima facie reliability of the proposed evidence for admission.
76. Additionally, **Rule 149 (E)** authorises a chamber to request any verification regarding the authenticity of evidence obtained out of court. The Chambers were keen to ensure that when admitting evidence at trial that no party was disadvantaged over another by “having a higher evidentiary onus in introducing evidence than another.”¹⁷¹
77. “Evidence cannot be probative without having indicia of reliability. In admitting material into evidence, including witness statements, the Trial Chamber followed the inclusionary approach of the Special Tribunal’s Rules to receiving evidence.”¹⁷² The Trial Chamber stated that evidence may have some probative value which may later be found to be distinct from the weight that can ultimately be given to that evidence. This means that evidence could initially appear to be of probative value but, in light of other evidence or upon further examination (which may include challenges from other parties), its weight may be diminished to the point of not being worthy of inclusion.¹⁷³
78. The Trial Chamber stated that “when assessing the weight of the evidence in deliberating each charge in the amended consolidated indictment, the Trial Chamber has reassessed each piece of evidence and relied on relevant evidence to the extent that it found it to be credible, reliable and probative in light of the totality of the evidence. The Trial Chamber generally assessed each piece of evidence in the context of all related evidence. Some particular pieces of evidence, however, related to a topic or evidentiary theme so discrete that they could be assessed without requiring substantial comparison with other admitted evidence.”¹⁷⁴
79. **Rule 91** – The Trial Chamber allowed the Prosecution to amend its exhibit list filed under Rule 91.¹⁷⁵

¹⁶⁹ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [111].

¹⁷⁰ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [178].

¹⁷¹ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [180].

¹⁷² *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [181].

¹⁷³ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [181].

¹⁷⁴ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [188].

¹⁷⁵ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution) STL-11-01/T/TC (6 May 2015) (TC) Disposition.

G) The Pre-Trial Judge shall order the Prosecutor, within a time-limit set by him and not less than six weeks before the Pre-Trial Conference required by Rule 127, to file the following:

(i) the final version of the Prosecutor's pre-trial brief, including, for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused. This brief shall include any admissions by the Parties, as well as a statement of matters that are not in dispute;

[...]

(iii) the list of exhibits the Prosecutor intends to offer stating, where possible, whether the Defence has any objection as to authenticity. The Prosecutor shall serve on the Defence copies of the exhibits so listed or provide to the Defence access to the exhibits.¹⁷⁶

80. **Rule 162 (A) and (B)** – The Trial Chamber did not support the submission of the Defence that the CDRs were illegally transferred to the UNIIC, or to the Special Tribunal's Office of the Prosecutor given there was necessary legal authorisation for such acts which were not in contravention of Rule 162,¹⁷⁷ which states:

(A) No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

(B) In particular, evidence shall be excluded if it has been obtained in violation of international standards on human rights, including the prohibition of torture¹⁷⁸.

81. Furthermore, on appeal, Defence Counsel for Mr Oneissi argued as its first legal point that the Trial Chamber erred in accepting that the CDRs had been lawfully disclosed to the UNIIC and to the Prosecution. Defence Counsel for Mr Oneissi submit as their second ground for appeal the question as to whether the Trial Chamber erred in concluding that, in the absence of judicial control, international human rights standards on the right to privacy had been breached and thus the CDRs under Rule 162 should have been excluded.¹⁷⁹

82. In responding to whether the transfer of the CDRs should have been authorized by an independent judicial authority, the Appeals Chamber held that UNIIC and the Prosecutor had the right to legally request the CDRs without judicial authorization as this was not

¹⁷⁶ Rule 91 of the STL Rules of Procedure and Evidence.

¹⁷⁷ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [108]-[110].

¹⁷⁸ Rule 162 of the STL Rules of Procedure and Evidence.

¹⁷⁹ *Prosecutor v Ayyash et al* (Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records) STL-11/01/T/AC (28 July 2015) (AC) [8], [13] – [21].

required under their respective legal instruments. The Security Council Resolutions which established both the STL and the UNIIC did not demonstrate an intention on behalf of the Security Council to subject either body to jurisdiction of judicial or other authorities in their investigations.¹⁸⁰

83. The Lebanese government requested the establishment of the STL at their own request in order to create independent external organs who could carry out impartial investigations into the terrorist attack and assassination of former Prime Minister Hariri on the 14th of February 2005, as well as other connected and associated crimes.¹⁸¹
84. Moreover, the Appeals Chamber found the exclusion of CDR and ergo CST evidence was proportionate to the legitimate aim.¹⁸² Given the CDRs were not stored nor collected for the purpose of investigating future unspecified and indeterminate criminal activity, the transfer of CDRs which took place was uniquely for the purpose of the investigation and to refer to crimes which had already been carried out. The investigators therefore had a specified purpose, and as such, access to the CDRs was only granted on this investigatory basis.¹⁸³
85. The Appeals Chamber held that the interference with the privacy of the Accused and the Lebanese population was “neither unlawful nor arbitrary”¹⁸⁴ Whilst the Appeals Chamber dismissed this second aspect of the appeal and supported the findings of the Trial Chamber on the legality of gathering and transfer of evidence, they did accept that “collection of CDRs may constitute a restriction on the right to privacy.”¹⁸⁵ The Appeals Chamber reiterated the importance of ensuring restrictions on the right to privacy remain proportionate.
86. In closing, the Appeals Chamber found that there was no violation of international standards on human rights, particularly with regards to privacy protection concerns mentioned above, which would have potentially contravened Rule 162 (A) and (B) of the STL Rules of Procedure and Evidence.

V. EXTRAPOLATIONS

¹⁸⁰ *Prosecutor v Ayyash et al* (Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records) STL-11/01/T/AC (28 July 2015) (AC) [23], [31].

¹⁸¹ *Prosecutor v Ayyash et al* (Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records) STL-11/01/T/AC (28 July 2015) (AC) [23].

¹⁸² *Prosecutor v Ayyash et al* (Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records) STL-11/01/T/AC (28 July 2015) (AC) [36], [57]-[61].

¹⁸³ *Prosecutor v Ayyash et al* (Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records) STL-11/01/T/AC (28 July 2015) (AC).

¹⁸⁴ *Prosecutor v Ayyash et al* (Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records) STL-11/01/T/AC (28 July 2015) (AC) [8].

¹⁸⁵ *Prosecutor v Ayyash et al* (Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records) STL-11/01/T/AC (28 July 2015) (AC) [37].

87. CSTs must be of probative value.¹⁸⁶
88. Probative value can be proven by relevant witnesses who can analyse CSTs.¹⁸⁷
89. CSTs must bear sufficient indicia of reliability.**188**
90. To be reliable, CSTs must be verified for consistency and accuracy with previous versions of CDRs.¹⁸⁹
91. CSTs may be used to connect members of a group and to establish that the Accused acted in consortium.¹⁹⁰
92. To justify admissibility of CSTs, the tendering Party must demonstrate the admissibility of the CDRs from which the CSTs derive. The tendering party must also provide information on the chain of custody, relevance, reliability, accuracy, integrity and authenticity of both the CDRs and the CSTs.¹⁹¹
93. CSTs must not include information which cannot be found in CDRs.¹⁹²
94. The tendering Party must prove the process of transformation from CDRs to CSTs is reliable.¹⁹³
95. Reliability of communications cannot be ascertained without hearing the testimony of relevant witnesses.¹⁹⁴

¹⁸⁶ *Prosecutor v Ayyash et al* ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC) [175]; *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [8], [18], [25], [33], [41].

¹⁸⁷ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [25]-[26].

¹⁸⁸ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [9], [19], [27], [34], [43].

¹⁸⁹ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [9], [19], [27], [34], [43].

¹⁹⁰ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [8], [16], [114].

¹⁹¹ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [50].

¹⁹² *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [51].

¹⁹³ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [54].

¹⁹⁴ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [54].

96. To establish probative value of CSTs it is necessary to hear the testimony of their author.¹⁹⁵
97. Cross-examination is needed in order to establish reliability of CSTs and CDRs.¹⁹⁶
98. Data used for the production of CSTs must be gathered in a manner that is compatible with international human rights standards, national laws of the State in question and in a manner that is not antithetical to the integrity of proceedings.¹⁹⁷
99. CSTs must be made in a readable format with extractions of relevant data only.¹⁹⁸
100. Experts must be ready to testify before the Court in support of their findings.¹⁹⁹ Such experts are necessary to ensure thorough understanding of technical aspects of the case (such as CDRs and CSTs).²⁰⁰
101. It may be necessary to present the relevant CDRs before the Court and so they should be at the disposal of the Party relying on them to prove the reliability of CSTs.²⁰¹
102. Experts and analysts should be prepared to act as witnesses before the Court to explain processes of generation, storage and retrieving data from CDRs to CSTs.²⁰²
103. The contextual evidence on the provenance of CSTs must be provided to prove reliability, integrity, value and authenticity.²⁰³

¹⁹⁵ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [56].

¹⁹⁶ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [57].

¹⁹⁷ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [61].

¹⁹⁸ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [113].

¹⁹⁹ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [115], [118]-[119].

²⁰⁰ *Prosecutor v Ayyash et al* (Redacted Version of The Corrected Version of The Pre-Trial Judge's Report Prepared pursuant to Rule 95(A) of the Rules of Procedure and Evidence) STL-11-01/PT/PTJ (11 December 2013) (PTJ) [71].

²⁰¹ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [68], [112]-[113].

²⁰² *Prosecutor v Ayyash et al* (Decision on Four Prosecution Motions on Call Sequence Tables Related to Salim Jamil Ayyash, Hassan Habib Merhi, Assad Hassan Sabra, Mustafa Amine Badreddine, and Five Witness Statements) STL-11-01/T/TC (31 October 2016) [76]-[95]; *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [115].

²⁰³ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIHC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [113], [115].

104. CSTs must be obtained in a manner compatible with international human rights standards and cannot be a result of violation of the right to privacy. Their acquisition must serve a legitimate aim.²⁰⁴

VI. CITATIONS:

Prosecutor v Ayyash et al (Redacted Version of The Corrected Version of The Pre-Trial Judge's Report Prepared pursuant to Rule 95(A) of the Rules of Procedure and Evidence) STL-11-01/PT/PTJ (11 December 2013) (PTJ) <https://www.legal-tools.org/doc/800500/>;

Prosecutor v Ayyash et al (Transcript) 20140116_STL-11-01_T_T29_OFF_PUB_EN (16 January 2014) (TC) https://www.stl-tsl.org/crs/assets/Uploads/20140116_STL-11-01_T_T29_OFF_PUB_EN_1-108.pdf;

Prosecutor v Ayyash et al (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution) STL-11/01/T/TC (6 May 2015) (TC) <https://www.legal-tools.org/doc/b5109f/>;

Prosecutor v Ayyash et al (Decision on the Prosecution Motions for the Admission of the Call Sequence Tables Related to the Five Colour-Coded Mobile Telephone Groups and Networks) STL-11-01/T/TC (31 October 2016) (TC) <https://www.legal-tools.org/doc/6bdc75/>;

Prosecutor v Ayyash et al (Decision on Four Prosecution Motions on Call Sequence Tables Related to Salim Jamil Ayyash, Hassan Habib Merhi, Assad Hassan Sabra, Mustafa Amine Badreddine, and Five Witness Statements) STL-11-01/T/TC (31 October 2016) (TC) <https://www.legal-tools.org/doc/51982b-1/>;

Prosecutor v Ayyash et al (Decision on Appeal by Counsel for Mr. Oneissi against the Trial Chamber's Decision on the Legality of the Transfer of Call Data) STL-11-01/T/AC (28 July 2015) (AC) <https://www.legal-tools.org/doc/30049c/>;

Prosecutor v Ayyash et al (Prosecution Motion for the Admission of Green Network Related Call Sequence Tables and Related Statement) STL-11-01/T/TC (29 January 2015) (TC) <https://www.legal-tools.org/doc/f47a4f/>;

Prosecutor v Ayyash et al (Prosecution Motion for the Admission of Purple Phone Related Call Sequence Tables) STL-11-01/T/TC (30 January 2015) (TC) <https://www.legal-tools.org/doc/61a92c/>;

Prosecutor v Ayyash et al (Prosecution Motion for the Admission of Blue Network-Related Call Sequence Tables and Related Statements) STL-11/01/T/TC (2 February 2015) (TC) <https://www.legal-tools.org/doc/140aae/>;

Prosecutor v Ayyash et al (Prosecution Motion for the Admission of Yellow Phone Related Call Sequence Tables and Related Statement) STL-11-01/T/TC (3 February 2015) (TC) <https://www.legal-tools.org/doc/0f9b0d>

Prosecutor v Ayyash et al ([Judgement](#)) STL-11-01/T/TC (18 August 2020) (TC). <https://www.stl-tsl.org/crs/assets/Uploads/20200818-F3839-PUBLIC-Full-Judgement-Annexes-FILED-EN-WEB-Version-v0.2.pdf>

Prosecutor v Ayyash et al ([Decision on Admissibility of "Notice of Appeal on Behalf of Mr Ayyash against Conviction and Sentence"](#)) STL-11-01/ AI-AC (29 March 2021) (AC).

²⁰⁴ *Prosecutor v Ayyash et al* (Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution) STL-11-01/T/TC (6 May 2015) (TC) [108].

Prosecutor v Ayyash et al ([Prosecution Appeal Brief](#)) STL-11-01/A-2/AC (29 March 2021) (AC).

Prosecution v Ayyash et al ([Scheduling Order for Pronouncement of Appeal Judgment](#)) STL-11-01/A-2/AC (24 February 2022) (AC).

Prosecutor v Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva (ICTR-98-41)

I. CASE DETAILS

- **Case name:** *Prosecutor v Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva* (ICTR-98-41-T)
- **Tribunal/Court:** International Criminal Tribunal for Rwanda (“ICTR”)
- **Offence charged:**
 - Théoneste Bagosora, Aloy Ntabakuze and Anatole Nsengiyumva:
 - Count 1: Conspiracy to Commit Genocide – Acquitted
 - Count 2: Direct and Public Incitement to Commit Genocide – Acquitted
 - Count 3: Genocide – Guilty
 - Count 4: Crimes Against Humanity (Extermination, Persecution, Rape, Murder, Other inhuman acts) – Guilty
 - Count 5: Serious Violation of Common Article 3 to the Geneva Conventions and Additional Protocol II (Violence to Life, Outrages upon Personal Dignity) – Guilty
 - Gratien Kabiligi - Acquitted on all counts
- **Stage of the proceedings:** Trial
- **Keywords:** Voluminous data, Admissibility, Chain of Custody, Prejudice

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. Photographs:

- a. P55 (Cemetery);¹
- b. P76B (Club with nail weapon);²
- c. P107 (Collection of 4 photographs - Building and road in Sonatubes);³
- d. P111 (Collection of 9 Photographs - Memorial and locations in Nyanza);⁴

¹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (18 June 2003) (TC I) 31, line 22.

² *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (8 July 2003) (TC I) 44, lines 35-37; 45, lines 4, 13-15.

³ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 10, lines 32-35.

⁴ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 39, lines 11, 22-24, 37; 40, lines 1-6.

- P107 and P111 were taken by ICRC investigators;⁵
- e. P120A (House of Zigiranyirazo and the Presbyterian Church);⁶
- f. P120B (Intersection where a roadblock was erected);⁷
- g. P120C (Presbyterian Church);⁸
- h. P132 (Memorial with 17 names);⁹
- i. P134 (Collection of 9 Photographs of the Prime Minister's Residence and neighbouring area);¹⁰
- j. P151 (Collection of 4 Photographs - Dead bodies);¹¹
 - P151 were photographs taken by a colleague of the witness interrogated who was present at the time of the picture and then given to an ICTR team and to the Prosecutor (except for picture 4 for which the origin is unknown).¹²
- k. P174 (Grenade Launcher);¹³
- l. P179 (Collection of 7 Photographs - Camp Kigali);¹⁴
- m. P184 (Image of a Russian Made Grenade Launcher);¹⁵
- n. P185 (Image of RGF Handled Automatic Pistols);¹⁶
- o. P186 (Collection of 3 Photographs - Landouald Ndasingwa and his family);¹⁷
- p. P187 (Collection of 4 Photographs - Family home of Landouald Ndasingwa);¹⁸
- q. P190 (Collection of Illustrations and Photographs of Military Armement);¹⁹
- r. P192 (Collection of 6 Photographs - Kanombe Camp);²⁰
 - P192 were taken by "some" investigators (presumably from the ICTR);²¹
- s. P304 (Camp Kigali);²²

⁵ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 11, lines 18, 23.

⁶ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (6 November 2003) (TC I) 1, lines 15-16; 2, lines 8-9.

⁷ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (6 November 2003) (TC I) 2, lines 8-9.

⁸ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (6 November 2003) (TC I) 2, line 15.

⁹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (18 November 2003) (TC I) 24 lines 8-16, line 20

¹⁰ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (19 November 2003) (TC I) 47, lines 26-37, 48, lines 1-37, 49 lines 1-20.

¹¹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (2 December 2003) (TC I) 19, lines 19-37, 20 lines 1-37, 21, lines 1-4.

¹² *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (2 December 2003) (TC I) 15, line 37.

¹³ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (30 January 2004) (TC I) 12, lines 8-33.

¹⁴ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (9 February 2004) (TC I) 14, lines 2, 13-25, 16; lines 20-37; 17, lines 1-37; 19 lines 1-37; 20 lines 1-7

¹⁵ *Prosecutor v Bagosora et al* (Image of an RPG7 Russian Made Rocket Propelled Grenade Launcher - Prosecution Exhibit P184) [ICTR-98-41](#) (13 February 2004).

¹⁶ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (13 February 2004) (TC I) 14, lines 26-37; 15 lines 1-7.

¹⁷ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (13 February 2004) (TC I) 21, lines 14-37; 22, lines 1-11.

¹⁸ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (13 February 2004) (TC I) 22, lines 13-26.

¹⁹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (16 February 2004) (TC I) 12, lines 6-7.

²⁰ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (17 February 2004) (TC I) 74, lines 1-20.

²¹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (17 February 2004) (TC I) 75, lines 18-19.

²² *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (16 September 2004) (TC I) 11, lines 2-4.

- t. P305 (Camp Kigali aerial view);²³
- u. P306 (Kanombe Camp Kigali aerial view);²⁴
- v. P307 (Kimihurura aerial view);²⁵
- w. P295A-C (Collection of 3 Photographs - Around Rubavu Hill);²⁶
- x. P296 (Collection of 9 Photographs - Gisenyi Military Camp and neighbourhood);²⁷
 - P325-326 were satellite Photographs provided by the US State Department;²⁸
- y. DK73 (Three persons purported to be French soldiers);²⁹ This was submitted for? identification purposes.³⁰
- z. DNT83A; DNT83B (Photograph of Bashimiraho);³¹
 - DNT83A and B were taken by Mr Tremblay and his assistant (Defence of Aloys Ntabakuze);³² The photographs show the location of Bashimiraho at a particular time;³³
- aa. DNT89 (Collection of 12 Photographs - St-André College and Charles Lwanga Church);³⁴ DNT89 shows the location of events;³⁵
- bb. DNT 97 (Collection of 3 Photographs - Ecole Supérieure Militaire);³⁶ DNT97 shows entrances used in a particular building;³⁷
- cc. DNT126 (US Army Command and General Staff College Photo),³⁸ showing the shoulder pad of Major Ntabakuze;³⁹

²³ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (16 September 2004) (TC I) 14, lines 15-19.

²⁴ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (16 September 2004) (TC I) 15, lines 16-24.

²⁵ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (16 September 2004) (TC I) 15, lines 32-37; 16, lines 1-8.

²⁶ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (6 September 2004) (TC I) 36, lines 20-22, 31-37; 37, lines 1-4, 33-37; 38 lines 1-26.

²⁷ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (6 September 2004) (TC I) 40, lines 1-8, 20-35.

²⁸ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 26, lines 32-36; 29, lines 20-24.

²⁹ *Prosecutor v Bagosora et al* (Photograph of Three Persons Purported to be French Soldiers (Admitted for Identification Purposes) – Defence Exhibit DK73) [ICTR-98-41-T](#) (1 July 2004).

³⁰ *Prosecutor v Bagosora et al* (Photograph of Three Persons Purported to be French Soldiers (Admitted for Identification Purposes) – Defence Exhibit DK73) [ICTR-98-41-T](#) (1 July 2004).

³¹ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) table on page 651.

³² *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) table on page 651.

³³ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) table on page 651.

³⁴ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) table on page 652.

³⁵ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) table on page 652.

³⁶ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) table on page 652.

³⁷ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) table on page 652.

³⁸ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) table on page 655.

³⁹ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) table on page 655.

- dd. DNT227 (Aloys Ntabakuze),⁴⁰ showing the shoulder pad of Major Ntabakuze in 1994;⁴¹
- ee. DNS203 (Photograph P59 with witness markings);⁴²
- ff. DB115 (Collection of 4 Photographs - Different Persons);⁴³
- DB115 were photographs extracted from the book “Rwanda: Les medias du genocide” Jean-Pierre Chrétien 1995;⁴⁴
- gg. DB355B (Collection of 13 Photographs - Buildings within Butotori Area).⁴⁵ DB355B were taken by the Defence Team of Bagosora in January or February 2006;⁴⁶

2. Satellite images

- a. P325 (Remera/ Kigali area);⁴⁷
- b. P326 (Islamic Cultural Centre in Kigali).⁴⁸

3. Videos

- a. P44 (Meeting between Bagosora and UNAMIR);⁴⁹ This intends to show the power and level of authority of Bagosora;⁵⁰
- b. P109 (Massacre scenes at Nyanza);⁵¹ This intends to show precisely the location of the massacre so to prove that it was planned;⁵²
- c. P167 (High Commissioner Lasso Meeting);⁵³
- d. P168 (Meeting between Bagosora, Dallaire and Kouchner) with transcripts;⁵⁴ This intends to show the power and level of authority of Bagosora;⁵⁵
- e. P355 (President Compound);⁵⁶

⁴⁰ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) table on page 663.

⁴¹ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) table on page 663.

⁴² *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (10 July 2006) (TC I) 8, lines 21-23.

⁴³ *Prosecutor v Bagosora et al* (Four Photographs Extracted from Jean-Pierre Chretien’s Book: Rwanda Les Medias Du Genocide – Defence Exhibit DB115) [ICTR-98-41-T](#) (1 July 2004).

⁴⁴ *Prosecutor v Bagosora et al* (Four Photographs Extracted from Jean-Pierre Chretien’s Book: Rwanda Les Medias Du Genocide – Defence Exhibit DB115) [ICTR-98-41-T](#) (1 July 2004).

⁴⁵ *Prosecutor v Bagosora et al* (13 Photographs of Buildings within Butotori Area – Defence Exhibit DB355B) [ICTR-98-41-T](#) (13 October 2006).

⁴⁶ *Prosecutor v Bagosora et al* (13 Photographs of Buildings within Butotori Area – Defence Exhibit DB355B) [ICTR-98-41-T](#) (13 October 2006).

⁴⁷ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 29, lines 3-6, 12-14.

⁴⁸ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 31, lines 16-18.

⁴⁹ *Prosecutor v Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) (TC I) [841] - [846].

⁵⁰ *Prosecutor v Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) (TC I) [844] - [850].

⁵¹ *Prosecutor v Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) (TC I) [835] - [836].

⁵² *Prosecutor v Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) (TC I) [835] - [836].

⁵³ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (19 January 2004) (TC I) 61, lines 7-19.

⁵⁴ *Prosecutor v Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) (TC I) [847] - [850].

⁵⁵ *Prosecutor v Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) (TC I) [844] - [850].

⁵⁶ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (21 July 2005) (TC I) 47 (under seal).

- f. P363 (Excerpt from “Rwanda: Finding a way Home” Insight News Television Limited);⁵⁷
- P363 and P355: “Rwanda: Finding the Way Home” Insights News Television Limited (10/95/A96/RWA);⁵⁸
- g. P382 (Information about the event in the religious center in Kabgayi);⁵⁹
- h. P382 is an excerpt of BBC Video Footage;⁶⁰ P382 intends to contradict the testimony of several witnesses from the Defence and to show the inhuman conditions of Tutsis Kabgayi center in 1994;⁶¹
- i. P393 (Rally Scenes);⁶²
- j. P424A (Interview of Nsengiyumva in Gisenyi);⁶³ Intends to show that it was civilians and not combatants that were targeted;⁶⁴
- k. DK7 (Excerpt from “The Triumph of Evil” - by PBD Frontline);⁶⁵
- DK7 Documentary “The Triumph of Evil” comes from PBS Frontline;⁶⁶
- l. DB70 (Interview General Dallaire - Excerpt from TV Programme Le Point);⁶⁷
- DB70 is a TV Program which comes from the channel Le point (14.09.1994);⁶⁸
- m. DNT78 - DNT79 - DNT 80 (Videos of witnesses testimony in the Semanza case).⁶⁹ DNT78, DNT79; DNT78 intends to show contradictions between witnesses’ testimonies.⁷⁰

4. Still images from videos

- a. P108 (Extracted from DK7 - Military Green Vehicle);⁷¹
- b. P110A; P110B; P110C; P110D; P110E (Extracted from video P109 - Dead bodies in Nyanza);⁷²

⁵⁷ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (26 July 2005) (TC I) 45 (under seal).

⁵⁸ *Prosecutor v Bagosora et al* (Prosecution Exhibit P363) [ICTR-98-41](#) (26 July 2005) (TC I) and *Prosecutor v Bagosora et al* (Prosecution Exhibit P355) [ICTR-98-41](#) (21 July 2005) (TC I).

⁵⁹ *Prosecutor v Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) (TC I) [837] - [840].

⁶⁰ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (10 March 2006) (TC I) 75, line 18.

⁶¹ *Prosecutor v Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) (TC I) [837] - [840].

⁶² *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (7 June 2006) (TC I) 31, lines 34-37; 32, lines 1-28.

⁶³ *Prosecutor v Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) (TC I) [851].

⁶⁴ *Prosecutor v Bagosora et al*, (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) (TC I) [851] - [855].

⁶⁵ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 19, lines 29-35.

⁶⁶ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 19, line 33.

⁶⁷ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (26 January 2004) (TC I) 1, lines 34-37; 2, lines 1-2.

⁶⁸ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (23 January 2004) (TC I) 53, lines 12-13.

⁶⁹ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) [1816],

⁷⁰ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) table on page 651.

⁷¹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 18, lines 1-3; 21, lines 30-37; 22, lines 1-10.

⁷² *Prosecutor v Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) (TC I) [1114].

- c. P163 (Extracted from video P44 - Bagosora's Face);⁷³
- d. P164 (Extracted from video P167 - Bagosora and another man);⁷⁴
- e. P165 (extracted from video P168A - Bagosora and another man);⁷⁵
- f. P166 (extracted from video P167 - Collection of 7 images);⁷⁶
- g. P176 (Extracted from video DK7 - Military Green Vehicle);⁷⁷
- h. P362 (Extracted from video P363 - "Rwanda 1994. Compilation Sujets JT: TF1" - Jean Kambanda and his escort);⁷⁸
- P362: Still Image from "Rwanda 1994. Compilation Sujets JT" TF1.⁷⁹
- i. P404 (Kabgayi Cathedral).⁸⁰

5. Voice recordings

- a. P249 (Radio RTLM Broadcasts - 9 March; 2 and 3 April 1994);⁸¹ DB274 (Speeches of Mr. Kambanda and Gatsinzi 10 April 1994);⁸² DB274 intends to show that killings of politicians were not attributable to the army chain of command.⁸³
- b. NTABALO14 (KABIGRA-01) (Interview of Kabiligi) conducted by ICTR Investigators.⁸⁴

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

- 6. **Most of the video and photograph evidence** listed above was introduced in the course of the trial and identified by witnesses. As for evidentiary value, the origin of photographs, *i.e.* when, where and by whom they were taken, was questioned by the Defence.⁸⁵ The Prosecutor argued that the purpose of such evidence was to be identified by witnesses and the questions raised by the Defence were irrelevant.⁸⁶ As for the video,

⁷³ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (19 January 2004) (TC I) 8, lines 11-18.

⁷⁴ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (19 January 2004) (TC I) 10, lines 36-37; 11, lines 1-19.

⁷⁵ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (19 January 2004) (TC I) 12, lines 22-25.

⁷⁶ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (19 January 2004) (TC I) 59, lines 11-18.

⁷⁷ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (6 February 2004) (TC I) 5, lines 3-35.

⁷⁸ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (26 July 2005) (TC I) 45 (under seal).

⁷⁹ *Prosecutor v Bagosora et al* (Still Image of Jean Kambanda and his escort – Prosecution exhibit P362) [ICTR-98-41-T](#) (26 July 2005).

⁸⁰ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (12 July 2006) (TC I) 83, lines 32-35; 84, lines 4-8; 85, lines 17-21.

⁸¹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (8 June 2004) (TC I) 17, lines 32-37; 18, lines 1-3.

⁸² *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (10 November 2005) (TC I) 44, lines 21-27.

⁸³ *Tbóneste Bagosora and Anatole Nsengiyumva v. The Prosecutor* (Judgement) ICTR-98-41-A (14 December 2011) (AC) [529] fn. 1264.

⁸⁴ *Prosecutor v Bagosora et al* (Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C)) ICTR-98-41-T (14 October 2004) (TC I) 2 [1].

⁸⁵ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (9 February 2004) (TC I) 14, lines 2-11.

⁸⁶ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (9 February 2004) 14, lines 7-8.

the Defence argued that the Prosecution failed to provide witnesses, who could identify the location showed in it.⁸⁷

7. **Photographs P107 and P111.** The Defence argued that the Prosecution had not properly identified the collections of the photographs, since it could not provide information on by whom and when the pictures were taken.⁸⁸ The Prosecution argued that the elements depicted in the pictures had already been identified by the witness.⁸⁹ Who took the pictures and on what date, was irrelevant.⁹⁰ The Prosecution further stated that identifying each photograph when presented to a witness would be too burdensome.⁹¹ The photographs were provisionally admitted, subject to further information from the Prosecution.⁹² The Prosecution later provided the information in a clarification by mean of correspondence.⁹³ The Prosecution stated that information was provided without prejudice to its position that it does not create or imply an obligation to provide similar information in the future.⁹⁴

8. **Photographs P151.** P151 is a collection of 4 photographs. A witness, who was present at the time when the first three pictures were taken, testified to the origin of the photograph, his handwriting on the original photographs and the ink stamp on photograph three, which provided the date when the film was developed.⁹⁵ The Defence only objected to the admission of the fourth photograph. The witness was not present when it was taken and 'as a result, the prejudicial effect outweighs the probative value.'⁹⁶ The Prosecution argued that the testimony accurately reflects the scene and other witnesses will corroborate the statement.⁹⁷

9. **Video excerpts (P393 and DB70).** The Prosecution presented a short excerpt of a video of 51 minutes to an expert witness.⁹⁸ The Defence argued that it would be better to exhibit the entire integral video.⁹⁹ The President agreed, and the 51 minutes were presented and admitted as evidence.¹⁰⁰ As of **DB70**, the Prosecution would have liked to show more of the 29 minutes video rather than only the 4 minutes, but to save time, the Court agreed only to watch the excerpt.¹⁰¹

10. **Photographs (still images) of video P109 (P110A, P110B, P110C and P110E).** The Defence objected stating that presenting photographs of an already examined video,

⁸⁷ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) [2315].

⁸⁸ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 47, lines 13-17.

⁸⁹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 13, lines 21-25.

⁹⁰ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 13, lines 20-21.

⁹¹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 13, lines 22-25.

⁹² *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 13, lines 2-4.

⁹³ *Prosecutor v Bagosora et al* (Clarification Regarding Photographs) [ICTR-98-41-T](#) (22 October 2003).

⁹⁴ *Prosecutor v Bagosora et al* (Clarification Regarding Photographs) [ICTR-98-41-T](#) (22 October 2003).

⁹⁵ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (2 December 2003) (TC I) 15, lines 23-37; 16, lines 1-23.

⁹⁶ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (2 December 2003) (TC I) 19, lines 32-37.

⁹⁷ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (2 December 2003) (TC I) 20, line 33.

⁹⁸ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (7 June 2006) (TC I) 29, lines 24-25.

⁹⁹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (7 June 2006) (TC I) 32, line 17.

¹⁰⁰ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (7 June 2006) (TC I) 33, line 4.

¹⁰¹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (23 January 2004) 53 lines 2-3; 54 lines 1-6; *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (26 January 2004) 1, lines 9-11, 33-35; 2, line 2.

directly depicting horrific massacres, and going over and over it again is prejudicial to the defendants and decreases the video's probative value.¹⁰² The Prosecution argued that it could not explain in front of the witness the evidential purposes of presenting these images, but briefly stated that it was with regard to the location of the events adding that they 'will allow the Court and counsel to subsequent reconstruct and examine these.'¹⁰³

11. **Aerial Photographs (P304).** The Defence objected as to the authenticity of the pictures.¹⁰⁴ They argued that they could have been enhanced or moved around by a computer and that the circumstances of the development of this picture were unknown, thus making it doubtful that they correspond to the reality in 1994.¹⁰⁵ The Prosecution argued that 'they were not going to use these to any great detail' and that they intended to admit this evidence through the witness.¹⁰⁶ They also explained that that they were US-generated and told that they were taken in April 1994 'from a very reliable source'.¹⁰⁷

12. **Satellite Photograph (P325).** Exhibit P325 is a satellite photograph with an enlargement contained in a small box, which has the title "roadblock", so as to indicate the location of a roadblock. The Defence objected firstly to this box, as there was no evidence corroborating the existence of such a roadblock.¹⁰⁸ The Prosecution stated its willingness not to rely on it, saying that it would even prefer the photograph without this enlargement.¹⁰⁹ Secondly, the Defence objected this exhibit was not necessary, as maps of the same area had already been admitted as evidence stating 'we have a situation where the possible use of this (...) photograph is duplicative of the maps that already exist'.¹¹⁰ They further submitted that maps, contrary to photographs, allowed knowing the authors and date of the document.¹¹¹ According to them, there was also lack of information in regard of the circumstances in which the picture was taken, making it doubtful whether it was really the stated area.¹¹² Hence and for all these reasons, they claimed that the prejudice stemming from the use of these photographs outweighs its evidentiary value.¹¹³ The Prosecution to this responded that maps and photographs are different types of documents, and that photographs offer more than maps and allow to better look at the different areas.¹¹⁴

13. **Video P382.** The Defence objected to the use of this piece of evidence, stating that 'we do not know the one who shot that film. We do not know when the film was shot. Neither do we know, for instance, who translated the conversation between the two young persons on the footage (...). We do not know where the conversation took place. (...) We are not aware of the chain of custody of the footage. It is possible that that

¹⁰² *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 33, lines 10-29.

¹⁰³ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 32, lines 28-34; 35, lines 6-12.

¹⁰⁴ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (16 September 2004) (TC I) 11, lines 34-37; 12, lines 1-3.

¹⁰⁵ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (16 September 2004) (TC I) 11, lines 34-37; 12, lines 1-3.

¹⁰⁶ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (16 September 2004) (TC I) 12, lines 5-6.

¹⁰⁷ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (16 September 2004) (TC I) 12, lines 11-16.

¹⁰⁸ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 27, lines 21-22.

¹⁰⁹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 27, lines 6-9.

¹¹⁰ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 27, lines 26-37; 28, lines 1-7.

¹¹¹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 27, lines 26-32.

¹¹² *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 27, lines 27-29.

¹¹³ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 28, lines 4-6.

¹¹⁴ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 29, lines 2-6.

footage has been doctored'.¹¹⁵ For all these reasons, it argued that the piece of evidence was highly questionable and that therefore the Chamber should not accept its use.¹¹⁶ The Prosecution answered that none of these aspects should bar it from 'showing the witness the film and asking questions'.¹¹⁷ Later on, the Defence raised that the Chamber should not rely on the translation made by the journalist.¹¹⁸

14. At another hearing, the Prosecution played the video without sound in order to get a location identified by the present witness as the sound had already been heard.¹¹⁹ The Defence raised an objection, for the record, that the video should have been viewed with the sound.¹²⁰
15. **Tape recording of an interview (KABIGRA-01).** The Prosecutor presented this piece of evidence in a motion and argued that it was not required for 'documentary evidence to be admitted through a witness'.¹²¹ The Defence for Ntabakuze 'filed no response to the motion'¹²² whereas the Defence of Kabiligi did file one.¹²³ They firstly argued that the interviews conducted by ICTR investigators were not voluntary, hence contrary to Rule 95 Rules of Procedure and Evidence (RPE).¹²⁴ Secondly, that the improper recording made its reliability questionable, and thus was contrary to Rule 89(C) RPE.¹²⁵ Finally, it argued that the recordings breached Rule 43 RPE according to which the content as well as the transcript of it should be transmitted as soon as possible to the suspect, and sealed in its presence with the Prosecutor's and Suspect signature.¹²⁶

Was the DDE admitted and/or relied upon?

16. **For photographs and videos,** the Chamber agreed with the argumentation of the Prosecutor that complete identification is not always an essential condition to admission.¹²⁷ For example, despite the lack of a precise identification of the date of a video by the Prosecution (P109 - which the Prosecution nonetheless considered to have been dated by the witness), the Court admitted the evidence and the issue would be address at

¹¹⁵ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (10 March 2006) (TC I) 65, lines 30-37.

¹¹⁶ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (10 March 2006) (TC I) 65, lines 30-37.

¹¹⁷ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (10 March 2006) (TC I) 66, lines 8-13.

¹¹⁸ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (10 March 2006) (TC I) 72, lines 26-30.

¹¹⁹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (12 July 2006) (TC I) 82, lines 23-26.

¹²⁰ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (12 July 2006) (TC I) 82, lines 34-36.

¹²¹ *Prosecutor v Bagosora et al* (Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence) ICTR-98-41-T (28 April 2004) (TC I) 3 [5].

¹²² *Prosecutor v Bagosora et al* (Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C)) ICTR-98-41-T (14 October 2004) (TC I) [2].

¹²³ *Prosecutor v Bagosora et al* (Defence for Kabiligi's Response to "Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence") ICTR-98-41-T (7 May 2004) (TC I) [1].

¹²⁴ *Prosecutor v Bagosora et al* (Defence for Kabiligi's Response to "Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence") ICTR-98-41-T (7 May 2004) (TC I) [8] – [9]; According to Rule 95 RPE, "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. »

¹²⁵ *Prosecutor v Bagosora et al* (Defence for Kabiligi's Response to "Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence") ICTR-98-41-T (7 May 2004) (TC I) [26]; According to Rule 89(C) RPE, "A Chamber may admit any relevant evidence which it deems to have probative value."

¹²⁶ *Prosecutor v Bagosora et al* (Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C)) ICTR-98-41-T (14 October 2004) (TC I) [7].

¹²⁷ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (09 February 2004) (TC I) 14, lines 10-11.

the later stage of the proceedings.¹²⁸ In its judgment, the Chamber, when examining such evidence, commonly refers to the identification of the material that has been made by the witness and relies upon it.¹²⁹

17. **Photographs P107 and P111.** The Chamber admitted the photographs conditionally, subject to further information.¹³⁰
18. **Photographs P151.** In response to the Defence's objection on the admission of photograph four, the Chamber stated that the fourth picture is "intrinsically identifiable".¹³¹ After the witness identified the location of the picture, the Chamber stated that it should be considered as sufficient.¹³² The Court admitted all four photographs.¹³³
19. **Photographs (still images) of video P109 (P110A, P110B, P110C and P110E).** As the Prosecution did not want to explain in detail the evidentiary value of the photographs in the presence of the witness, the Chamber trusted that what the Prosecution would present would be useful and invited them to proceed.¹³⁴ After the questioning, the pieces of evidence were admitted without further discussion.¹³⁵
20. **Aerial Photographs (P304).** The Chamber found that the photographs must be admitted based on what the witness had already said.¹³⁶ The Chamber stated 'we can't spend more time on this' after the Defence teams kept objecting, adding that their comments were noted and that they were free to challenge their authenticity later through alternative materials or witnesses.¹³⁷
21. **Satellite Photograph (P325).** The Chamber admitted P325 as evidence, stating that the Prosecution would not rely on the enlargement with the mention "roadblock".¹³⁸ It stated that there was no harm in admitting this evidence and that it was a document, which on the face of it, appeared to be a photograph, reminding the important respect for the admission of evidence in common law countries.¹³⁹
22. **Video (P382).** The President of the Chamber accepted that the video be showed to the witness and stated that the admission of the evidence would be dealt with later on.¹⁴⁰ Additionally, regarding the translation made by journalists, the President of the Chamber answered that these elements go to the weight of evidence and dismissed the objection.¹⁴¹

Regarding the second hearing in question, the President dismissed the objection by stating that the video was a 'matter of corroboration, a reinforcement; with other words, in conformity with our ruling'. It added, though, that the objection would be noted.¹⁴²

¹²⁸ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 38, lines 9-36.

¹²⁹ *Prosecutor v Bagosora et al* (Judgement and Sentence) ICTR-98-41-T (18 December 2008) (TC I) see e.g. fn 1003, 1009, 1022, 1480, 1615 (and so on).

¹³⁰ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 13, lines 2-4.

¹³¹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (2 December 2003) (TC I) 20, line 33.

¹³² *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (2 December 2003) (TC I) 20, lines 33-34.

¹³³ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (2 December 2003) (TC I) 21, line 3.

¹³⁴ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 35, lines 13-17.

¹³⁵ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 38, line 1.

¹³⁶ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (16 September 2004) (TC I) 13, lines 1-4.

¹³⁷ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (16 September 2004) (TC I) 13, lines 1-4.

¹³⁸ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 31, lines 2-7.

¹³⁹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 31, lines 2-7.

¹⁴⁰ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (10 March 2006) (TC I) 67, lines 7-9.

¹⁴¹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (10 March 2006) (TC I) 72, lines 32-33.

¹⁴² *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (12 July 2006) (TC I) 83, lines 11-13.

23. **Tape recording of an interview (KABIGRA-01).** The Chamber held on the one hand that since the Defence of Ntabakuze made no objection to the admission of the tape recording, it can be admitted as such.¹⁴³ On the other hand, it found that Kabiligi had asked for a counsel and was not provided one; hence the recording was contrary to Rule 95 RPE and excluded.¹⁴⁴
24. All the exhibits were **admitted** *except* one interview recording (KABIGRA-01) as discussed above.

¹⁴³ *Prosecutor v Bagosora et al* (Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C)) ICTR-98-41-T (14 October 2004) (TC I) [12].

¹⁴⁴ *Prosecutor v Bagosora et al* (Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C)) ICTR-98-41-T (14 October 2004) (TC I) [21].

IV. RULES OF EVIDENCE

Relevant Rules of Evidence and their Application

25. Rule 43 RPE.¹⁴⁵
26. Rule 89(C) RPE.¹⁴⁶
27. Rule 95 RPE.¹⁴⁷
28. Rule 54 RPE.¹⁴⁸

Application of Rules of Evidence

29. Testimony by video-conference - The classification of a testimony by video-conference as a DDE is uncertain, therefore, it is placed here.
30. **Testimony by video-conference** of Witnesses BT and Major Donald McNeil. The Prosecution and the Defence both filed motions in order to have witnesses testify by video-conference. On one side, the witness of the Prosecution (witness BT staying in Belgium) feared reprisals against her family and persistently refused to come to testify at the ICTR (Arusha - Tanzania).¹⁴⁹
31. The Prosecution argued that the testimony was fundamentally important and that it was legally not possible to compel a witness to come to testify.¹⁵⁰ The Defence teams opposed the motion and submitted in their response that accepting mere unwillingness as a ground to accept testimony by video-conference would be a dangerous precedent.¹⁵¹ On the other side, the witness of the Defence (Major Donald McNeil staying in Canada), was unable to

¹⁴⁵ “Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure: (i) The suspect shall be informed in a language he understands that the questioning is being audio-recorded or video-recorded; (ii) In the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded; (iii) At the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything he has said, and to add anything he may wish, and the time of conclusion shall be recorded; (iv) The content of the recording shall then be transcribed as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to the suspect, together with a copy of the recording or, if multiple recording apparatus was used, one of the original recorded tapes; and (v) After a copy has been made, if necessary, of the recorded tape for purposes of transcription, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect.”

¹⁴⁶ “A Chamber may admit any relevant evidence which it deems to have probative value.”

¹⁴⁷ “No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”

¹⁴⁸ “At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial”.

¹⁴⁹ *Prosecutor v Bagosora et al* (Decision on the Prosecutor’s Request for Testimony of Witness BT via Video-Link) ICTR-98-41-T (8 October 2004) (TC I) [2], [13].

¹⁵⁰ *Prosecutor v Bagosora et al* (Decision on the Prosecutor’s Request for Testimony of Witness BT via Video-Link) ICTR-98-41-T (8 October 2004) (TC I) [2], [11].

¹⁵¹ *Prosecutor v Bagosora et al* (Decision on the Prosecutor’s Request for Testimony of Witness BT via Video-Link) ICTR-98-41-T (8 October 2004) (TC I) [3].

travel due to a recent surgery.¹⁵² The Prosecution agreed with the motion, even suggesting a written deposition.¹⁵³

32. Rule 90(A) RPE provides that the Court should in principle hear witnesses directly. The RPE of the ICTR as last amended in May 2004, unlike those of the ICTY,¹⁵⁴ did not expressly provide for the taking of testimony by video-conference.¹⁵⁵ However, Rules 54 and 71 RPE could be relied upon to justify such a testimony.¹⁵⁶ The Chamber stated that testimony by video-conference must be ordered when it is in the interest of justice.¹⁵⁷ To this end, the unwillingness or impossibility of the witness to come and the importance of the testimony must be weighed.¹⁵⁸
33. The Chamber reminded that hearing witnesses directly is fundamental in order to be able to observe their demeanour.¹⁵⁹ However, testimony by video-conference is not incompatible with it, even though technical interferences might alter the weight given to the testimony.¹⁶⁰ The Chamber hence granted the testimony by video-conference for both motions.

V. EXTRAPOLATIONS

34. Photographs

- a) Complete identification is not an essential condition to admission.¹⁶¹ The lack of complete identification of a photograph (by whom, when, where) should not impede its presentation to a witness and its admission as evidence when discussed by the witness.¹⁶²
- b) Not all elements of a photograph must be identified for its admission as evidence. The sole identification of the location of a photograph by a witness should be considered as sufficient for its admission.¹⁶³

¹⁵² *Prosecutor v Bagosora et al* (Decision on Testimony by Video-Conference) ICTR-98-41-T (20 December 2004) (TC I) [1].

¹⁵³ *Prosecutor v Bagosora et al* (Decision on Testimony by Video-Conference) ICTR-98-41-T (20 December 2004) (TC I) [3].

¹⁵⁴ See Rule 81(bis) RPE ICTY.

¹⁵⁵ See Rule 71(D) RPE ICTR.

¹⁵⁶ *Prosecutor v Bagosora et al* (Decision on Testimony by Video-Conference) ICTR-98-41-T (20 December 2004) (TC I) [2].

¹⁵⁷ *Prosecutor v Bagosora et al* (Decision on Testimony by Video-Conference) ICTR-98-41-T (20 December 2004) (TC I) [4].

¹⁵⁸ *Prosecutor v Bagosora et al* (Decision on Testimony by Video-Conference) ICTR-98-41-T (20 December 2004) (TC I) [4].

¹⁵⁹ *Prosecutor v Bagosora et al* (Decision on the Prosecutor's Request for Testimony of Witness BT via Video-Link) ICTR-98-41-T (8 October 2004) (TC I) [12].

¹⁶⁰ *Prosecutor v Bagosora et al* (Decision on the Prosecutor's Request for Testimony of Witness BT via Video-Link) ICTR-98-41-T (8 October 2004) (TC I) [15].

¹⁶¹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (09 February 2004) (TC I) 14, lines 10-11.

¹⁶² *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (09 February 2004) (TC I) 14-20.

¹⁶³ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (2 December 2003) (TC I) 20, lines 32-34.

c)

35. **Videos**

- a) The lack of complete identification of a video (by whom, when, where) should not impede its presentation to a witness¹⁶⁴ nor its admission as evidence.¹⁶⁵

36. **Voice Recordings**

- a) Recordings of interviews will not be admitted as evidence if such interviews were conducted contrary to investigation procedures, the RPE and the right to a fair trial.¹⁶⁶

37. **Photographs**

- a) Shocking photographs depicting atrocities should not be shown when there is no relevance beyond it, as the prejudice could outweigh the probative value.¹⁶⁷
- b) Photographs with an enlargement (a box), which has been given a name, should be corroborated by a witness or other documents.¹⁶⁸

38. **Aerial Photograph**

- a) Maps should be preferred to aerial photographs as they allow knowing the authors and the date of creation.¹⁶⁹
- b) If the photographs have been enhanced or moved around by a computer, it affects the authenticity of photographs.¹⁷⁰
- c) When the circumstances of the development of an aerial photograph are unknown, it may make it doubtful whether they correspond to reality.¹⁷¹

39. **Video**

- a) When Counsel presents a video to a witness, they should, if possible, identify where, when and by whom it was taken and show the chain of custody.¹⁷²
- b) A video should be exhibited as evidence in its entirety¹⁷³
- c) Without witness identification of the location of the video from the counsels, a video should not be given any weight.¹⁷⁴
- d) When showed during Trial, video should be watched with sound.¹⁷⁵

¹⁶⁴ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (10 March 2006) (TC I) 67, lines 7-9.

¹⁶⁵ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (12 July 2006) (TC I) 83, lines 12-13.

¹⁶⁶ *Prosecutor v Bagosora et al* (Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C)) ICTR-98-41-T (14 October 2004) (TC I) [12], [21].

¹⁶⁷ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (1 October 2003) (TC I) 33, lines 6-21.

¹⁶⁸ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 27, lines 25-37; 28, lines 1-7.

¹⁶⁹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (14 October 2004) (TC I) 27, lines 25-37; 28, lines 1-7.

¹⁷⁰ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (16 September 2004) (TC I) 11, lines 34-37; 12, lines 1-3.

¹⁷¹ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (16 September 2004) (TC I) 12, lines 1-3.

¹⁷² *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (10 March 2006) (TC I) 65, lines 29-37.

¹⁷³ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (7 June 2006) (TC I) 32, line 12-24.

¹⁷⁴ *Prosecutor v Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) (TC I) [2315].

¹⁷⁵ *Prosecutor v Bagosora et al* (Transcript) ICTR-98-41 (12 July 2006) (TC I) 82, lines 34-36.

40. Voice Recordings

- a) Suspects should participate voluntarily in interviews conducted by ICTR investigators.¹⁷⁶
- b) Improper recording make reliability questionable, thus contrary to Rule 89(C) RPE.¹⁷⁷
- c) The content and transcript of the recording should be transmitted as soon as possible to the suspect and sealed in its presence with the Prosecutor and suspect's signature, in accordance with Rule 43 RPE.¹⁷⁸

Note - Testimony by video-conference

The classification of a testimony by video-conference as a form of DDE is uncertain, therefore, it is placed here.

Testimony by video-conference of Witnesses BT and Major Donald McNeil.

The Prosecution and the Defence both filed motions in order to have witnesses testify by video-conference. On one side, the witness of the Prosecution (witness BT staying in Belgium) feared reprisals against her family and persistently refused to come to testify at the ICTR (Arusha - Tanzania).³⁶⁵ The Prosecution argued that the testimony was fundamentally important and that it was legally not possible to compel a witness to come to testify.³⁶⁶ The Defence teams opposed the motion and submitted in their response that accepting mere unwillingness as a ground to accept testimony by video-conference would be a dangerous precedent.³⁶⁷ On the other side, the witness of the Defence (Major Donald McNeil staying in Canada), was unable to travel due to a recent surgery.³⁶⁸ The Prosecution agreed with the motion, even suggesting a written deposition.³⁶⁹

Rule 90(A) RPE provides that the Court should in principle hear witnesses directly. The RPE of the ICTR as last amended in May 2004, unlike those of the ICTY,³⁷⁰ did not expressly provide for the taking of testimony by video-conference.³⁷¹ However, Rules 54 and 71 RPE could be relied upon to justify such a testimony.³⁷² The Chamber stated that testimony by video-conference must be ordered when it is in the interest of justice.³⁷³ To this end, the unwillingness or impossibility of the witness to come and the importance of the testimony must be weighed.³⁷⁴ The Chamber reminded that hearing witnesses directly is fundamental in order to be able to observe their demeanour.³⁷⁵ However, testimony by video-conference is not incompatible with it, even though technical interferences might alter the weight given to the testimony.³⁷⁶ The Chamber hence granted the testimony by video-conference for both motions.

¹⁷⁶ *Prosecutor v Bagosora et al* (Defence for Kabiligi's Response to "Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence") ICTR-98-41-T (7 May 2004) (TC I) [8]-[9]; According to Rule 95 RPE, "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. »

¹⁷⁷ *Prosecutor v Bagosora et al* (Defence for Kabiligi's Response to "Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence") ICTR-98-41-T (7 May 2004) (TC I) [26]; According to Rule 89(C) RPE, "A Chamber may admit any relevant evidence which it deems to have probative value."

¹⁷⁸ *Prosecutor v Bagosora et al* (Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C)) ICTR-98-41-T (14 October 2004) (TC I) [4].

VI. CITATIONS

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (18 June 2003) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS17031R0000629620.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (8 July 2003) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS20213R0000615636.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (1 October 2003) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS16648R0000615746.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (6 November 2003) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS13039R0000615813.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (18 November 2003) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS14671R0000615823.DOC>

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (19 November 2003) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS17566R0000615825.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (2 December 2003) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS13628R0000628852.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (19 January 2004) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS11870R0000616144.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (23 January 2004) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS18594R0000616154.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (26 January 2004) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS17134R0000615846.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (30 January 2004) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS18253R0000615854.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (6 February 2004) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS13228R0000615861.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (9 February 2004) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS15157R0000615863.DOC>

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (13 February 2004) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS14445R0000615871.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (16 February 2004) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS14821R0000615873.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (17 February 2004) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS17575R0000629645.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (8 June 2004) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS11882R0000616375.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (6 September 2004) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS13538R0000616689.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (16 September 2004) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS12529R0000629681.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (14 October 2004) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS15570R0000616462.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (25 April 2005) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS12575R0000617128.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (21 July 2005) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS14504R0000617175.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (26 July 2005) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS17896R0000617180.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (10 November 2005) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS12375R0000617222.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (10 March 2006) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS17602R0000617269.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (7 June 2006) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS14100R0000628627.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (10 July 2006) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS16975R0000630153.DOC>;

Prosecutor v Bagosora et al (Transcript) ICTR-98-41 (12 July 2006) (TC I)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-98-41/TRS16918R0000630155.DOC>;

Prosecutor v Bagosora et al (Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence) ICTR-98-41-T (28 April 2004) (TC I)

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Motions/NotIndexable/ICTR-98-41/MSC18393R0000543331.PDF>;

Prosecutor v Bagosora et al (Defence for Kabiligi's Response to "Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence") ICTR-98-41-T (7 May 2004) (TC I)

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Submission/NotIndexable/ICTR-98-41/MSC18637R0000543449.PDF>;

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<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/ICTR-98-41/MSC17705R0000545039.PDF>;

Prosecutor v Bagosora et al (Decision on Testimony by Video-Conference) ICTR-98-41-T (20 December 2004) (TC I)

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/ICTR-98-41/MSC45543R0000545604.PDF>;

Prosecutor v Bagosora et al (Decision on the Prosecutor's Request for Testimony of Witness BT via Video-Link) ICTR-98-41-T (8 October 2004) (TC I)

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/ICTR-98-41/MSC18745R0000544989.PDF>;

Prosecutor v Bagosora et al (Prosecutor's Final Trial Brief) ICTR-98-41-T (1 March 2007) (TC I)

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/FinalBrief/NotIndexable/ICTR-98-41/MSC45639R0000552884.PDF> -

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/FinalBrief/NotIndexable/ICTR-98-41/MSC45639R0000552891.PDF> -

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/FinalBrief/NotIndexable/ICTR-98-41/MSC45639R0000552893.PDF>;

Prosecutor v Bagosora et al (Major Aloys Ntabakuze Amended Final Trial Brief) ICTR-98-41-T (23 April 2007) (TC I)

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/FinalBrief/NotIndexable/ICTR-98-41/MSC45638R0000553361.PDF>;

Prosecutor v Bagosora et al (Judgement and Sentence) ICTR-98-41-T (18 December 2008) (TC I)

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-98-41/MSC17781R0000558336.PDF>;

Théoneste Bagosora and Anatole Nsenjyumva v. The Prosecutor (Judgement) ICTR-98-41-A (14 December 2011) (AC)

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-98-41/MSC19278R0000565076.PDF>.

***Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba,
Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and
Narcisse Arido (ICC-01/05-01/13)***

I. CASE DETAILS

- **Case name:** *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido (ICC-01/05-01/13)*
- **Tribunal/Court:** International Criminal Court (“ICC”)
- **Offence charged:** charges for offences against the administration of justice under Articles 70(1)(c) – corruptly influencing the witnesses; 70(1)(b) – presenting false evidence regarding witnesses; 70(1)(a) - the offence of giving false testimony
- **Stage of the proceedings:** Trial and Appeal
- **Keywords:** Transcripts, Translations, Bar table, Privacy, Prejudice, Authenticity, Reliability, Right to Privacy, Authorship, Open Source Data

An anonymous tip launched a new investigation into the interference with witnesses in the case *Prosecutor v. Jean Pierre Bemba Gombo*, which proceeded while the first trial was still in progress.

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?¹

¹ Annex A to Prosecutor’s Request provides the following information with respect to each item tendered: (i) the evidence registration number (“ERN”); (ii) the type; (iii) the source identity; (iv) the date; (v) the title; (vi) the basis of relevance; and (vii) the date of disclosure(s). It is, presumably, confidential (not available online) (*Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”²⁷ November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII).

1. Recordings, corresponding phone logs, transcripts and translations from the ICC Detention Unit (“No. 1”). The admission of the evidence No. 1 (the ICC Detention Unit recordings) was sought by the Prosecution. The ICC Detention Unit recordings and call logs were produced by the Registry and provided to the Parties, pursuant to the orders of Pre-Trial Chamber II.² Translations and transcripts of the recordings were produced by the Office of the Prosecution or the Prosecutor’s Language Service Unit.³
2. Social media evidence (screenshots from Facebook of publicly available profiles) (“No. 2”): No information available about where the DDE was obtained from exactly, but it was tendered by the Prosecution. Presumably, they were extracted from Facebook pages by the Prosecutor’s Office.
3. Call Data Records (“CDRs”)⁴ (“No. 3”); Legends for CDRs were obtained by Belgian authorities in response to the Prosecutor’s Request for Assistance.⁵
4. Information extracted from SIM cards (“No. 4”): SIM cards were seized from Arido and received by the Registry pursuant to instructions from the Single Judge.⁶
5. Emails (“No. 5”): The Accused themselves provided and/or disclosed many of the emails. CAR-D21-0001-0011, CAR-D21-0002-0072, CAR-D21-0003-0050, CAR-D21-0003-0057, CAR-OTP-0075-2618).⁷ In addition, emails were obtained by national authorities in executing the Prosecution’s requests for assistance (“RFA”) (CAR-OTP-0075-0244, CAR-OTP-0075-0285, CAR-OTP-0075-0478, CAR-OTP-0075-0506, CAR-OTP-0075-0537, CAR-OTP-0075-0750, CAR-OTP-0075-0752, CAR-OTP-0075-0781, CAR-OTP-0075-0784, CAR-OTP-0075-0849, CAR-OTP-0075-1152, CAR-OTP-0091-0546, CAR-OTP-0091-0551 and CAR-OTP-0091-0556). These were transmitted to the Prosecution (CAR-OTP-0075-0022).⁸ The items were extracted from Arido’s email. The Prosecution also proposes the admission of email forwarded by Kilolo to his Defence team (CAR-D21-0004-0546). The email contained” a non-verbatim transcript of D-0026’s interview with Bemba Defence.”⁹
6. Intercepted communication, corresponding phone logs, transcripts and translations (“No. 6”): In addition to the intercepted communication from the ICC Detention Unit, the intercepted material originated from the Prosecution’s request to the Dutch authorities to intercept calls placed and received by Kilolo and Mangenda. This was authorised by the Single Judge of Pre-Trial Chamber II.¹⁰ Before transmitting the material to the Court, the Pre-Trial Judge assigned an Independent Counsel to review it to identify relevant material for the proceedings and excluding “potentially privilege information.”¹¹
7. All types of DDE (Nos. 1-6) were admitted. No discussion with regard to evidence No. 2 or 4 appeared to take place in the Trial and Appeals Chambers.

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

8. Nos. 1 and 3 (ICC Detention Unit recordings and CDRs): With regard to the authenticity of evidence:¹²

² *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [16]. In its request to the Pre-Trial Chamber, the Prosecution presented in support of the allegations an open-source video material, in which Bemba’s supporters reported having had phone conversations with him while in the ICC Detention Centre. The Prosecution used the Youtube video to demonstrate that Bemba violated the applicable regulations at the detention centre, which created the basis for the collection of the material and did not violate his right to privacy. See the following submissions: *Prosecution v Bemba et al* (Public Redacted document With Confidential, EX PARTE, only available to Prosecution and Registry Annex A Public redacted version of “Request for Judicial Assistance to Obtain Evidence for Investigation under Article 70”, 3 May 2013, ICC-01/05-44-Conf-Exp) ICC-01/05-01/13-1113-Red (6 August 2015) (PTC) [27]; *Prosecutor v Bemba et al.* (Public with Confidential Annexes A, B, C, D, E, F, G, H and I, Public Redacted Version of “Consolidated Request for Disclosure and Judicial Assistance”, ICC-01/05-01/13-2227-Conf-Red, 19 September 2017) ICC-01/05-01/13-2227-Red2 (20 September 2017) (AC) [33] and [43]; and *Prosecutor v. Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [388]-[390]

³ *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/13-2275-Red (08 March 2018) (AC) [1338].

⁴ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [29].

⁵ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [29].

⁶ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [19].

⁷ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [25].

⁸ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [25].

⁹ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [25]-[26].

¹⁰ *Prosecutor v Bemba et al* (Public redacted version of “Prosecution’s First Request for the Admission of Evidence from the Bar Table”, 16 June 2015, ICC-01/05-01/13-1013-Conf) ICC-01/05-01/13-1013-Red (23 June 2015) (TC VII) [12].

¹¹ *Prosecutor v Bemba et al* (Public redacted version of “Prosecution’s First Request for the Admission of Evidence from the Bar Table”, 16 June 2015, ICC-01/05-01/13-1013-Conf) ICC-01/05-01/13-1013-Red (23 June 2015) (TC VII) [12].

¹² *Prosecutor v Bemba et al* (Public Redacted Version of Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) [219]-[225].

9. Some communications and logs do have inherent indicia of authenticity, such as corporate watermarks of the telecommunications provider);
10. The content of every communication in evidence matches the allegedly corresponding logs and attributed numbers;
11. P-361 gave expert testimony on the origins of CDRs in this case, provided by the national telecommunication companies. It was indicated that CDRs provided by the Prosecutor were “likely” or “highly likely” to come from telecommunications providers;
12. The case record is replete with further information confirming the authenticity and chain of custody of these communications and logs;
13. The Registry either generated or received many of the materials challenged. It is a neutral organ charged with, inter alia, making the evidence available by storing and registering it. Therefore, the Detention Center’s logs provided by the Registry are precisely the information acquired in the course of performance of administrative functions by the Registry;
14. In light of paras. 1-5, there is no need for the Prosecution to corroborate the authenticity with additional testimonial evidence. All communications in the case file corresponded with the logs;
15. With respect to the conclusion that the Detention Centre Materials had not been obtained by means of a violation of Mr Bemba’s right to privacy,¹³ the Trial Chamber found that the transmission to the Prosecutor of the recordings of Mr Bemba’s non-privileged telephone calls at the Detention Centre had a basis in law and was proportionate to the aim pursued.¹⁴

With regard to the reliability of evidence:

16. Bemba’s defence challenged the reliability of evidence based on the problem of synchronization of the spoken content between two interlocutors (the recorded conversation took place via two different lines, from which the recordings were subsequently merged by the Prosecution in order to create a dialogue. However, it caused multiple discrepancies, such as different time when the conversation ended for two speakers, wrong order of speakers, etc.). In the Chamber’s view:
17. The technical irregularities (The produced transcripts diverged significantly from the actual, real-time conversation both in terms of the correct order of speakers and the context in which particular utterances are spoken; etc.) in recording conversations

¹³ According to Article 69(7) of the Rome Statute, evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

¹⁴ *Prosecutor v Bemba et al* (Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible) ICC-01/05-01/13-1432 (30 October 2015) (TC VII) [14]-[19].

from and to the ICC Detention Centre, albeit significant, were not of such a scale as to exclude the evidence from the outset;¹⁵

18. The Prosecutor's access to the Detention Centre Materials was necessary;¹⁶
19. "Access to the Detention Centre Materials was proportionate to its objective".¹⁷
20. No. 2 (Facebook screenshots): Social media screenshots were accepted as "submitted" evidence, its consideration among other pieces of evidence was deferred to the trial judgment.¹⁸ However, in the Trial Chamber decision it was not discussed.
21. No discussion took place with regard to evidence No. 4 (SIM cards).
22. No. 5 (Emails): The Trial Chamber dismissed Arido's Defence's challenge to an admission of an alleged email containing a non-verbatim transcript of an interview of a witness, since it only aimed to prove that inconsistencies fall outside of Rule 68 of the Rules of Procedure and Evidence.¹⁹
23. No. 6 (Intercepted communication, corresponding phone logs, transcripts, and translations):
24. With regard to the indicia of authenticity of communication and call logs, corporate watermarks of the telecommunications provider offer evidence of authenticity.²⁰
25. The content of all communication in evidence matches the allegedly corresponding logs and attributed numbers.²¹
26. The case record is replete with further information confirming the authenticity and chain of custody of these communications and logs.²²

¹⁵ *Prosecutor v Bemba et al* (Public Redacted Version of Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) [226]-[227].

¹⁶ *Prosecutor v Bemba et al* (Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible) ICC-01/05-01/13-1432 (30 October 2015) (TC VII) [16].

¹⁷ *Prosecutor v Bemba et al* (Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible) ICC-01/05-01/13-1432 (30 October 2015) (TC VII) [17].

¹⁸ *Prosecutor v Bemba et al* (Decision on "Prosecution's Fifth Request for the Admission of Evidence from the Bar Table") ICC-01/05-01/13-1524 (14 December 2015) (TC VII) [12].

¹⁹ *Prosecutor v Bemba et al* (Decision on "Prosecution's Fifth Request for the Admission of Evidence from the Bar Table") ICC-01/05-01/13-1524 (14 December 2015) (TC VII) [9].

²⁰ *Prosecutor v Bemba et al* (Public Redacted Version of Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) [219].

²¹ *Prosecutor v Bemba et al* (Public Redacted Version of Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) [220].

²² *Prosecutor v Bemba et al* (Public Redacted Version of Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) [222].

27. In light of paras. 1-3, there is no need for the Prosecution to corroborate the authenticity with the additional testimonial evidence. All communications in the case file corresponded with the logs.²³
28. Telephonic and intercepted communication evidence collected by Dutch authorities did not violate internationally recognised human rights, the Rome Statute or national law. The Chamber considered that the Dutch Prosecution in requesting interception and the Dutch Investigative Judge in authorising the request did not “appear to be so manifestly unlawful that they amount to a failure to act in accordance with the law.” Therefore, no violation of Kilolo’s rights to privacy occurred when collecting such evidence.²⁴
29. However, if a violation would have occurred, the Chamber would have to evaluate whether this violation “casts a substantial doubt on the reliability of evidence or whether the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”²⁵
30. The Trial Chamber also rejected Kilolo’s and Bemba’s Defence teams’ arguments concerning the inability of the Pre-Trial Chamber Single Judge to review the work of the Independent Counsel as well as the request to exclude all communications it identified as privileged. The Court had already given the Counsel a mandate to conduct such work and the Chamber did not see a need to review the argument.²⁶
31. There was an additional important finding that was provided by the Trial Chamber in its Decision on Prosecution’s Fifth Request. In particular, with regard to a transcript of a video (the latter has already been admitted on the list of evidence), the Trial Chamber found that:
32. “In principle, the Chamber considers that recognising the formal submission of audio-visual material automatically includes recognising the formal submission of any associated transcripts or translations which were duly disclosed. This would be the case irrespective of whether these transcripts/translations were on the list of evidence or formally submitted, though it is clearly preferable to formally submit these associated documents so there is no confusion as to their status.”²⁷

²³ *Prosecutor v Bemba et al* (Public Redacted Version of Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) [222].

²⁴ *Prosecutor v Bemba et al* (Decision on Requests to Exclude Dutch Intercepts and Call Data Records) ICC-01/05-01/13-1855 (29 April 2016) (TC VII) [26]-[27].

²⁵ *Prosecutor v Bemba et al* (Decision on Requests to Exclude Dutch Intercepts and Call Data Records) ICC-01/05-01/13-1855 (29 April 2016) (TC VII) [10].

²⁶ *Prosecutor v Bemba et al* (Decision on Requests to Exclude Dutch Intercepts and Call Data Records) ICC-01/05-01/13-1855 (29 April 2016) (TC VII) [31].

²⁷ Not quite clear to what argument of the Defence it refers. In Mangenda’s Response the Defence objected to any document without translation (paras. 2-3). However, it was not mentioned that such documents were DDE (audio-visual materials). *Prosecutor v Bemba et al* (Decision on ‘Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table’) ICC-01/05-01/13-1524 (14 December 2015) (TC VII) [7].

In the Appeals Chamber:

33. No. 1: The Appeals Chamber refuted Mr Bemba's argument on the violation of the right to privacy in violation of Article 69(7) of the Rome Statute: The conditions of the detention at the Detention Center were made known upon arrival to the defendant.²⁸ The intercepted conversations were received "in the course of normal functioning (administrative activities)" of the Detention Center;²⁹
34. There was no specific order for surveillance and interception of the telephone communications by the Pre-Trial Single Judge; the latter authorised only the transmission of such recordings to the Prosecutor, based on Article 57(3)(a) of the Rome Statute.³⁰
35. The Appeals Chambers was not persuaded by Mr Babala's challenge that the Trial Chamber could not rely on the audio recordings' transcript and translations due to technical issues surrounding them. When determining the relevant details of the telephone communications, the Trial Chamber "conducts its own independent assessment of evidence," which includes listening to the recording and reviewing the transcriptions and translations of the recordings.³¹ The Appeals Chamber determined that the fact these transcripts and translations were created by the Office of the Prosecution instead of the Registry does not make the evidence inadmissible.³² In addition, the Appeals Chamber further noted that "not all mistakes are material and affect the substance or understanding of the document."³³ Parties should indicate how mistakes affect the content in question.³⁴

²⁸ *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [373]-[375].

²⁹ *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [381].

³⁰ *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [381].

³¹ *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [1338].

³² *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [1339].

³³ *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [1338].

³⁴ *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision

36. Nos. 2-5: No discussion took place in the Appeals Chamber with regard to evidence Nos. 2-5
37. No. 6: The Appeals Chamber affirmed the Trial Chamber decision. The Dutch Intercept Materials had not been obtained in violation of the Statute or internationally recognised human rights within the meaning of Article 69 (7) of the Statute.³⁵

Arguments of the Prosecution:

38. All evidence is *prima facie* relevant and probative of material issues at trial. It constitutes direct evidence of the conduct charged and/or corroborates other such evidence in the case.³⁶
39. No. 1 (ICC Detention Unit recordings): The Prosecutor incorporated the arguments by reference to another request for the admission of evidence, where the following arguments were provided:³⁷
 - a. They were obtained in accordance with judicial authorisation;
 - b. Participation in the conversations was not challenged;
 - c. A plausible challenge cannot be sustained (the calls were placed from the phone extension of Mr Bemba);
 - d. Other evidence corroborates the reliability and accuracy of the recordings.
40. No. 2 (Facebook screenshots): The documents are open source materials from Facebook and, thus, *prima facie* authentic and reliable. Moreover, it is corroborated by the “general appearance” (there are indications that they originate from Facebook, such as Facebook logo, layout of webpage in the screenshot and its structure)³⁸ and other evidence (including witness statements).³⁹

of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [1338].

³⁵ *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [533].

³⁶ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [3].

³⁷ *Prosecutor v Bemba et al* (Public redacted version of “Prosecution’s Second Request for the Admission of Evidence from the Bar Table”) ICC-01/05-01/13-1113-Conf (31 July 2015) (TC VII) [17]-[27].

³⁸ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [17].

³⁹ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [18].

41. No. 3 (CDRs): The legend (i.e., a call sequence table showing usage of any number of mobile phones in chronological order) for CDRs corroborate the analysis of records by witnesses and are relevant to understanding and assessing CDRs received from those companies.⁴⁰
42. No. 4 (information extracted from SIM cards): The documents:
 - a. were highly relevant to the confirmed charges;
 - b. bore sufficient indicia of reliability for which they propose to show;
 - c. were taken from the very source from which they are claimed to originate; and
 - d. with the exception of one, were in the Defence's possession for over a year and, for all documents, the Defence was aware of the Prosecution's clear intention to rely on them.⁴¹
43. No. 5 (Emails) With regard to emails, many were provided by the Accused which directly "lends to their authenticity and reliability."⁴²
44. Others were extracted from Arido's email address. The Prosecution established that Arido was the owner of the address and used it during the time the items were created. Therefore, the authenticity and *prima facie* reliability of emails is corroborated by the documents' appearance, including a valid email address and signatures.⁴³ The Prosecution also added that these emails would not prejudice the Defence, and that any potential prejudice would be marginal and outweighed by probative value. The Prosecution argued the following for the admission of the email documents:
 - a. Relevance is high to the confirmed charges
 - b. To the matters they claim to demonstrate, that bear "sufficient indicia of reliability
 - c. The documents were lawfully obtained from Arido or provided by the Accused
 - d. The Defence had the documents over a year and were aware that Prosecution aims include them in the Prosecution's List of Evidence
 - e. The Reliability, authenticity and weight are "individually corroborated by other evidence, including witnesses P-0245, P0260 and P-0261."⁴⁴

⁴⁰ *Prosecutor v Bemba et al* (Public redacted version of the "Prosecution's Fifth Request for the Admission of Evidence from the Bar Table", 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [29].

⁴¹ *Prosecutor v Bemba et al* (Public redacted version of the "Prosecution's Fifth Request for the Admission of Evidence from the Bar Table", 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [20].

⁴² *Prosecutor v Bemba et al* (Public redacted version of the "Prosecution's Fifth Request for the Admission of Evidence from the Bar Table", 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [10].

⁴³ *Prosecutor v Bemba et al* (Public redacted version of the "Prosecution's Fifth Request for the Admission of Evidence from the Bar Table", 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [10].

⁴⁴ *Prosecutor v Bemba et al* (Public redacted version of the "Prosecution's Fifth Request for the Admission of Evidence from the Bar Table", 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [11].

45. No 6. (Intercepted communication, corresponding phone logs and transcripts and translations): Probative value of the material proposed by the Prosecution is not prejudicial to the Defence, since it has been lawfully obtained.⁴⁵ In addition, the Prosecution argued that the materials are “highly relevant” to the confirmed charges;
- a. they are reliable as they were collected according to national law and the Rome Statute,
 - b. the Accused confirmed facts of several conversations;
 - c. the material assists the Chamber in evaluating the truth;
 - d. the Defence had sufficient notice of the content;
 - e. the reliability, accuracy and weight of the intercepted records are “independently corroborated by other evidence in the case.”
46. All of the proposed evidence meets the criteria for admission pursuant to Article 69 of the Rome Statute.
47. Their admission from the bar table will also save valuable Court resources and time and promote judicial economy without causing any unfair prejudice to the Accused.⁴⁶

Arguments of the Defence:

48. The Prosecution breached procedural requirements, intended to cause prejudice to the discovery of the truth and to the respect of the guiding principles of fair procedure and course of the trial;⁴⁷
49. No. 1 (ICC Detention Unit recordings): There is an uncertainty in the allocation of numbers listed in the records as well as conversations are unreliable. The Prosecution have to demonstrate, for each audio conversation which it attributes to a particular person, on the basis of the allocation made by the Detention Center to the respective telephone numbers, that said person, and not another, had actually took part in the conversation.⁴⁸ There are a lot of discrepancies, as well as out of context conversations or links artificially created by the Prosecution (i.e., the conversations were manually edited to be presented in the form of a dialogue), which make them unreliable and

⁴⁵ *Prosecutor v Bemba et al* (Public redacted version of “Prosecution’s First Request for the Admission of Evidence from the Bar Table”, 16 June 2015, ICC-01/05-01/13-1013-Conf) ICC-01/05-01/13-1013-Red (23 June 2015) (TC VII) [28].

⁴⁶ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [4].

⁴⁷ *Prosecutor v Bemba et al* (Version publique expurgée de la « Réponse de l’équipe de Défense de M. Fidèle BABALA WANDU à la « Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table » (ICC-01/05-01/13-1498-Conf) », déposée le 7 décembre 2015) ICC-01/05-01/13-1513-red (10 December 2015) (TC VII) [3].

⁴⁸ *Prosecutor v Bemba et al* (Version publique expurgée de la « Réponse de l’équipe de Défense de M. Fidèle BABALA WANDU à la « Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table » (ICC-01/05-01/13-1498-Conf) », déposée le 7 décembre 2015) ICC-01/05-01/13-1513-red (10 December 2015) [14].

undermines their probative value.⁴⁹ From another point of view, the inclusion in the record of Mr Babala's conversations violates the accused's right to remain silent, as well as to respect for his private life.⁵⁰

50. The Defence of Mr Mangenda argued that the intercepts lack "the necessary indicia of reliability to be admitted as evidence in the case for three reasons:
 - a. no official translations have been provided;
 - b. no evidence has been adduced authenticating the participants in the conversations; and
 - c. no evidence has been adduced describing the methodology of recording and storing the conversations.
51. Further, the Prosecution has failed to establish the relevance of some of the information tendered, which should be established through testimonial evidence."⁵¹
52. The Defence of Mr Mangenda added that electronic recordings of oral conversations are unsuitable for admission from the bar table since they almost always required additional information to establish the requisite indicia of reliability.⁵²
53. *Presumably* No. 2 (Facebook screenshots)⁵³:
 - a. The documents are a compilation of publicly available information extracted by the Prosecution staff members. After being heavily processed, the nature of the documents is no longer "Open Source". Since the authors of the documents did not testify, the Defence are deprived of the opportunity to test the reliability of the documents⁵⁴;
 - b. The photos do not bear an ERN number; therefore, it is impossible to ascertain the photo that metadata corresponds to; many URL addresses have broken links or do not link to the same page as on the screenshots. Hence, they are of no probative value of authenticity and reliability of the photo or screenshots.⁵⁵

⁴⁹ *Prosecutor v Bemba et al* (Version publique expurgée de la « Réponse de l'équipe de Défense de M. Fidèle BABALA WANDU à la « Prosecution's Fifth Request for the Admission of Evidence from the Bar Table » (ICC-01/05-01/13-1498-Conf) », déposée le 7 décembre 2015) ICC-01/05-01/13-1513-red (10 December 2015) [21].

⁵⁰ *Prosecutor v Bemba et al* (Version publique expurgée de la « Réponse de l'équipe de Défense de M. Fidèle BABALA WANDU à la « Prosecution's Fifth Request for the Admission of Evidence from the Bar Table » (ICC-01/05-01/13-1498-Conf) », déposée le 7 décembre 2015) ICC-01/05-01/13-1513-red (10 December 2015) [42].

⁵¹ *Prosecutor v Bemba et al* (Public Redacted Version Response to "Prosecution's Second Request for the Admission of Evidence from the Bar Table") ICC-01/05-01/13-1200-Red (7 October 2015) (TC VII) [2].

⁵² *Prosecutor v Bemba et al* (Public Redacted Version Response to "Prosecution's Second Request for the Admission of Evidence from the Bar Table") ICC-01/05-01/13-1200-Red (7 October 2015) (TC VII) [6].

⁵³ Due to the confidentiality redaction, it is not quite clear whether the issue was addressed with regard to evidence No. 2 or any other.

⁵⁴ *Prosecutor v Bemba et al* (Public Redacted Version of Response to Fifth Bar Table Motion) ICC-01/05-01/13-1517-Red (9 December 2015) (TC VII) [4].

⁵⁵ *Prosecutor v Bemba et al* (Public Redacted Version of Response to Fifth Bar Table Motion) ICC-01/05-01/13-1517-Red (9 December 2015) (TC VII) [5].

54. No Arguments were submitted with regard to Nos. 3 and 4 (CDRs and SIM cards data respectively)
55. No. 5 (Emails): With regards to emails, the Defence of Arido objected to admission of a document, allegedly an email sent by Kilolo to his Defence team (CAR-D21-0004-0546) and challenged the Prosecution's interpretation on all the emails from his email addressed. The reasoning is stated in the Confidential Annex A.⁵⁶
56. No 6. (Intercepted communication): In a filing, the Defence of Mangenda requested the Trial Chamber the exclusion of telephone intercepts obtained through the Prosecution's request to the Trial Chamber, which contained material misstatements.⁵⁷ The Defence argued that due to misstatements, "admitting the Telephone Intercepts would be antithetical to and would seriously damage the integrity of the proceedings." Therefore, the evidence should not be admitted pursuant to Article 69(7) of the Rome Statute. The Defence argued that telephone surveillance violated the right to privacy of Mr Mangenda.⁵⁸
57. The Defence of Kilolo requested the Trial Chamber to exclude all telephonic and intercepted telecommunication evidence. The Defence claimed that such evidence acquired in a manner which violates the Rome Statute and "internationally recognised human rights standards."⁵⁹
58. The Defence of Bemba also argued that the use of Independent Counsel to identify the material lacked safeguards, since the Pre-Trial Chamber Single Judge was not able to verify the Counsel's findings.⁶⁰
59. During the Appeal phase, the Accused (Mr Bemba, Mr Kilolo, Mr Mangenda and Mr Babala) challenged the Trial Chamber decision with the following arguments. They claimed that the Chamber "erred by not excluding, and by relying in the Conviction Decision on logs and recordings of Mr Kilolo's and Mr Mangenda's telephone conversations which had been collected by the Dutch authorities and

⁵⁶ *Prosecutor v Bemba et al* ([Narcisse Arido's Response to the Prosecution Fifth Bar Table Motion ICC-01/05-01/13-1498-Conf](#)) ICC-01/05-01/13-1515 (7 December 2015) (TC VII).

⁵⁷ *Prosecutor v Bemba et al* (Public Redacted Version "Corrigendum to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda Obtained Pursuant to a Judicial Order Based on Material Misstatements By the Prosecution") ICC-01/05-01/13-1136-Red (15 July 2016) (TC VII) [1], [31].

⁵⁸ *Prosecutor v Bemba et al* (Public Redacted Version "Corrigendum to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda Obtained Pursuant to a Judicial Order Based on Material Misstatements By the Prosecution") ICC-01/05-01/13-1136-Red (15 July 2016) (TC VII) [8]-[10].

⁵⁹ *Prosecutor v Bemba et al* (Public Redacted Version Motion on behalf of Aimé Kilolo Musamba pursuant to Article 69(7) of the Statute to exclude evidence obtained in violation of the Statute and/or internationally recognized human rights ICC-01/05-01/13-1796-Conf) ICC-01/05-01/13-1796-Red (03 May 2016) (TC VII) [2]-[3].

⁶⁰ *Prosecutor v Bemba et al* (Public Redacted Version of Defence Application pursuant to Article 69(7) of the Rome Statute) ICC-01/05-01/13-1799-Red (22 April 2016) (TC VII) [50]-[72].

transmitted to the Prosecutor, in execution of requests for assistance.”⁶¹ Kilolo and Bemba based their arguments on the inadmissibility in alleged violation of the legal professional privilege in their telephone communication and Mr Mangenda relied on Article 69 (7) of the Rome Statute related to his telephone communication.⁶²

General Legal Submissions on DDE

60. No. 1 (ICC Detention Unit Calls): they contained conversations between Bemba and Babala on a range of topics; including the recruitment and management of Defence witnesses; the coaching of prospective witnesses, the payment of money through Western Union and MoneyGram to various individuals; Kilolo’s trips to see prospective Defence witnesses in the Bemba main case; and the use of code words to disguise the illicit nature of the conversations. The conversations reflected Bemba’s participation in the common plan and Babala’s significant involvement, including the procurement of Defence witnesses, as well as the participation of both in the cover-up of the overall strategy;⁶³
61. No. 2 (screenshots from Facebook): They were relevant to establishing the association and relationship the Accused and the witnesses had with each other;⁶⁴
62. No. 3 (legend for CDRs): The legend for CDRs were corroborating the analysis of records by witnesses and were relevant to understanding and assessing CDRs received from those companies.⁶⁵
63. No. 4 (information extracted from SIM cards): They contained the names and phone numbers of persons listed as contacts on Arido’s phone, including other Defence witnesses in the Main Case, and, thus, were relevant to demonstrating Arido’s contacts and relationships with those witnesses.⁶⁶
64. No. 5 (Emails): The emails contained the Accused’s communication with others to implement the overall strategy of witness intimidation. The emails established the

⁶¹ *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [401].

⁶² *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [402].

⁶³ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [15].

⁶⁴ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [17].

⁶⁵ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [29].

⁶⁶ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [19].

communication between the Defence witnesses in the Main Case and other individuals, who allegedly were involved in the plan. In addition, the documents provided information on the location and dates when Defence witnesses were contacted.⁶⁷

65. No 6. (Intercepted communication, corresponding logs, translations and transcripts): The intercept comprises records and recordings of conversation and text messages between the Accused as well as with Accused and witnesses involved in the confirmed incidents of the case.⁶⁸

IV. RULES OF EVIDENCE

66. The Office of the Prosecutor requested Trial Chamber VII to admit 108 items of evidence from the bar table, pursuant to Articles 64(9)(a), 69(3) and 69(4) of the Rome Statute and Rule 63(3) of the Rules of Procedure and Evidence.⁶⁹

V. EXTRAPOLATIONS

67. Call logs, intercepts, call data records:

- a. In general, considerations, such as the right to privacy, should be taken into account and respected by the Prosecution;⁷⁰
- b. Recording (surveillance) in the ordinary course of detention, where the conditions of the detention are made known upon arrival to the defendant, is considered received “in the course of normal functioning (administrative activities)” of the ICC Detention Centre, and as such do not violate the right to privacy;⁷¹
- c. The authenticity of the CDRs should be corroborated by witness statements, including expert opinions on their origin;⁷²

⁶⁷ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [9]

⁶⁸ *Prosecutor v Bemba et al* (Public redacted version of “Prosecution’s First Request for the Admission of Evidence from the Bar Table”, 16 June 2015, ICC-01/05-01/13-1013-Conf) ICC-01/05-01/13-1013-Red (23 June 2015) (TC VII) [11].

⁶⁹ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [1].

⁷⁰ *Prosecutor v Bemba et al* (Decision on Requests to Exclude Dutch Intercepts and Call Data Records) ICC-01/05-01/13-1855 (29 April 2016) (TC VII) [10].

⁷¹ *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [381].

⁷² *Prosecutor v Bemba et al* (Public Redacted Version of Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989-Red (19 October 2016) [739].

- d. Small technical irregularities of the CDRs, such as out of context conversations or wrong order of speakers—without indication of tampering or interference and if corroborated by other evidence—do not affect the reliability of evidence.⁷³
68. **Social media:** Due to the fact that it was not discussed in the judgments/decisions, no guideline can be extrapolated from the court reasoning. On the other hand, the following arguments of the defence are of particular importance here:
- a. The compilation of publicly available information extracted by the Prosecution staff members were processed by the latter and indicated interference (e.g., the photos did not bear an ERN number; it was impossible to ascertain the photo that metadata corresponds to; many URL addresses had broken links or did not link to the same page as on the screenshots) and, as such, lost the nature of an “Open Source” document⁷⁴;
- b. In order to be considered authentic and reliable, photos extracted from open sources should contain an ERN number consistent with its metadata and clear reference to the source on the internet (URL link).⁷⁵
69. **Emails:** possible extrapolation related to email are the following
- a. Emails provided by the Accused directly leads to their authenticity and reliability⁷⁶
70. **Intercepted telephone communication:** possible extrapolation:
- a. If intercepted communication evidence is collected in violation of privacy, the violation casts a substantial doubt on the reliability of evidence and whether the admission of such evidence would be antithetical to and would seriously damage the integrity of the proceedings⁷⁷
- b. The transmission to the Prosecutor of the recordings of the accused’s non-privileged telephone calls at the detention centre do not violate the accused’s right to privacy where the collecting and transmission of the recordings had a basis in law; were necessary; and were proportionate to the objective.⁷⁸

⁷³ *Prosecutor v Bemba et al* (Public Redacted Version of Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989-Red (19 October 2016) [227].

⁷⁴ *Prosecutor v Bemba et al* (Public Redacted Version of Response to Fifth Bar Table Motion) ICC-01/05-01/13-1517-Red (9 December 2015) [4].

⁷⁵ *Prosecutor v Bemba et al* (Public Redacted Version of Response to Fifth Bar Table Motion) ICC-01/05-01/13-1517-Red (9 December 2015) [5].

⁷⁶ *Prosecutor v Bemba et al* (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [10].

⁷⁷ *Prosecutor v Bemba et al* (Decision on Requests to Exclude Dutch Intercepts and Call Data Records) ICC-01/05-01/13-1855 (29 April 2016) [10].

⁷⁸ *Prosecutor v Bemba et al* (Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible) ICC-01/05-01/13-1432 (30 October 2015) (TC VII) [15]-[17].

- c. Transcripts and translations carried out by the Office of the Prosecution instead of the Registry does not make them inadmissible.⁷⁹
- d. Using an Independent Counsel assigned by a Pre-Trial Judge to review intercepted communication to exclude potential privileged communication does not violate the right to privacy.⁸⁰
- e. Not all mistakes in translations or transcripts of intercepted communication are material or affect the substance or understanding of the document.⁸¹

⁷⁹ *Prosecutor v Bemba et al* (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [1339].

⁸⁰ *Prosecutor v Bemba et al* (Decision on Requests to Exclude Dutch Intercepts and Call Data Records) ICC-01/05-01/13-1855 (29 April 2016) [31].

⁸¹ *Prosecutor v Bemba et al* (Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”) ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [1338].

VI. CITATIONS

Prosecutor v. Bemba et al (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/05-01/13-749 (11 November 2014) (PTJ) <https://www.legal-tools.org/doc/a44d44/>;

Prosecutor v. Bemba et al (Public redacted version of “Prosecution’s First Request for the Admission of Evidence from the Bar Table”, 16 June 2015, ICC-01/05-01/13-1013-Conf) ICC-01/05-01/13-1013-Red (23 June 2015) (TC VII) <https://www.legal-tools.org/doc/3d50dc/>;

Prosecutor v. Bemba et al (Public redacted version of “Prosecution’s Second Request for the Admission of Evidence from the Bar Table”) ICC-01/05-01/13-1113-Conf-Red (31 July 2015) (TC VII) <https://www.legal-tools.org/doc/f342c9-1/>;

Prosecutor v. Bemba et al (Public Redacted Version Response to “Prosecution’s Second Request for the Admission of Evidence from the Bar Table”) ICC-01/05-01/13-1200-Red (7 October 2015) (TC VII) <https://www.legal-tools.org/doc/787b50/>;

Prosecutor v. Bemba et al (Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible) ICC-01/05-01/13-1432 (30 October 2015) (TC VII) <https://www.legal-tools.org/doc/1b7b66/>;

Prosecutor v. Bemba et al (Public redacted version of the “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”, 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) <https://www.legal-tools.org/doc/0441c1/>;

Prosecutor v. Bemba et al (Response to “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”) ICC-01/05-01/13-1514 (7 December 2015) (TC VII) <https://www.legal-tools.org/doc/355764/>

Prosecutor v. Bemba et al (Narcisse Arido’s Response to the Prosecution Fifth Bar Table Motion ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1515 (7 December 2015) (TC VII) <https://www.legal-tools.org/doc/c12bcd/>;

Prosecutor v. Bemba et al (Public Redacted Version of response to Fifth Bar Table Motion) ICC-01/05-01/13-1517-red (9 December 2015) (TC VII) <https://www.legal-tools.org/doc/a94aec/>;

Prosecutor v. Bemba et al (Version publique expurgée de la « Réponse de l’équipe de Défense de M. Fidèle BABALA WANDU à la « Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table » (ICC-01/05-01/13-1498-Conf) », déposée le 7 décembre 2015) ICC-01/05-01/13-1513-red (10 December 2015) (TC VII) <https://www.legal-tools.org/doc/892d47/>;

Prosecutor v. Bemba et al (Decision on “Prosecution’s Fifth Request for the Admission of Evidence from the Bar Table”) ICC-01/05-01/13-1524 (14 December 2015) (TC VII) <https://www.legal-tools.org/doc/9ac32d/>;

Prosecutor v. Bemba et al (Public Redacted Version of Defence Application pursuant to Article 69(7) of the Rome Statute) ICC-01/05-01/13-1799-Red (22 April 2016) (TC VII) <https://www.legal-tools.org/doc/558815/pdf>

Prosecutor v. Bemba et al (Decision on Requests to Exclude Dutch Intercepts and Call Data Records) ICC-01/05-01/13-1855 (29 April 2016) (TC VII) <https://www.legal-tools.org/doc/e4815b/>;

Prosecutor v. Bemba et al (Public Redacted Version Motion on behalf of Aimé Kilolo Musamba pursuant to Article 69(7) of the Statute to exclude evidence obtained in violation of the Statute and/or internationally recognized human rights ICC-01/05-01/13-1796-Conf) ICC-01/05-01/13-1796-Red (3 May 2016) (TC VII) <https://www.legal-tools.org/doc/2303d3/>;

Prosecutor v. Bemba et al (Public Redacted Version "Corrigendum to Motion to Declare Inadmissible Telephone Intercepts of Mr. Mangenda Obtained Pursuant to a Judicial Order Based on Material Misstatements by the Prosecution") ICC-01/05-01/13-1136-Red (15 July 2016) (TC VII) <https://www.legal-tools.org/doc/b11255/pdf>

Prosecutor v. Bemba et al (Public Redacted Version of Judgment pursuant to Article 74 of the Statute) ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) <https://www.legal-tools.org/doc/fe0ce4/>;

Prosecutor v. Bemba et al (Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute") ICC-01/05-01/13-2275-Red (8 March 2018) (AC) <https://www.legal-tools.org/doc/56cfc0/>

Prosecutor v Jean-Pierre Bemba Gombo (ICC-01/05-01/08)

I. CASE DETAILS

- **Case name:** *The Prosecutor v Jean-Pierre Bemba Gombo* (ICC-01/05-01/08)
- **Tribunal/Court:** International Criminal Court (“ICC”)
- **Offence charged:** two counts of crimes against humanity: murder and rape; and three counts of war crimes: murder, rape and pillaging. Acquitted by the Appeals Chamber on 8 June 2018
- **Stage of the proceedings:** Pre-Trial and Trial
- **Keywords:** Reliability, Excerpt, Authenticity, Probative value, Prejudice, Chain of custody, Relevance, Originality, Integrity, Objectivity, Reliability, Authorship, Context, Corroboration, Provenance

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. **Video** (EVD-D01-00042).¹ **Video** (EVD-D01-00042) – was ‘part of the MLC archives and was produced by MLC members in the town of Sibut in early 2003, at a time when the CAR was still under attack’.² **Video** (EVD-D01-00042) – was ‘produced by MLC members’.³

2. **Extracts of *Radio France Internationale* (“RFI”) programmes** (EVD-P-02258 – ‘radio broadcast dating 5 December 2002, reporting the killing of the interviewee’s brother-in-law in PK22’⁴ (this piece of evidence further appears in the Trial stage as CAR-OTP-0031-0099); EVD-P-02259 - indirect evidence that ‘shows that the attack was directed against the CAR civilian population’⁵; EVD-P-02162 – RFI broadcast dated 4 November 2002 reporting that ‘during a telephone conversation they had with Mr Jean-Pierre Bemba, he told them that if his men had committed “atrocities, they would [have been] arrested and undergo[ne] trial under their Movement’s military laws”’.⁶

3. **Extracts of *Radio France Internationale* (“RFI”) programmes** – information contained in confidential annex – ‘Chamber being aware of the confidential nature of the annexes to the Prosecutor’s filing ICC-01/05-01/08-278, does not consider the disclosure of this particular information to be inconsistent with the confidential nature of the document as such’.⁷ **Extracts of**

¹ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [102]-[104].

² *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [104].

³ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [104].

⁴ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [123], fn 167; [141].

⁵ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [94], fn 118.

⁶ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [470].

⁷ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [94], footnote 118.

Radio France Internationale (“RFI”) programmes – information contained in confidential annex (see point 13 above).

4. **Photographs** (CAR-OTP-0046-0198; CAR-OTP-0046-0203; CAR-OTP-0046-0215; CAR-OTP-0046-0217).⁸ **Photographs** (CAR-OTP-0046-0198; CAR-OTP-0046-0203; CAR-OTP-0046-0215; CAR-OTP-0046-0217) – origin was not discussed. **Photographs** (CAR-OTP-0046-0198; CAR-OTP-0046-0203; CAR-OTP-0046-0215; CAR-OTP-0046-0217) – author was a prosecution witness.⁹

5. **Telephone record** (CAR-OTP-0055-0893).¹⁰ **Telephone record** (CAR-OTP-0055-0893) – according to the Prosecution, ‘emanates from the Thuraya Telecommunications Company’.¹¹ **Telephone record** (CAR-OTP-0055-0893) – ‘was provided by non-trial prosecution Witness 161’.¹²

6. **Audio recording of an interview** (CAR-OTP-0005-0159).¹³ **Audio recording of an interview** (CAR-OTP-0005-0159) – ‘although prosecution states that the source is RFI, no evidence has been provided to that effect’.¹⁴ **Audio recording of an interview** (CAR-OTP-0005-0159) – see above (paragraph 17).

7. **Audio recording of a radio programme** (CAR-OTP-0031-0099).¹⁵ **Audio recording of a radio programme** (CAR-OTP-0031-0099) – programme from RFI.¹⁶ **Audio recording of a radio programme** (CAR-OTP-0031-0099) – ‘source is clearly identified and reporters, correspondents and interviewees are introduced and identified in the recording’.¹⁷

⁸ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [157].

⁹ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [157].

¹⁰ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [162].

¹¹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [162].

¹² *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [162].

¹³ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [121].

¹⁴ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [121].

¹⁵ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [123].

¹⁶ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [123].

¹⁷ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [123].

8. **Audio recording of four tracks of a news programme and one interview** (CAR-OTP-0031-0104).¹⁸ **Audio recording of four tracks of a news programme and one interview** (CAR-OTP-0031-0104) – ‘source is clearly identified in the recording and reporters, correspondents and interviewees are introduced and identified therein’.¹⁹

9. **Audio recording of four tracks of a news programme and one interview** (CAR-OTP-0031-0104) – news programme ‘Journal Afrique’ and one interview on the programme ‘Invité Afrique’.²⁰ **Audio recordings of a news programme** (CAR-OTP-0031-0093, CAR-OTP-0031-0106, CAR-OTP-0031-0116, CAR-OTP-0031-0120, CAR-OTP-0031-0122, CAR-OTP-0031-0124, CAR-OTP-0031-0136) – radio programme ‘Journal Afrique’.²¹

10. **Audio recordings of a news programme** (CAR-OTP-0031-0093, CAR-OTP-0031-0106, CAR-OTP-0031-0116, CAR-OTP-0031-0120, CAR-OTP-0031-0122, CAR-OTP-0031-0124, CAR-OTP-0031-0136).²² **Audio recordings of a news programme** (CAR-OTP-0031-0093, CAR-OTP-0031-0106, CAR-OTP-0031-0116, CAR-OTP-0031-0120, CAR-OTP-0031-0122, CAR-OTP-0031-0124, CAR-OTP-0031-0136) – ‘source is clearly identified and reporters, correspondents and interviewees are introduced and identified therein’.²³

11. **Video** (CAR-D04-0002-1382).²⁴ **Video** (CAR-D04-0002-1382) – recording of a program called ‘A Coeur Ouvert’.²⁵ **Video** (CAR-D04-0002-1382) – information contained in the confidential annex.²⁶

¹⁸ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [125].

¹⁹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [126].

²⁰ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [125].

²¹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [127].

²² *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [127].

²³ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [128].

²⁴ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [80].

²⁵ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [80].

²⁶ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [80], fns 97-98 therein.

12. **Audio recording** (CAR-DEF-0001-0830).²⁷ **Audio recording** (CAR-DEF-0001-0830) – information contained in the confidential annex.²⁸ **Audio recording** (CAR-DEF-0001-0830) – information contained in the confidential annex.²⁹

Evidentiary Considerations

13. The Chamber notes that it ‘takes a case-by-case approach in assessing the relevance and probative value of each piece of evidence’.³⁰ To do so, it is ‘guided by various factors, such as the nature of the Disclosed Evidence, the credibility, the reliability, the source from which the evidence originates, the context in which it was obtained, and its nexus to the charges of the Case or the alleged perpetrator’.³¹ The Chamber noted that ‘[a]s a general rule, a lower probative value will be attached to indirect evidence than to direct evidence’.³² The Chamber initially ‘assesses the relevance, probative value and admissibility of indirect evidence’.³³ It then examines ‘whether there exists corroborating evidence, regardless of its type or source’.³⁴

14. In addition, the Chamber shall take all appropriate protective measures pursuant to Article 68(1) of the Statute to protect the privacy of the victims, witnesses and others affected by the work of the Court when admitting DDE evidence. This includes requiring consent before disclosing DDE evidence.³⁵

²⁷ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [82].

²⁸ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [82] (see footnote 100).

²⁹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [82], fn 100.

³⁰ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [58].

³¹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [58].

³² *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [51].

³³ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [52].

³⁴ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [52].

³⁵ *Prosecutor v Bemba* (Redacted Decision on the Prosecution’s Request to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [85]

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

15. **Video** (EVD-D01-00042) – was screened to support the argument that ‘if the alleged crimes occurred during the attack in the CAR, they were not committed by MLC troops’.³⁶ **Video** (EVD-D01-00042) - The Chamber, in assessing its probative value, noted that ‘the video is part of the MLC archives and was produced by MLC members in the town of Sibut in early 2003, at a time when the CAR was still under attack’.³⁷ It noted that ‘the interviewees’ statements taken by a party to the conflict in time of war may be driven by fear and therefore may not be objective and reliable’.³⁸ It concluded that ‘a low probative value should be attached to this video-based evidence’.³⁹

16. **Photographs** (CAR-OTP-0046-0198; CAR-OTP-0046-0203; CAR-OTP-0046-0215; CAR-OTP-0046-0217) – were used to ‘show the MLC in Sibut and prove, *inter alia*, the alleged authority and control of the accused over the MLC in the CAR’.⁴⁰ **Photographs** (CAR-OTP-0046-0198; CAR-OTP-0046-0203; CAR-OTP-0046-0215; CAR-OTP-0046-0217) – the Chamber noted ‘that photographs CAR-OTP-0046-0203 and CAR-OTP-0046-0215 were discussed in Court and tendered into evidence both by the prosecution and the defence’.⁴¹ They were thus held to be relevant and probative since they provided ‘sufficient indicia of reliability’.⁴² For the photographs CAR-OTP-0046-0198 and CAR-OTP-0046-0217, the Chamber noted that ‘there is no strict requirement establishing that every piece of evidence must be authenticated officially or by a witness in court in order for it to be considered authentic, reliable and holding probative value’.⁴³ However, since the prosecution had not provided ‘any information or evidence to support their authenticity and reliability’, their probative value was ‘outweighed by their potential unfair prejudice to a fair trial’.⁴⁴ In addition, pursuant to Article 68(1) of the Rome Statute. In relation to DDE, this includes the privacy of the witnesses and therefore consent is required when using photographs of witnesses and others affected by the work of the Court. The Chamber held that circulation of such photographs without the consent from individuals may constitute a violation of the right to privacy or private

³⁶*Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [102].

³⁷ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [104].

³⁸ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [104].

³⁹ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [104].

⁴⁰ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [157].

⁴¹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [158].

⁴² *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [158].

⁴³ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [159].

⁴⁴ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [159].

life.⁴⁵ Therefore prior to disclosure of the photographs, individuals in the images should be consulted, if possible, to ensure that there are no unaddressed security issues.⁴⁶ In addition, the use of photographs should not unnecessarily link individuals depicted in the images with the Court.⁴⁷

17. **Telephone record** (CAR-OTP-0055-0893) – was used to show the accused’s ‘contact with the MLC commanders in the field during the time period relevant to the charges’ and his ‘alleged knowledge and command responsibility’.⁴⁸ **Telephone record** (CAR-OTP-0055-0893) – the Chamber held that it was relevant because it was discussed and identified by the witness. The Chamber held that it may help to ‘contextualise and understand the testimony of witness 178’.⁴⁹

18. **Audio recording** (CAR-OTP-0005-0159) – was used as ‘an interview of the accused by a journalist concerning the MLC’s withdrawal from the CAR in March 2003’.⁵⁰ **Audio recording** (CAR-OTP-0005-0159) – the Chamber held that it was unlikely to assist in the Chamber’s determination of the particular issue.⁵¹ It noted that the recording was only an excerpt and that the Chamber had not been ‘provided with sufficient information in order to verify this brief excerpt actually emanates from RFI or one of its reports or correspondents’.⁵² The Chamber noted that ‘unless the recording bears sufficient *indicia* that it is what it purports to be (i.e. an RFI transmission), the prosecution must also provide information on its source, originality and integrity’.⁵³ Since this information was absent, the probative value of the recording ‘was outweighed by its potentially prejudicial effect on a fair trial’.⁵⁴

19. **Audio recording of a radio programme** (CAR-OTP-0031-0099) – was used as ‘background information on the conflict in different areas of the CAR, the identity of the armed groups involved, as well as accounts from victims and eye-witnesses on the crimes included in the charges against the

⁴⁵ *Prosecutor v Bemba* (Redacted Decision on the Prosecution’s Request to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [85].

⁴⁶ *Prosecutor v Bemba* (Redacted Decision on the Prosecution’s Request to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [85].

⁴⁷ *Prosecutor v Bemba* (Redacted Decision on the Prosecution’s Request to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [87].

⁴⁸ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [162].

⁴⁹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [163].

⁵⁰ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [122].

⁵¹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [122].

⁵² *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [122].

⁵³ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [122].

⁵⁴ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [122].

accused'.⁵⁵ **Audio recording of a radio programme** (CAR-OTP-0031-0099) – the Chamber held that it was relevant since it referred to ‘events that allegedly took place in the CAR during the time period relevant to the charges and it is contemporaneous with the events’.⁵⁶ It was satisfied for its probative value since there were sufficient *indicia* that this recording was what it purported to be and the source was clearly identified.⁵⁷ The Chamber held that ‘radio recordings containing the accounts of persons interviewed may be considered for limited purposes, to be determined on a case-by-case basis’.⁵⁸ It held that this particular recording could ‘serve to corroborate other pieces of evidence’.⁵⁹

20. Audio recording of four tracks of a news programme and one interview (CAR-OTP-0031-0104) – was used for background information ‘on the events taking place in the CAR during the time period relevant to the charges’.⁶⁰ **Audio recording of four tracks of a news programme and one interview** (CAR-OTP-0031-0104) – the Chamber held that it was relevant because it contained ‘information on the events taking place in the CAR during the time period relevant to the charges’ and was ‘contemporaneous with the relevant events in this case’.⁶¹ The Chamber was satisfied that there were sufficient *indicia* that the passages were what they purport to be, i.e. news programmes from RFI.⁶²

21. Audio recordings of a news programme (CAR-OTP-0031-0093, CAR-OTP-0031-0106, CAR-OTP-0031-0116, CAR-OTP-0031-0120, CAR-OTP-0031-0122, CAR-OTP-0031-0124, CAR-OTP-0031-0136) – were used for background information ‘on the events taking place in the CAR during the time period relevant to the charges’.⁶³ **Audio recordings of a news programme** (CAR-OTP-0031-0093, CAR-OTP-0031-0106, CAR-OTP-0031-0116, CAR-OTP-0031-0120, CAR-OTP-0031-0122, CAR-OTP-0031-0124, CAR-OTP-0031-0136) – the Chamber held that they were relevant and

⁵⁵ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [117].

⁵⁶ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [123].

⁵⁷ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [123].

⁵⁸ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [124].

⁵⁹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [124].

⁶⁰ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [125].

⁶¹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [125].

⁶² *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [126].

⁶³ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [127].

contemporaneous.⁶⁴ The Chamber was satisfied that there were sufficient indicia that the passages were what they purport to be, i.e. news programmes from RFI.⁶⁵

22. **Video** (CAR-D04-0002-1382) – was used to prove the ‘accused’s alleged knowledge of the crimes committed in the CAR’.⁶⁶ **Video** (CAR-D04-0002-1382) – the Chamber held that it was relevant because it related to ‘matters that are properly considered by the Chamber’.⁶⁷ Its authenticity was not disputed and it had ‘indicia of reliability, originality and integrity such as a date of emission shown during almost the entire duration of the video, a logo of the TV programme and the image and voice of Mr Olivier Kamitatu, with no interruptions in what seem to be full answers to the questions posed by the interviewer’.⁶⁸

23. **Audio recording** (CAR-DEF-0001-0830) – was used to prove the ‘accused’s duty to prevent crimes’.⁶⁹ **Audio recording** (CAR-DEF-0001-0830) – the Chamber noted that the date of the recording was unknown and that it contained no questions.⁷⁰ It held that the ‘prosecution should have provided the recording in full and not just an excerpt thereof’.⁷¹ There was insufficient information ‘to determine the relevance or probative value of the audio material as the prosecution did not provide evidence to verify that the voice recorded is that of Mr Olivier Kamitatu, nor did it produced any evidence to confirm the date, circumstances and context in which the recording was created’.⁷²

Was the DDE admitted and/or relied upon?

⁶⁴ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [127].

⁶⁵ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [128].

⁶⁶ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [80].

⁶⁷ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [81].

⁶⁸ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [81].

⁶⁹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [82].

⁷⁰ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [83].

⁷¹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [83].

⁷² *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [84].

24. **Video** (EVD-D01-00042) – The Chamber concluded that ‘a low probative value should be attached’ to the video.⁷³ [presumably admitted]- information unavailable due to the filing’s confidentiality.⁷⁴
25. **Extracts of *Radio France Internationale* (“RFI”) programmes** – information contained in a confidential annex.
26. **Photographs** (CAR-OTP-0046-0203 and CAR-OTP-0046-0215) were admitted.⁷⁵ Photographs (CAR-OTP-0046-0198 and CAR-OTP-0046-0217) were not admitted.⁷⁶
27. **Telephone record** (CAR-OTP-0055-0893) was admitted.⁷⁷
28. **Audio recording** (CAR-OTP-0005-0159) was not admitted.⁷⁸
29. **Audio recording of a radio programme** (CAR-OTP-0031-0099) was admitted for the limited purpose of corroborating other pieces of evidence.⁷⁹
30. **Audio recording of four tracks of a news programme and one interview** (CAR-OTP-0031-0104) was admitted for the limited purpose of corroborating other pieces of evidence.⁸⁰
31. **Audio recordings of a news programme** (CAR-OTP-0031-0093, CAR-OTP-0031-0106, CAR-OTP-0031-0116, CAR-OTP-0031-0120, CAR-OTP-0031-0122, CAR-OTP-0031-0124, CAR-OTP-0031-0136) were admitted for the limited purpose of corroborating other pieces of evidence.⁸¹
32. **Video** (CAR-D04-0002-1382) was admitted.⁸²

⁷³ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [104].

⁷⁴ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [10], fn 129.

⁷⁵ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [158].

⁷⁶ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [159].

⁷⁷ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [163].

⁷⁸ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [122].

⁷⁹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [124].

⁸⁰ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [126].

⁸¹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [128].

⁸² *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [81].

33. **Audio recording** (CAR-DEF-0001-0830) was not admitted.⁸³

General Legal Submissions on DDE

34. **Photographs** (CAR-OTP-0046-0198, CAR-OTP-0046-0203, CAR-OTP-0046-0215, CAR-OTP-0046-0217) – The Prosecution also sought redactions of the photographs of witnesses and information specially affecting ongoing or further in investigations, which included the photographs of investigator(s) contained in forensic reports.⁸⁴ The Defence objected to their admission arguing ‘that they should have been introduced through their author, who is a prosecution witness’ and that the photos ‘have no context, cannot be authenticated, and that neither the Chamber nor the defence can ascertain what or who they are purported to represent’.⁸⁵

35. **Telephone record** (CAR-OTP-0055-0893) – The Defence objected to its admission since ‘the records fall predominantly outside the time period relevant to the charges’ and the ‘prosecution has offered absolutely no basis for their provenance or authenticity or even any foundation for its assertion that the telephone number cited belonged to the accused’.⁸⁶ The defence argued that the document ‘should have been introduced through a witness who has knowledge of these records and who could have provided the Chamber with a basis for their admission’.⁸⁷

36. **Ten audio recordings of RFI broadcasts** – The Prosecution argued that the recordings ‘bear *indicia* of reliability’ and that ‘they were made contemporaneously to the events covered in the charges and RFI is a reputable organization’.⁸⁸ It argued that ‘the recordings identify the reporters and the information detailing the chain-of-custody shows that these recordings were received directly from RFI’.⁸⁹ / The Defence opposed their admission arguing ‘that media reports are not sufficiently reliable to be considered admissible’ and referred to ‘the practice adopted in the *Katanga* case, in which Trial Chamber II concluded that before audio material could be admitted, the Chamber required evidence of originality and integrity’.⁹⁰

⁸³ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [84].

⁸⁴ *Prosecutor v Bemba* (Public Redacted Version of Prosecution’s Request to Lift, Maintain and Apply Redactions to Witnesses’ Statements and Related Documents) ICC-01/05-01/08-572-Red2 (27 October 2009) [12].

⁸⁵ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [157].

⁸⁶ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [162].

⁸⁷ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [162].

⁸⁸ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [119].

⁸⁹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [119].

⁹⁰ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [118].

37. **Video** (CAR-D04-0002-1382) The Defence argued that ‘the video is relevant to and probative of many aspects of the defence case’.⁹¹

38. **Audio recording** (CAR-DEF-0001-0830) –The Defence argued that ‘it objects in principle to the admission of an interview conducted so far in advance of the events relevant to the charges, but it alleges that it is in any event relevant to and probative in establishing that measures were taken by the MLC to prevent and punish crimes’.⁹²

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

39. Article 61(7) of the Statute concerning ‘sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged’.⁹³

40. Three-part admissibility test under which the Chamber ‘will examine, on a preliminary basis, whether the submitted materials (i) are relevant to the case; (ii) have probative value; and (iii) are sufficiently relevant and probative to outweigh any prejudicial effect that could be caused by their admission’.⁹⁴ The Chamber ‘stresses that there is no strict requirement that every document be authenticated officially or by a witness in court’.⁹⁵ Items can also be (i) self-authenticating; (ii) ‘agreed upon by the parties as authentic’; (iii) ‘*prima facie* reliable if they bear sufficient indicia of reliability’ or (iv) ‘in the case the item itself does not bear sufficient indicia of reliability, shown to be authentic and reliable by the tendering party through provision of sufficient information to enable the Chamber to verify that the documents are what they purport to be’.⁹⁶

41. The ‘admissibility determination does not – in any way – predetermine the Chamber’s final assessment of the evidence or the weight to be afforded to it; this will only be determined by the Chamber at the end of the case when assessing the entirety of the evidence admitted for the purpose

⁹¹ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [80].

⁹² *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [82].

⁹³ *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [28].

⁹⁴ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [7]-[8].

⁹⁵ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [9].

⁹⁶ *Prosecutor v Bemba* (Public Redacted Version of ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’ of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [9].

of the trial'.⁹⁷ Furthermore, 'a determination on the usage the Chamber will make of a specific item of evidence cannot be made, *a priori*, in a decision on the admissibility of evidence'.⁹⁸

42. Article 68(1) of the Statute concerning 'appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.'

V. EXTRAPOLATIONS

43. Based on the decisions discussed above, these criteria were important for the Court when considering the admission of the DDE in the present case:

Common for all types of DDE:

- Relevance;⁹⁹
- Probative value (it should not be outweighed by their potential unfair prejudice to a fair trial).¹⁰⁰

44. Photographs:

- a. There is no strict requirement establishing that every piece of evidence [including photos] must be authenticated officially or by a witness in court in order for it to be considered authentic, reliable and holding probative value. However, information on their authenticity and reliability should in any case be provided.¹⁰¹
- b. The consent of witnesses and others affected by the work of the Court whose image is being circulated is required. In the absence of such consent and depending on the circumstances, this may constitute an unjustified infringement of the right to privacy or "private life".¹⁰²
- c. The use of photographs should not unnecessarily link the individuals depicted therein with the Court, and particularly the way in which they are involved with

⁹⁷ *Prosecutor v Bemba* (Public Redacted Version of 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [11].

⁹⁸ *Prosecutor v Bemba* (Public Redacted Version of 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [14].

⁹⁹ *Prosecutor v Bemba* (Public Redacted Version of 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [7]-[8].

¹⁰⁰ *Prosecutor v Bemba* (Public Redacted Version of 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [7]-[8].

¹⁰¹ *Prosecutor v Bemba* (Public Redacted Version of 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [158]-[159].

¹⁰² *Prosecutor v Bemba* (Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [85].

the ICC. They should only be used when no satisfactory alternative investigative avenue is available.¹⁰³

- d. Refraining from disclosing photographs of investigators to the Defence does not cause prejudice to the Defence investigations.¹⁰⁴
- e. The materials disclosed by the prosecution, either as part of the evidence it intends to advance against the accused, or exculpatory evidence or "material" for defence preparation, should be provided in their entirety.¹⁰⁵
- f. As with all other non-public information, a detailed record of the disclosure shall be kept by the investigating party.¹⁰⁶

45. Telephone records: If the telephone record was discussed and identified by the witness it may be considered relevant on the basis that it helps to contextualise the witness' testimony.¹⁰⁷

46. Audio recordings:

- a. Sufficient indicia of reliability of audio recordings can be established by assessing that the recording is what it purports to be and there is sufficient information on the source, originality and integrity of the recording – the absence of this information may lead to the probative value of this evidence being outweighed;¹⁰⁸
- b. An audio recording tendered into evidence should be of the recording in full and not an excerpt thereof;¹⁰⁹
- c. Audio recordings should be contemporaneous;¹¹⁰
- d. Evidence to verify the voice of the person recorded should be provided;¹¹¹

¹⁰³ *Prosecutor v Bemba* (Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [87].

¹⁰⁴ *Prosecutor v Bemba* (Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [85]-[87].

¹⁰⁵ *Prosecutor v Bemba* (Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [85].

¹⁰⁶ *Prosecutor v Bemba* (Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [87].

¹⁰⁷ *Prosecutor v Bemba* (Public Redacted Version of 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [163].

¹⁰⁸ *Prosecutor v Bemba* (Public Redacted Version of 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [9] and [122].

¹⁰⁹ *Prosecutor v Bemba* (Public Redacted Version of 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [83].

¹¹⁰ *Prosecutor v Bemba* (Public Redacted Version of 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [127].

¹¹¹ *Prosecutor v Bemba* (Public Redacted Version of 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [84].

- e. An audio recording should be tendered along with its date and the circumstances and context in which the recording was created.¹¹²
- f. Radio recordings containing the accounts of persons interviewed may be admissible for limited purposes, to be determined on a case-by-case basis and in particular to corroborate other pieces of evidence.¹¹³

47. Video recordings:

- a. Interviews captured in a video which may not be objective or reliable should receive low-probative value.¹¹⁴
- b. Interviews conducted during an armed conflict by a party to the conflict may not be objective and reliable and therefore low probative value may be attached to the video.¹¹⁵
- c. Indicia of reliability, originality and integrity such as date of emission, a logo of the TV programme + the image and voice of the person interviewed without interruptions.¹¹⁶

VI. CITATIONS

Prosecutor v. Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) <https://www.legal-tools.org/doc/07965c/>;

Prosecutor v. Bemba (Public Redacted Version of the Prosecution's Request to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents) ICC-01/05-01/08-572-Red2 (27 October 2009) (TC III) <https://www.legal-tools.org/doc/f29fbc/>;

Prosecutor v. Bemba (Redacted Decision on the Prosecution's Request to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) <https://www.legal-tools.org/doc/b7754c/>;

Prosecutor v. Bemba (Public Redacted Version of 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012) (8 October 2012) (TC III) <https://www.legal-tools.org/doc/13ca4b/>;

¹¹² *Prosecutor v Bemba* (Public Redacted Version of 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [84].

¹¹³ *Prosecutor v Bemba* (Public Redacted Version of "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [124], [126], [128].

¹¹⁴ *Prosecutor v Bemba* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [104].

¹¹⁵ *Prosecutor v Bemba* (Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [104].

¹¹⁶ *Prosecutor v Bemba* (Public Redacted Version of 'Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute' of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [81].

Prosecutor v Laurent Gbagbo and Charles Blé Goudé (ICC-02/11-01/15) – Analysis Part I

I. CASE DETAILS

- **Case name:** *Prosecutor v Laurent Gbagbo and Charles Blé Goudé* (ICC-02/11-01/15)
- **Tribunal/Court:** International Criminal Court (“ICC”)
- **Offence charged:** Crimes Against Humanity allegedly committed in Côte d'Ivoire in 2010 and 2011
- **Stage of the proceedings:** Trial Chamber I – Acquitted of all charges
- **Keywords:** Authenticity, Expert witness, Relevance, Probative value, Court Resources, Chain of Custody

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. **Video CIV-OTP-0020-0558, (herein referred to as ‘Video 1’)**
 - a. The video is listed as No. 55 under Defence Charles Blé Goudé’s list of evidence as ‘CIV-OTP-0020-0558.’
 - b. The video relates to paragraph 96 to 105 of Witness P-106’s Statement (‘witness’).¹
 - c. The video is 2 minutes in duration² and it shows people being burnt alive.
 - d. The witness claims in his Witness Statement that the video shows people being burnt alive in Yopougon in Côte d'Ivoire, however the Prosecution and Defence both agree that the video was filmed in Kenya and is therefore not related to the Côte d'Ivoire post-election violence in the present case.³
 - e. The video was obtained by an OTP Investigator from the witness. The witness said he obtained the video from a friend, who transferred the video to him from a computer to the memory card on his phone.⁴ The witness claimed he was present during the burning incident in Yopougon and had filmed the incident himself but had later deleted the video.⁵ He confirmed his friend’s footage was what he saw first hand; he confirmed that it was the same place and the same victims he saw as

¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 2, lines 2-3.

² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 30, line 16.

³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 2, lines 12-20; 3, lines 1-5, 21-23.

⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 6, lines 2-5.

⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 6, lines 2-5.

depicted in his friend's video.⁶ The name of the friend was identified during a closed session.⁷

2. **Video CIV-D25-0002-00033, (herein referred to as 'Video 2')**

- a. The video is a clip of the Accused, Charles Blé Goudé, on TV on Channel 2. Interpretation of the audio in the video is given by the interpreter.⁸ Further details were not discussed.

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

Video 1:

3. At the beginning of the hearing, the Prosecution clarified to the court that it would no longer be relying on the video as evidence for conviction of the charges.⁹ The video was used instead by the Defence to test the witness's credibility during cross-examination.¹⁰

4. The Defence argued that although the Prosecution was not relying on the video, "it was relevant to confront the witness nevertheless with the video in order to test his credibility and why he introduced this video to the Prosecution alleging that this related to events in Yopougon, while it's been established that it's not related to Yopougon."¹¹

5. The court said, 'we will decide on this'¹² and shortly agreed that 'it is relevant, the matter of the video,'¹³ and allowed the Defence to question the witness on the video on the basis of assessing his credibility; but had asked Counsel to "...keep it really short...We should not dwell too much into it. But of course, I think it's relevant for what we discussed before."¹⁴

Pre-Trial chamber

6. During the pre-trial phase, Defence Counsel argued that the Prosecution failed to provide any probative evidence to support its allegations that "President Gbagbo was responsible for implementing, defining a policy aimed at retaining power at all costs as President of the Republic of Côte d'Ivoire, particularly through conducting sustained,

⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 8-11.

⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 6-7.

⁸ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 56-57.

⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 2, lines 7-10.

¹⁰ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 4, line 4.

¹¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 4, lines 3-9.

¹² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 4, lines 10-11.

¹³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 5, lines 9-10.

¹⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 5, lines 11-12.

carefully planned, deadly, wide-spread and systematic attacks against civilians opposed to him which allegedly culminated in the allegations charged in the DCC.”¹⁵

7. Defence Counsel made some general observations about the probative value of the evidence produced by the Prosecution; which it considered to be low.¹⁶

8. Defence Counsel stated that, “Based on jurisprudence, in order to assess the value of the evidence the Chamber will take into account the probative value and admissibility.”¹⁷

9. In relation to the relevance of evidence, Defence Counsel stated that, “For any particular item of evidence to be relevant, there is need to establish a link between that item of evidence and the charge against the accused. An item of evidence is relevant only if...it has a probative value, and it is only on this case that it can be considered as constructive and decisive.”¹⁸

10. Defence Counsel asserted that several elements needed to be taken into account when assessing the value of evidence, including “the nature, credibility, reliability, provenance of that item of evidence and its link with the charges made against the alleged perpetrator of the facts.”¹⁹

11. Defence Counsel argued that the evidence produced by the Prosecution did not ‘reach the threshold of reliable and credible evidence.’²⁰ Counsel argued that “The evidence is neither concrete nor tangible and, as a result, does not make it possible to establish the existence of substantial grounds to believe that that person perpetrated the crimes charged.”²¹

12. Defence Counsel argued that the source of most of the evidence produced by the Prosecution lacked clarity.²² This was notable in several videos which had unidentified sources, and the Defence Counsel referred specifically to ‘Video 1’ as an example of this.²³

13. ‘Video 1’ was supposed to show incriminating evidence of an alleged massacre that occurred in Yopougon, however the video was actually filmed in Kenya in March 2009 and not in Yopougon; and it was in fact the Prosecution that had informed the Defence Counsel of this.²⁴

¹⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 19, lines 14-19.

¹⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 31.

¹⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 31, lines 2-3.

¹⁸ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 31, lines 5-6.

¹⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 31, lines 9-12.

²⁰ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 31, lines 13-14.

²¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 31, lines 14-16.

²² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 31, lines 17-20.

²³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 31, lines 10-17.

²⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 31, lines 10-17.

14. Defence Counsel stated that it was necessary “to examine each case event by event, the credibility or rather the lack of credibility of each of the Prosecution witnesses, and this is what we will do in the course of our presentation.”²⁵

15. Defence Counsel argued that the witness who produced ‘Video 1’ and claimed that it showed the massacre perpetrated in Yopougon by agents of the LMP was “Obviously...not credible. He cannot be credible.”²⁶

16. Defence Counsel described the video as ‘fabricated or false evidence’²⁷ and therefore it considered the allegations of the Prosecution relating to the events that were supposed to happen in Yopougon were “not supported by sufficient evidence to prove that the alleged crimes were committed in Yopougon.”²⁸ Counsel asserted that the Prosecution relied on “vague and fuzzy elements that lack credibility and some of which have even been tampered with.”²⁹

17. In response, the Prosecution filed its ‘Prosecution’s submission on issues discussed during the Confirmation Hearing’ on 21 March 2013.³⁰ The Prosecution argued that the Defence Counsel’s claim that the witness was ‘obviously’ not credible was misleading. The Prosecution instead invited the Chamber to read paragraphs 96 to 103 of the witness’ statement on pages 0229 to 0230 wherein the witness explained that he did not film the video himself and that it was received from a friend and therefore the authenticity of the video had “no bearing on the credibility of this witness and on the probative value of the rest of his evidence.”³¹ In addition, ‘the said video was never relied upon by the Prosecution in its two previous Lists of Evidence for the Confirmation of charges Hearing.’³²

Trial-Chamber

18. During the trial phase, on 7 February 2017, the Prosecution asserted that the irrelevance of the video had already been discussed previously and referred to in the confirmation hearing on 25 and 26 February 2013.³³

19. The witness had multiple phones that he used at once.³⁴ He said he gave two videos to the Investigator, but he could not recall which videos he gave because it had been so long ago.³⁵

²⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 34, lines 17-19.

²⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 34, lines 20-25.

²⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-19-Red-ENG (26 February 2013) (PTC I) 40, line 13.

²⁸ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-19-Red-ENG (26 February 2013) (PTC I) 40, lines 16-17.

²⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-19-Red-ENG (26 February 2013) (PTC I) 40, lines 18-19.

³⁰ *Prosecutor v Gbagbo and Blé Goudé* (Prosecution’s submissions on issues discussed during the Confirmation Hearing) ICC-02/11-01/11-420-Red (21 March 2013) (PTC I).

³¹ *Prosecutor v Gbagbo and Blé Goudé* (Prosecution’s submissions on issues discussed during the Confirmation Hearing) ICC-02/11-01/11-420-Red (21 March 2013) (PTC I) [25].

³² *Prosecutor v Gbagbo and Blé Goudé* (Prosecution’s submissions on issues discussed during the Confirmation Hearing) ICC-02/11-01/11-420-Red (21 March 2013) (PTC I) [25].

³³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 2, lines 22-25; 3, lines 1-2.

³⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 11-12.

³⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 13-14.

20. The Court considered that ‘the problem is that the witness himself spoke about two videos: One taken by himself and one given to him by a friend.’³⁶ The Prosecution confirmed that it had in its possession the video given by the witnesses’ friend and not the video the witness said he took himself and then later deleted.³⁷

21. The Defence argued that it was necessary to show the video to the witness because the witness had to identify whether it was the same video he gave to the OTP. The Court responded directly to this by saying that ‘the video will be shown in 34 minutes.’³⁸

22. The court therefore allowed the video to be shown to the witness to clarify whether it was the *same* video the witness gave to the OTP, of which the witness alleged was the recording of people being burnt alive in Yopougon in Côte d'Ivoire.³⁹ The video is allowed to be played in open session as there was no confidentiality attached to it.⁴⁰

23. The video was played to the witness and the witness said that this was *not* the video he gave to the OTP, because the people in the video were speaking a different language to that spoken in Côte d'Ivoire (‘incorrect video’).⁴¹

24. The witness said he had showed the video to the OTP investigators and they extracted it and analysed it at the ICC.⁴² The witness gave the memory card containing the videos to the OTP but cannot remember the exact details of the exchange because he had head injuries that caused him memory loss.⁴³ He said he had several videos.⁴⁴ He did not recall watching the videos with the OTP before giving it over (note that the witness had previously said he had shown the video to the OTP).⁴⁵

25. The witness did admit to having previously possessed this ‘incorrect’ video on his phone.⁴⁶ He said he downloaded the ‘incorrect’ video and intended to delete it but failed to do so and said that this was his mistake because he had several phones with a lot of videos and had lost track.⁴⁷

³⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 28, lines 22-25.

³⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 28-29.

³⁸ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 29, line 25.

³⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 29, line 23; 14-15.

⁴⁰ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 30, lines 18-25; 31, lines 1-8.

⁴¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 31, lines 16-19.

⁴² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 2, lines 15-16; 26, lines 13-17.

⁴³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 79, lines 3-16.

⁴⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 80, lines 12-14.

⁴⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 79, line 21.

⁴⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 80, lines 16-18; 81, lines 5-9.

⁴⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 81.

26. Defence Counsel asked the witness if he was aware that the same ‘incorrect’ video had been posted on YouTube purporting to be an incident in Côte d'Ivoire.⁴⁸ He responded by saying that he was aware that this video was not taken in the Côte d'Ivoire.⁴⁹

27. Defence Counsel for Gbagbo made an oral application to the Court to call for the investigators who were present during the interview with the witness wherein the witness's phone memory card was handed over, to be called before the court for questioning.⁵⁰ The Court said it would make its decision in the next few days.⁵¹

28. In the next hearing, on 8 February 2017, the OTP pointed out to the Court that there was a Report called ‘CIV-OTP-0020-0559,’ which outlined the set of facts that happened during the extraction of the video from the mobile phone, in the interview with the witness on 26 March 2012.⁵² In that Report, the witness himself confirmed that that was the video to be extracted.⁵³

29. The OTP also pointed out another Report drafted by the investigator who led the interview, called ‘CIV-OTP-0021-1004,’ which was drafted on 7 May 2012, after the interview was conducted.⁵⁴ In this Report it stated that when the video was sent to the translators to obtain a transcript, the investigator was immediately informed that the language in the video was Swahili, a language spoken in Kenya and not in Côte d'Ivoire.⁵⁵

30. The Prosecution submitted to the Court that those two Reports were sufficient enough to explain what happened during the interview with the witness and the investigators, without the need to call on the investigators for questioning.⁵⁶

31. Defence Counsel did not agree with the Prosecution and said that the Reports *only* deal with the Kenya video and did not say anything about the other videos.⁵⁷ It was therefore necessary for the investigator to be called upon to explain exactly how the evidence was collected.⁵⁸ It is also necessary because the Reports were not a verbatim transcription and it is the investigator who decides what to write down in the Reports.⁵⁹ They also needed to know how information was collected from the witness and what methods were applied in technical terms.⁶⁰ The Defence also argued that it was necessary to question the prior testimony of the witness, because the witness said the facts in his Witness Statement were true, but after he was shown the video, he said it was the incorrect video during cross-examination.⁶¹

⁴⁸ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 81, lines 21-23.

⁴⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 81, lines 24-15; 82, line 1.

⁵⁰ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 82-83.

⁵¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 82-83.

⁵² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 2-3.

⁵³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 3, lines 9-10.

⁵⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 3-4.

⁵⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 3-4.

⁵⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 5.

⁵⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 9-10.

⁵⁸ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 10, lines 9-14.

⁵⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 10, lines 9-14.

⁶⁰ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 10, lines 22-25.

⁶¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 10.

32. The Chamber expressed some concern that the two Reports referred to above did not have signatures on them; ‘I don’t understand why these reports are never signed. None of these reports are signed with name and surname and so that the responsibility is taken over what -- we don’t know who has written them.’⁶² (Please note: after the Court pointed out its concerns, the Prosecution said it could get affidavits from the OTP investigators; however the Court said it did not want affidavits and then it stopped talking about the issue. During the hearing on the next day, the Court allowed the Reports to be admitted as evidence and did not comment further on the Reports not having signatures on them).⁶³

33. Chambers decided to reject the Defence Counsel for Gbagbo’s oral request to call on the OTP investigators as witnesses for questioning, as “the investigator’s version of facts and how they unfolded is clearly established in the reports submitted in the record of the case,” and therefore there was no need to call on them for questioning.⁶⁴

Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute:

34. On 3 June 2013, the Court delivered its Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute.⁶⁵

35. In its Decision, the Court made several general comments on its approach to evidence submitted by parties so far.

36. In relation to the quality of individual items of evidence, the Court considered that it would be “unhelpful to formulate rigid formal rules, as each exhibit and every witness is unique and must be evaluated on its own merits”⁶⁶ However, the Court did consider it useful to express its general disposition towards certain types of evidence.⁶⁷

37. As a general comment, the Court stated that it was preferable for Chambers to have “as much forensic and other material evidence as possible. Such evidence should be duly authenticated and have clear and unbroken chains of custody.”⁶⁸

38. Although the Court did not specifically mention ‘Video 1’ in its general comments or within its footnotes, these comments are relevant and applicable to the evidence at hand.

Video 2

⁶² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 11, lines 20-25; 12, line 1.

⁶³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 11-12; *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-119-Red-ENG (9 February 2017) (TC I) 1, lines 16-22.

⁶⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-119-Red-ENG (9 February 2017) (TC I) 1, lines 16-22.

⁶⁵ *Prosecutor v Gbagbo* (Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute) ICC-02/11-01/11-432 (3 June 2013) (PTC I).

⁶⁶ *Prosecutor v Gbagbo* (Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute) ICC-02/11-01/11-432 (3 June 2013) (PTC I) 13.

⁶⁷ *Prosecutor v Gbagbo* (Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute) ICC-02/11-01/11-432 (3 June 2013) (PTC I) 13.

⁶⁸ *Prosecutor v Gbagbo* (Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute) ICC-02/11-01/11-432 (3 June 2013) (PTC I) [27].

39. **Video 2:** The video was used to test whether the witness was telling the truth about a video he saw on TV in paragraph 53 of his witness statement.⁶⁹
40. Defence Counsel for Charles Blé Goudé asked the witness if this was the video, he was referring to in paragraph 53 of his witness statement wherein he stated that “One day Charles Blé Goudé was on RTI and called on the youths to go to the headquarters to take up arms and defend the country.”⁷⁰
41. The witness said this was not the same video he was referring to in his witness statement and that the video he saw on TV was screened on Channel 1.⁷¹ This video shown to him in Court was screened on Channel 2.⁷²
42. The witness stated that he did not know the date of when the video was shown on TV, but it was show on TV a number of times.⁷³ He previously stated that the video was shown on TV after the elections.⁷⁴
43. The witness did admit to seeing this video shown to him in Court before, on TV.⁷⁵

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

Video 1

44. Video was disclosed pursuant to Rule 77.⁷⁶

Video 2

45. Not discussed.

V. EXTRAPOLATIONS

46. General

- a. There should be as much forensic and other material evidence made available to the Court and such evidence should be duly authenticated and have a clear and unbroken chain of custody.⁷⁷

⁶⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 55-58.

⁷⁰ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 55, lines 10-11.

⁷¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 55, line 25; 56, line 1; 57, lines 8-9.

⁷² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 56-57.

⁷³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 58-59.

⁷⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-116-Red-ENG (6 February 2017) (TC I) 20, lines 19-21.

⁷⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 58.

⁷⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 3.

⁷⁷ *Prosecutor v Gbagbo* (Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute) ICC-02/11-01/11-432 (3 June 2013) (PTC I) 13.

47. Videos

- a. If a video is tendered through a witness and the source of a video cannot be traced and identified, but the video was not taken by the witness themselves, then the credibility of the witness may not be affected.⁷⁸
- b. If a video is tendered through a witness, the video may be shown in Court and the witness may need to explain whether it is the same video that he or she provided to the relevant party.⁷⁹
- c. If a video is tendered through a witness, this witness may need to explain how he or she obtained this video.⁸⁰
- d. There should be a clear record of how the video was obtained by OTP investigators and what methods were applied in technical terms.⁸¹ This information can be gathered through, for example, questioning of the witness or through Reports submitted by OTP investigators who collected the video.⁸² However it may be necessary to call on the investigators for questioning as the Reports are not verbatim transcripts and it is the investigator who decides what should be written in the Report.⁸³ (Note: that the Court decided that it was *not* necessary to call on the OTP investigators for questioning as their Reports were sufficient to recount the investigator's version of facts of what had unfolded).⁸⁴
- e. A video must have an established link with one or more of the charges against the Accused in order for it to be relevant.⁸⁵
- f. If the source of a video cannot be traced and identified, this will affect its probative value.⁸⁶ Evidence with unidentifiable sources may *not* be considered reliable and credible evidence.⁸⁷
- g. If a video is tendered through a witness and the source of a video cannot be traced and identified, then the witness who provided it may be found to be not credible.⁸⁸

⁷⁸ *Prosecutor v Gbagbo and Blé Goudé* (Prosecution's submission on issues discussed during the Confirmation Hearing) ICC-02/11-01/11-420-Red (21 March 2013) (PTC I) [25].

⁷⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 29.

⁸⁰ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 6-7, 11-14.

⁸¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 10.

⁸² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) 13-79; *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 2-11.

⁸³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) 10, lines 9-14.

⁸⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-119-Red-ENG (9 February 2017) (TC I) 1, lines 16-22.

⁸⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 31, line 5-6.

⁸⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 31.

⁸⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 31, lines 13-14.

⁸⁸ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) 34, line 20-25.

Please note: The Court did not deal specifically with issues of video admissibility, but rather made comments about evidence in general.⁸⁹

VI. CITATIONS

Prosecutor v Gbagbo and Blé Goudé (Transcript) ICC-02/11-01/15-T-116-Red-ENG (6 February 2017) (TC I) <https://www.legal-tools.org/doc/fda671/>;

Prosecutor v Gbagbo and Blé Goudé (Transcript) ICC-02/11-01/15-T-117-Red-ENG (7 February 2017) (TC I) <https://www.legal-tools.org/doc/edb9c6/>;

Prosecutor v Gbagbo and Blé Goudé (Transcript) ICC-02/11-01/15-T-118-Red-ENG (8 February 2017) (TC I) <https://www.legal-tools.org/doc/9d16f9/>;

Prosecutor v Gbagbo and Blé Goudé (Transcript) ICC-02/11-01/15-T-119-Red-ENG (9 February 2017) (TC I) <https://www.legal-tools.org/doc/ded6e3/>;

Prosecutor v Gbagbo and Blé Goudé (Transcript) ICC-02/11-01/11-T-18-Red-ENG (25 February 2013) (PTC I) <https://www.legal-tools.org/doc/f02d9d/>;

Prosecutor v Gbagbo and Blé Goudé (Transcript) ICC-02/11-01/11-T-19-Red-ENG (26 February 2013) (PTC I) <https://www.legal-tools.org/doc/89dc99/>;

Prosecutor v Gbagbo and Blé Goudé (Prosecution's submission on issues discussed during the Confirmation Hearing) ICC-02/11-01/11-420-Red (21 March 2013) (PTC I) <https://www.legal-tools.org/doc/fae772/>;

Prosecutor v Gbagbo (Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute) ICC-02/11-01/11-432 (3 June 2013) (PTC I) <https://www.legal-tools.org/doc/2682d8/>.

⁸⁹ *Prosecutor v Gbagbo* (Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute) ICC-02/11-01/11-432 (3 June 2013) (PTC I) 13.

Prosecutor v Laurent Gbagbo and Charles Blé Goudé (ICC-02/11-01/15) – Analysis Part II

I. CASE DETAILS

- **Case name:** *Prosecutor v Laurent Gbagbo and Charles Blé Goudé (ICC-02/11-01/15)*
- **Tribunal/Court:** International Criminal Court (“ICC”)
- **Offence charged:** Crimes Against Humanity allegedly committed in Côte d'Ivoire in 2010 and 2011
- **Stage of the proceedings:** Trial Chamber I – Acquitted of all charges
- **Keywords:** Authenticity, Expert witness, Relevance, Probative value, Court Resources, Chain of Custody

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. DDE was used during cross-examination of an expert witness to clarify matters contained in his Reports.
2. The expert witness was Mr Éric Baccard,¹ who was referred to as Witness CIV-OTP-P-0584² (expert).
3. He was the leader of the Forensic Science Unit of the Office of the Prosecutor (OTP)³ and a qualified pathologist.⁴ He explained that the OTP Forensic Science Unit included three sections:
 - a. Forensic matters: “autopsy, exhumations, examinations of victims and review of various objects”⁵
 - b. Cyber Investigative Unit: “which handles scientific matters relating to digital evidence collected via computers, for example, data that can be found on the internet or on social networks;”⁶ and
 - c. Imaging Unit: “which is responsible for drawing up maps, interpreting or identifying satellite images that are relevant, and also to enhance photographs,

¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 4, line 3.

² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 3, line 18.

³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 4, lines 13-17.

⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 5, lines 7-9.

⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 5, lines 21-22.

⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 5, lines 23-25.

videos and related activities, for example, preparing presentations for the Court.”⁷

4. The expert witness was only questioned for 1 day on 11 October 2017.
5. **Photographs in general:** The expert was asked about his opinion on the *value* of assessing documentary evidence. He provided general comments on issues that may arise in an autopsy based on injuries shown in photographs.⁸
6. **Video referred to in the Expert’s Report of CIV-OTP-0084-4416 (herein referred to as ‘Video 1’)** The expert explained his methodology of assessing various documentary evidence relating to the death of Mr Diakité Yaya, in his Report of CIV-OTP-0084-4416.⁹ One of these documents included a video of an incident that occurred which caused Mr Yaya to sustain his injuries.¹⁰ The video was obtained from the expert’s Report of CIV-OTP-0084-4416,¹¹ amongst other evidentiary documents given to him by the OTP.¹²
7. **Photographs referred to in the Expert’s Report of CIV-OTP-0078-0542 (herein referred to as ‘Photographs 1’).** The Prosecution questioned the expert on two photographs found in the expert’s Report titled ‘Forensic Report, Biological Samples for Genetic Analysis, incident of 3 March 2011,’ named CIV-OTP-0078-0542.¹³ The two photographs were obtained from the expert’s Report titled ‘Forensic Report, Biological Samples for Genetic Analysis, incident of 3 March 2011,’ named CIV-OTP-0078-0542.¹⁴
8. It is unclear who took the photographs; however, the expert said *generally* he did not take photographs and that it was likely that the photos were taken by an investigator who was present with him, as this was always the case for a mission; but he could not be certain.¹⁵
9. **Photograph referred to in the Expert’s Report of CIV-OTP-0077-0432 and Photograph referred to in the Expert’s Report of CIV-OTP-0042-0439 (herein referred to collectively as ‘Photographs 2’)**

⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 6, lines 1-3.

⁸ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 11-12.

⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 14, line 25; 63, line 18.

¹⁰ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 14.

¹¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 14, line 25; 63, line 18.

¹² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 14, line 4.

¹³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 22, lines 16-18.

¹⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 22, lines 16-18.

¹⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 22, lines 7-11.

10. The Prosecution referred to a photograph in the expert's Report named CIV-OTP-0077-0432, which related to exhumations and autopsies on the events of 17 March 2011 and also included the exhumations at the Abobo cemetery in 2015.¹⁶ The photograph was taken in 2015 and depicted a memorial monument dedicated to the victims of the crisis.
11. The Prosecution compared this photo taken in 2015 with another photograph referred to in the expert's earlier Report called CIV-OTP-0042-0439, which related to the Abobo cemetery in 2012, in the area of INTERFU Carré des Indigents.¹⁷ This photograph was taken in 2012 and purported to depict the same memorial monument.¹⁸
12. One photo was obtained from the Expert's Report of CIV-OTP-0077-0432¹⁹ and the other photo was obtained from the Expert's Report of CIV-OTP-0042-0439.²⁰
13. It is unclear who took the photographs. The 2012 Photograph was suggested by the Prosecution as being taken by the expert himself, however the expert did not confirm this.²¹
14. The expert said *generally* he did not take photographs and that it was likely that the photos are taken by an investigator who was present with him, as this was always the case for a mission; but he could not be certain.²²

Evidentiary Considerations

Photographs in general

15. The Prosecution questioned the expert on the "value of an assessment based on documentary evidence," in comparison with evidence derived from a direct examination of a body.²³
16. The expert limited his answer to speaking generally about photographs as one of the types of documentary evidence. He described several problems with making autopsy assessments based on injuries shown in photographs:

¹⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 45.

¹⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 42, lines 10-11; 34, lines 24-25.

¹⁸ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 46.

¹⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 45.

²⁰ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 42, lines 10-11; 34, lines 24-25.

²¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 46, line 7.

²² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 22, lines 7-11.

²³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 11-12.

- (a) It is ‘an extremely difficult exercise because photographs can be doctored or Photoshopped and the quality of the images could also be poor or mediocre and, therefore, defining the specific injury would be imperfect;²⁴
 - (b) ‘Photographs can also be taken by people who have no scientific training and, therefore, may not reflect the full picture;²⁵
 - (c) ‘Quite often also victims are wearing their clothes and, therefore, these attires can hide their injury, and so the direct examination by photographs may be a bit incomplete.²⁶
17. He concluded that, ‘therefore, the probative value, which of course is in the hands of the magistrates or the Judges, would be somewhat limited because of these considerations.²⁷
18. In his Report named CIV-OTP-0084-4416,²⁸ he ‘focused on assessing the absence of incompatibilities and dissimilarities between the various photographs that were submitted and external body examinations conducted by other forensic experts...there were significant points to be noted, in terms of the fact that the forensic experts had actually examined the bodies.²⁹
19. He said that this type of documentary assessment of material was a rare method of forensic examination.³⁰ However, he stated that it had been frequently used in the context of Commissions of Inquiry (COI) which were based on photographs taken by the press or witnesses; in fact, he had used the same method in the first COI on Côte d'Ivoire, where he was a forensic expert.³¹ He said that he had used this method sometimes in France and talked about using it in the ICTY (but did not confirm that he had used it there).³²

Video 1

20. The expert stated that if the OTP told him that documents related to a particular victim, in this case Mr Yaya, he had no reason to doubt that it was not Mr Yaya.³³ However, despite this, he still had to conduct his own analysis of the documents to determine whether it was possible to identify the person.³⁴ See below for detailed discussion.

²⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 11-12.

²⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 12, lines 2-3.

²⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 12, lines 3-5.

²⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 12, lines 5-7.

²⁸ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 68, line 18.

²⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 12, lines 7-12.

³⁰ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 13, line 3.

³¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 13, lines 2-8.

³² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 13, lines 2-5.

³³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 65-66.

³⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 66, lines 6-9.

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

Video 1

21. The Prosecution referred to two photographs in the expert's Report titled 'Forensic Report, Biological Samples for Genetic Analysis, incident of 3 March 2011,' named CIV-OTP-0078-0542.
22. The first photo was identified by the Prosecution on page 588 of the Report, and the Prosecution asked the expert to identify who the two people in the photograph were. The expert identified the person on the left as Professor Hélène Yapo Ette and himself as the person on the right.
23. The second photo was the middle photo on page 596 of the Report, and the Prosecution asked the expert to describe what was happening in the photo. The expert stated that 'it is not two pairs of hands but three pairs of hands,' and that the incident happened during a power failure which resulted in the failure of the saw and that was why a mechanical saw was used to take a piece of the femur.
24. The video was one of the pieces of documentary evidence analysed by the expert to prepare his Report, wherein he concluded that there was no forensic basis to question the identity of the person, being Mr Yaya.³⁵ See below for detailed discussion.
25. The expert was provided with several documents from the OTP to prepare his Report. These documents related to the death of Mr Diakité Yaya and included an external examination Report and a forensic Report prepared by two doctors, a funeral document, a video and a witness statement.³⁶ The Prosecution asked the expert to explain how he proceeded when he assessed these documents (this was a question about the expert's methodology).
26. The expert explained that he first assessed the video, without being influenced by the Reports of any other forensic experts or the witness statement.³⁷ When he did so he

³⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 18, lines 4-6.

³⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 14, line 4.

³⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 14, lines 7-11.

became immediately aware that only part of the video showed the footage of the incident that caused M Yaya his injuries.³⁸ Secondly, he had taken the components of the video apart, ‘picture by picture’ and compared those pictures with the description of the injuries described in the two medical Reports prepared by the doctors.³⁹

27. The Prosecution asked the expert to explain the medical term ‘désaxation anatomique’ referred to in his Report. The expert referred to the video to explain the meaning of the term, which showed the victim’s major deviation or an inclined deformation of the lower extremities of both legs.⁴⁰
28. The Prosecution asked the expert to explain the medical term ‘cou-de-pied’ referred to in his Report. The expert also referred to the video to explain the meaning of the term and stated that ‘on watching the video, it would appear that this is slightly above the ankle, rather than specifically at the ankle.’⁴¹
29. The Prosecution asked the expert about the comparisons he made between the visible injuries shown in the video and the injuries noted in the medical records. The expert said that the injuries in both the medical records and the video showed injuries that were visible to the lower members.⁴² He noted issues with comparing the video with the medical Reports and stated that ‘one can cautiously say that there is some injury to the elbow because the video doesn't focus on that aspect and, therefore, one cannot see that very clearly. Now, when it comes to any other injury to the buttocks or to the thorax, these are dissimulated by clothing or because of the position of the victims. Consequently, they are not visible.’⁴³
30. The expert explained that the purpose of his assessment was to ‘detect any discordances between the materials which would have led to a conclusion that this was not the victim being considered,’⁴⁴ and he had concluded in his Report that there was ‘no forensic basis on which to question the identity of the victim, being Mr Diakité Yaya, in relation to the forensic conclusions pertaining to the causes and circumstances of his death.’⁴⁵

³⁸ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 14, lines 7-11.

³⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 14, lines 7-14.

⁴⁰ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 14, lines 20-15.

⁴¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 16, lines 18-19.

⁴² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 17, lines 14-15.

⁴³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 17, lines 14-20.

⁴⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 18, lines 1-2.

⁴⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 18, lines 4-6.

31. The Court allowed the Prosecution to produce the expert's Report and the documents referred to therein as: 'video and document 0046-1283, the external examination document 0083-0072, the external forensic expert report 0083-1350, and INTERFU report number 0084-2869.'⁴⁶
32. The expert said that an explosion may be a possible hypothesis for the cause of Mr Yaya's injuries, given the extent of his injuries and the fact that the injuries were inflicted on different locations of his body; which is typical of an explosion.⁴⁷ He said given the context of the video, all of it seemed to be 'compatible,' so he did not see anything in the results that would allow him to rule out the hypothesis of an explosion.⁴⁸
33. After the Prosecution finished questioning the expert, the Court allowed the Prosecution to produce the expert's Report and the documents referred to therein as evidence; as 'video and document 0046-1283, the external examination document 0083-0072, the external forensic expert report 0083-1350, and INTERFU report number 0084-2869.'⁴⁹
34. However, Counsel for the Defence requested the Court to show the documents and videos to the expert so that he could clarify that those were the correct documents that would be produced into evidence.⁵⁰
35. The Prosecution said that the witness had already confirmed that he had seen the documents previously and that it would be a waste of time to show each document one by one.⁵¹
36. The Court agreed with the Prosecution and said 'We will not waste time. It's okay, they're in.'⁵²

Photographs 2

37. The Prosecution referred to a photograph in the expert's Report named CIV-OTP-0077-0432, which related to exhumations and autopsies on the events of 17 March

⁴⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 18, lines 11-12.

⁴⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 67, line 10.

⁴⁸ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 69, lines 8-17.

⁴⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 18, lines 11-12.

⁵⁰ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 18, lines 16-19.

⁵¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 18.

⁵² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 18, lines 23-14.

2011 and included the exhumations at the Abobo cemetery in 2015.⁵³ The photograph was taken in 2015 and depicted a memorial monument dedicated to the victims of the crisis.

38. The Prosecution also referred to another photograph in the expert's earlier Report named CIV-OTP-0042-0439, which related to the Abobo cemetery in 2012, in the area of INTERFU Carré des Indigents.⁵⁴ This photograph was taken in 2012 and purported to depict the same memorial monument.⁵⁵
39. The Prosecution compared the two photographs side by side and asked the expert to explain whether the exhumations that were conducted in 2015 was in the same area that the expert visited in 2012; to which the expert answered yes.⁵⁶

General Legal Submissions on DDE

General comment on evidence tendered through expert witnesses

40. Chambers did not make an evaluation on each individual DDE, but it did make general comments on expert witnesses and evidence tendered through them.
41. In the Opinion of Judge Cuno Tarfusser's in Annex A, being in the majority,⁵⁷ in relation to the testimony and reports of several expert witnesses, he stated that 'no one of those reports would meaningfully assist the Chamber in discharging its responsibilities, whether as regards the determination of facts or the attribution of responsibility to either accused.'⁵⁸
42. He made a general comment in relation to evidence tendered through expert witnesses, stating that, 'a significant part of this trial was wasted in debating matters or documents of little, if any, significance to the charges, in spite of them having been tendered into evidence in great quantities.'⁵⁹
43. The Judge held that the volume of evidence, including videos, documentary items and witnesses did not make a trial complex, but instead what mattered was 'obviously the content and the quality of the material, as well as its relevance to the issue at stake.'⁶⁰

⁵³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 45.

⁵⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 42, lines 10-11; 34, lines 24-25.

⁵⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 46.

⁵⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 47, lines 4-5.

⁵⁷ *Prosecutor v Gbagbo and Blé Goudé* (Opinion of Judge Cuno Tarfusser) ICC-02/11-01/15-1263-AnxA (16 July 2019) (TC I).

⁵⁸ *Prosecutor v Gbagbo and Blé Goudé* (Opinion of Judge Cuno Tarfusser) ICC-02/11-01/15-1263-AnxA (16 July 2019) (TC I) [27].

⁵⁹ *Prosecutor v Gbagbo and Blé Goudé* (Opinion of Judge Cuno Tarfusser) ICC-02/11-01/15-1263-AnxA (16 July 2019) (TC I) [35].

⁶⁰ *Prosecutor v Gbagbo and Blé Goudé* (Opinion of Judge Cuno Tarfusser) ICC-02/11-01/15-1263-AnxA (16 July 2019) (TC I) [35].

44. The Judge considered that the evidence given by the experts were ‘irredeemable unsuitability to meaningful contribute to the trial by way of compelling conclusions which would be of any use to the Chamber.’⁶¹
45. He explained that this was because the evidence of the expert could at best ‘would consist in ‘confirming’, by way of a non-committal formula of ‘compatibility’, that yes, some people had indeed suffered from violent death or injuries.... They would, however, leave the Chamber as in the dark about the details of the incidents.’⁶²
46. The Judge therefore criticised the Prosecution for commissioning the Reports of the experts, as the Prosecution should have envisaged that they would not be of assistance to Chambers and waste of Court’s time.⁶³

IV. EXTRAPOLATIONS

DDE in general

47. An expert report should not be commissioned if it is likely to not be of assistance to the Chambers and be a waste of the Court’s time.⁶⁴
48. The expert witness may be asked to provide his or her opinion on the *value* of their assessment of DDE in comparison with other methods of assessments.⁶⁵ In this case the expert commented on issues that may generally arise out of making an assessment of injuries based on photographs, rather than an assessment made from a direct examination of a body.⁶⁶ The expert explained that this method of documentary assessment was rare and was only used in the context of Commissions of Inquiries.⁶⁷ (Note that the Court did not make any evaluation on this particular submission)

Videos:

49. The expert witness may be asked (by a party to the proceedings) to explain his or her methodology for assessing DDE referred to in their report.⁶⁸ In this case, the expert explained that he examined the video first before being influenced by any other document and then extrapolated the relevant parts of the video, picture by picture, and then compared them with other documents.⁶⁹
50. The expert witness may also be asked (by a party to the proceedings) to explain specific differences he or she found in comparing what was shown in a video versus what had been documented in a medical Report involving a physical examination.⁷⁰ In this case the expert noted that some injuries recorded in the medical Report, such

⁶¹ *Prosecutor v Gbagbo and Blé Goudé* (Opinion of Judge Cuno Tarfusser) ICC-02/11-01/15-1263-AnxA (16 July 2019) (TC I) [36].

⁶² *Prosecutor v Gbagbo and Blé Goudé* (Opinion of Judge Cuno Tarfusser) ICC-02/11-01/15-1263-AnxA (16 July 2019) (TC I) [36].

⁶³ *Prosecutor v Gbagbo and Blé Goudé* (Opinion of Judge Cuno Tarfusser) ICC-02/11-01/15-1263-AnxA (16 July 2019) (TC I) [37].

⁶⁴ *Prosecutor v Gbagbo and Blé Goudé* (Opinion of Judge Cuno Tarfusser) ICC-02/11-01/15-1263-AnxA (16 July 2019) (TC I) [37].

⁶⁵ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 11-12.

⁶⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 11-13.

⁶⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 13.

⁶⁸ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 14.

⁶⁹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 14.

⁷⁰ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 17.

as injuries to the elbow, buttocks and thorax, were *not* visible in the video. This was because the video was either not focused on that area, or that the injuries were obscured by clothing in the video.⁷¹ (Note that the court allowed the video to be produced as evidence, but did not consider it necessary to show the video in court⁷²)

51. The expert witness may be asked to explain certain terms referred to in the Report, and the expert may refer to the video for visible assistance in his or her explanation.⁷³ (Note that the court allowed the video to be produced as evidence, but did not consider it necessary to show the video in court⁷⁴)
52. What matters is the content and quality of the video material, as well as its relevance to the issue at stake, rather than the volume of evidence.⁷⁵

Photographs:

53. The expert may be asked to explain what is shown in a photograph⁷⁶ referred to in his or her Report and where it was taken.⁷⁷

NB: The Court did **not** consider the evidence of experts in general in this case to be of assistance to the Court in its determination of the facts or the attribution of responsibility to either accused.⁷⁸

V. CITATIONS

Prosecutor v Gbagbo and Blé Goudé (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) <https://www.legal-tools.org/doc/877554/>;

Prosecutor v Gbagbo and Blé Goudé (Opinion of Judge Cuno Tarfusser) ICC-02/11-01/15-1263-AnxA (16 July 2019) (TC I) <https://www.legal-tools.org/doc/f6c6f3/>, annexed to *Prosecutor v Gbagbo and Blé Goudé* (Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion) ICC-02/11-01/15-1263 (16 July 2019) (TC) <https://www.legal-tools.org/doc/440017/>.

⁷¹ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 17, lines 14-20.

⁷² *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 18, lines 23-14.

⁷³ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 14, lines 20-15; 16, lines 14-19.

⁷⁴ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 18, lines 23-14.

⁷⁵ *Prosecutor v Gbagbo and Blé Goudé* (Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion) ICC-02/11-01/15-1263 (16 July 2019) (TC) [35].

⁷⁶ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 30-33.

⁷⁷ *Prosecutor v Gbagbo and Blé Goudé* (Transcript) ICC-02/11-01/15-T-201-Red2-ENG (11 October 2017) (TC I) 45-47.

⁷⁸ *Prosecutor v Gbagbo and Blé Goudé* (Opinion of Judge Cuno Tarfusser) ICC-02/11-01/15-1263-AnxA (16 July 2019) (TC I) 20-26.

Prosecutor v Vidoje Blagojević and Dragan Jokić (IT-02-60)

I. CASE DETAILS

- **Case name:** *Prosecutor v Vidoje Blagojević and Dragan Jokić (IT-02-60-T)*
- **Tribunal/Court:** International Criminal Tribunal for the Former Yugoslavia (“ICTY”)
- **Offence charged:**

Vidoje Blagojević - charged with six counts, individually under Article 7(1) and with command responsibility under Article 7(3) of the Statute of the Tribunal.¹

- Under Count 1B, with complicity to commit genocide, punishable under Article 4(3)(e) of the Statute;
- Under Count 2, with extermination, a crime against humanity punishable under Article 5(b) of the Statute;
- Counts 3 and 4, with murder, as a crime against humanity punishable under Article 5(a) of the Statute;
- Also as a violation of the laws or customs of war punishable under Article 3 of the Statute;
- Under Count 5, with persecutions, a crime against humanity punishable under Article 5(h) of the Statute, through murder, cruel and inhumane treatment, terrorising of civilians, destruction of personal property and effects, and forcible transfer; and
- Under Count 6, with inhumane acts (forcible transfer), a crime against humanity punishable under Article 5(i) of the Statute.²

Dragan Jokić - charged with four counts under Article 7(1) of the Statute.³ He was not charged with Count 1, complicity in genocide.⁴

- Under Count 2 with extermination, a crime against humanity punishable under Article 5(b) of the Statute.
- Under Count 3 with murder, as a crime against humanity punishable under Article 5(a) of the Statute; and
- Under Count 4 as a violation of the laws or customs of war punishable under Article 3 of the Statute;
- Under Count 5, with persecutions, a crime against humanity punishable under Article 5(h) of the Statute, through murder, cruel and inhumane treatment, terrorising of civilians, and destruction of personal property and effects.⁵
- **Stage of the proceedings:** Pre-Trial, Trial, Judgement and Sentence
- **Keywords:** Expert witness, Admissibility, Reliability, Authenticity, Probative value, Chain of custody, Corroboration, Relevance

1. On 5 April 2004, the Trial Chamber entered a judgment of acquittal for Blagojević on Counts 2 to 4 of the Indictment, insofar as his individual criminal responsibility is alleged

¹ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [8]-[10].

² All charges contained at *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [8].

³ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [15].

⁴ *Prosecutor v Blagojević and Jokić* (Amended Joinder Indictment) IT-02-60-T (26 May 2003) (OTP) [34]-[35].

⁵ All charges contained at *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [15].

under Article 7(1) for planning, instigating, ordering and committing the crimes. The Trial Chamber further entered a judgment of acquittal on Counts 2, 4-6 of the Indictment, insofar as Vidoje Blagojević's individual criminal responsibility is alleged under Article 7(1) for planning, instigating and ordering the crimes.⁶

2. Blagojević was found guilty of:⁷

Count 1B: Complicity in Genocide

Complicity in genocide by aiding and abetting genocide pursuant to Articles 4(3)(e) and 7(1) of the Statute, through (a) killings members of the group and (b) causing serious bodily or mental harm to members of the group. This was subsequently overturned by the Appeals Chamber as they did not accept that the forcible transfer operation alone of coupled with the murders and mistreatment in Bratunac town sufficed to demonstrate an intent to destroy the protected group.⁸

Count 3: Murder

Murder via aiding and abetting, as a crime against humanity.

Count 4: Murder

Murder as a violation of the laws or customs of war in relation to paragraph 45(a)(c)(d) and (f).

Count 5: Persecutions

Persecutions via aiding and abetting, a crime against humanity, through murder, cruel and inhumane treatment, terrorising of Bosnian Muslim civilians in Srebrenica and at Potočari, and the forcible transfer of the Bosnian Muslims from the Srebrenica enclave.

Count 6: Inhumane Acts (Forcible Transfer)

Inhumane acts via aiding and abetting forcible transfer, a crime against humanity.

3. In its Pre-Trial Brief, the Prosecution alleged that Dragan Jokić “played a key role in facilitating the murders, burials and reburials;” it does not refer to any events taking place outside the Zvornik Brigade ‘area of responsibility.’ The Prosecution argued that Jokić’s liability under Count 5 therefore was limited to persecutions through murder, and cruel and inhumane treatment, including severe beatings in detention facilities in Zvornik. The Indictment alleged that Dragan Jokić incurs responsibility under Article 7(1) of the Statute as a result of his individual participation in the above acts.⁹
4. On 5 April 2004, the Trial Chamber entered a judgement of acquittal for Dragan Jokić on Counts 2 to 5 of the Indictment, insofar as his individual criminal responsibility is alleged under Article 7(1) for planning, instigating and ordering the crimes.¹⁰

⁶ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [10].

⁷ List of all charges at *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [797].

⁸ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-A (9 May 2007) (AC) [123]-[124].

⁹ All charges contained at *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [15].

¹⁰ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [16].

5. Jokić was found guilty of:¹¹

Count 2: Extermination

Charged pursuant to Articles 5(b) and 7(1) of the Statute as a crime against humanity

Count 3: Murder

Charged pursuant to Articles 5(a) and 7(1) of the Statute, aiding and abetting murder as a crime against humanity; and

Count 4: Murder

Charged pursuant to Articles 3 and 7(1) of the Statute as a violation of the laws or customs of war

Count 5: Persecutions

Charged pursuant to Articles 5(h) and 7(1) of the Statute, by:

- (a) murder of thousands of Bosnian Muslim civilians,
- (b) cruel and inhumane treatment of Bosnian Muslim civilians,
- (c) terrorising of Bosnian Muslim civilians in Srebrenica and at Potočari, and
- (d) destruction of personal property and effects belonging to the Bosnian Muslims.

As aiding and abetting persecutions, a crime against humanity, through murder.

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

6. **Aerial reconnaissance photographs** (i.e. **Ex. P12.1**, Aerial photograph of Bratunac town;¹² 27 July 1995 the United States Government took an aerial photograph of an area near Nova Kasaba,¹³ **Ex. P3.5**, aerial photograph of Nova Kasaba,¹⁴ **Ex. P6.6**, aerial photo disturbed earth, Nova Kasaba,¹⁵ **Ex. P681**, an aerial photograph of Bratunac town on which the location of Colonel Blagojević's apartment has been marked with a triangle;¹⁶ **Ex. P681**, an aerial photograph of Bratunac town on which the Vuk Karadžić School is marked by an "x";¹⁷ **Ex. P11.3**, aerial photograph of the Glogova area;¹⁸ 2 On 10 August 1995, the Security Council was briefed by the United States representative, who showed the Council aerial photographs indicating the existence of mass graves near Konjević Polje and Nova Kasaba;¹⁹ The aerial images also showed disturbed earth at the grave sites. See **Ex. P569 through Ex. P571** (Glogova); **Ex. P573 through Ex. P575** (Orahovac); **Ex. P578 and Ex. P579** (Dam near Petkovci); **Ex. P581 and Ex. P582** (Kozluk); **Ex. P584 through Ex. P586** (Branjevo Farm); **Ex. P588 through Ex. P598** (Zeleni Jadar); **Ex. P600 through Ex. P610** (Hodžići road); **Ex. P612 through Ex. P617** (Liplje) and **Ex.**

¹¹ All charges contained at *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [789].

¹² *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 265.

¹³ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [255].

¹⁴ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 899.

¹⁵ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 906.

¹⁶ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 949.

¹⁷ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 950.

¹⁸ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 1141.

¹⁹ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [380].

P620 through **Ex. 645**²⁰ (Čančari road);²¹ “The aerial images showed disturbed earth in areas removed from the primary graves, which disturbances appeared at simultaneously with the disturbance of the primary graves. That is how the investigators found some secondary graves.”²²

The Aerial reconnaissance photographs were obtained by the OTP from the United States Government.²³ They were likely taken by both U-2 planes and from satellites.²⁴ “Aerial images were provided to the ICTY by United States authorities, which provided views of many of the mass graves at the time of, or shortly after, their creation. These images were also able to provide information as to the location and creation dates of the secondary graves.”²⁵ “The aerial images were provided to the Prosecution by the US Government, pursuant to Rule 70 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia which allows the Prosecutor to receive confidential information on a limited basis and under certain conditions.”²⁶ The precise origin of the images is not disclosed as they were classified by the U.S government. Rule 70 of the Rules of Procedure and Evidence meant that questions about their provenance were to be avoided by the Defence. This is supported in the transcript of the Trial Judgement.²⁷ The OTP sought admission of the aerial images, and they were not challenged by the Defence. Many were admitted as documentary evidence under Rule 94 *bis* as part of the report previously prepared by OTP investigator D. Manning for the *Krstić* case.²⁸

7. **Forensic analysis of grave sites incorporating the aerial images in order to determine creation/disturbance dates and related testimony from *Krstić*** (i.e.: Using aerial imagery, forensic expert Richard Wright determined that the graves at Glogova had been disturbed and excavated somewhere between 27 July and 30 October 1995²⁹; **Ex. P552**, Dean Manning, Summary of forensic evidence – execution points and mass graves report, p. 12³⁰; Map used by Dean Manning, **Exhibit P555** the trial judgment states this shows the locations of primary and secondary grave sites³¹ (the exhibit actually seems to show where crimes took place and labels different structures, vehicles and where people are³²).

As noted above, the aerial images were provided by the United States government to the OTP. The OTP then supplied these images to investigators and forensic

²⁰ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 906.

²¹ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 1397.

²² *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 1397.

²³ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [255], [380].

²⁴ Mark Tran, ‘Spy pictures “show Bosnia massacre”’ (*The Guardian*, 11 August 1995) <<https://www.theguardian.com/world/1995/aug/11/warcrimes.marktran>> accessed 20 March 2020.

²⁵ D. Manning, *Srebrenica Investigation: Summary of Forensic Evidence-Execution Points and Mass Graves* (16 May 2000) 00950903.

²⁶ International Bar Association, ‘Evidence matters in ICC trials’ (August 2016) 26.

²⁷ *Prosecutor v Blagojević and Jokić* (Transcript) IT-02-60-T (5 February 2004) (TC) 7225.

²⁸ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution’s Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [30].

²⁹ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [312].

³⁰ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 906.

³¹ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 1400.

³² *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) Exhibit P555.

experts to assist them in locating and dating the mass grave sites.³³ The reports were introduced by the OTP to be admitted.³⁴ The OTP investigator D. Manning was requested by the OTP to summarise the significant findings and conclusions of the forensic experts due to their voluminous nature.³⁵

8. **Records of VRS radio communications**³⁶ intercepted by Army of Bosnia Herzegovina (ABiH) and the Agency for Research and Documentation of the Federation of Bosnia and Herzegovina (SDB). This includes the intercepted communications themselves (**Ex. P170 to P317**) as well as handwritten notebooks in which intercepts were transcribed by ABiH and SDB operators (**Ex P322 to P345**), an annotated index of intercepts processed by the SDB (**Ex P347**) and a handwritten notebook of a ABiH tactical intercept unit that operated in Dekic (**Ex P121B**) and a collection of handwritten loose-leaf intercept transcripts from an ABiH tactical intercept unit that operated in Gradina for identification purposes (**Ex P122B**).

All of the intercept material was collected and recorded by ABiH and SDB in Srebrenica before being given to the OTP.³⁷ The OTP ran an “intercept project” whereby members of the OTP assigned to the project tested the accuracy and reliability of the material.³⁸ The OTP sought the admission of all of the intercept material.³⁹

9. **The transcript of the testimony of the OTP analyst from the *Krstić* Trial**⁴⁰ – This was a witness called during the *Krstić* Trial and the testimony was recorded into transcript by the Court as standard procedure. The OTP sought to introduce this testimony in this trial under Rule 92 *bis* (D).⁴¹
10. **Military analyst Mr Butler’s report from the *Krstić* Trial, which incorporated the intercept evidence**⁴² Mr Butler was a witness called during the *Krstić* Trial: his reports concerned the VRS Brigade Command Responsibility and information allegedly linking the VRS to the crimes committed in the Srebrenica safe area in July 1995.⁴³ The OTP sought to introduce this testimony in the trial pursuant to Rule 94 *bis*.⁴⁴ The two reports of Mr Butler had been disclosed and submitted by the OTP on 31 October 2002 and 1

³³ D Manning, *Srebrenica Investigation: Summary of Forensic Evidence-Execution Points and Mass Graves* (16 May 2000) 00950903.

³⁴ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution’s Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [30].

³⁵ *Prosecutor v Blagojević and Jokić* (Transcript) IT-02-60-T (26 May 2000) (TC) 3548, line 23.

³⁶ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [1].

³⁷ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [1].

³⁸ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [6].

³⁹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [1].

⁴⁰ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution’s Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [1].

⁴¹ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution’s Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [1].

⁴² *Prosecutor v Blagojević and Jokić* (Decision on Prosecution’s Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [30].

⁴³ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution’s Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [30].

⁴⁴ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution’s Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [30].

November 2002.⁴⁵ This was admitted by the OTP and ultimately was admitted by the Court at the same time as the video compilation.⁴⁶

11. **Video compilation (Ex. P21)⁴⁷ and video stills from compilation (Ex. P22)⁴⁸** – The video compilation includes a range of different videos produced during the conflict. Examples include the Reuters footage (ERN No: V000-3914), SRT broadcast (ERN No: V000-0442 - V000-1957), Civilian footage of Ibro Zahirovic (ERN No: V000-3851), Dutch Battalion soldier's footage (ERN No: 3682), footage from a journalist Zoran Petrovic, who was in Srebrenica accompanying and filming the Bosnian Serb forces during the takeover (ERN: V0000-3826)⁴⁹. **Video showing the DutchBat soldiers (Ex. P 39)**, being held hostage at Hotel Fontana, about 30 DutchBat soldiers were held and were filmed while there.⁵⁰ **Video clip of first meeting at Hotel Fontana** between the VRS and DutchBat soldiers, **Ex. P38**.⁵¹ **Video taken in Srebrenica on 11 July 1995 (Ex. P37)**⁵², showing refugees attempting to get onto vehicles to take them to Potocari.⁵³
12. **Accompanying transcripts to various videos (Ex. P21a)**,⁵⁴ this exhibit provides the accompanying transcript to a variety of different videos that were shown in the trial as exhibit P21 (see above).⁵⁵
13. **Transcript of Interview conducted by Jean-Rene Ruez with Dragan Obrenovic, 2 April 2000 (P25.1), transcript of the interview conducted by Jean-Rene Ruez with Dragan Jokić (P26.1), 14 December 1999, transcript of interview conducted by Jean-Rene Ruez with Dragan Jokić, 1 April 2000 (P26.6).**⁵⁶
14. **Ex. P75, Photograph of the White House.**⁵⁷
15. **[Ex. P19.7] “is a photograph of the stairway area leading to the stage of the Pilica Dom. That is a blood splatter pattern. You can see it's dripping down the wall, and there's another pattern on the left of the photograph. And it also indicates damage to the walls and the structure of the Dom.”**⁵⁸

⁴⁵ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) fn 4.

⁴⁶ *Prosecutor v Blagojević and Jokić* (Transcript) IT-02-60-T (22 May 2003) (TC) 736, lines 6-8.

⁴⁷ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 426, 437, 441, 460, 483.

⁴⁸ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 412.

⁴⁹ *Prosecutor v Blagojević and Jokić* (Prosecution's Amended and Redacted Pre-Trial Brief) IT-02-60-T (8 November 2002) fn 70.

⁵⁰ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) fn 417.

⁵¹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) fn 510.

⁵² *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) fn 470.

⁵³ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [143].

⁵⁴ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 426, 437, 441, 34, 442, 443, 483.

⁵⁵ *Prosecutor v Blagojević and Jokić* (Srebrenica Trial Video (Subtitles Transcript)) IT-02-60-T (19 May 2003).

⁵⁶ *Prosecutor v Blagojević and Jokić* (Decision on prosecution's motion for clarification of oral decision regarding admissibility of accused's statement) IT-02-60-T (18 September 2003) (TC I) [2].

⁵⁷ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 412.

⁵⁸ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 1339.

III. COURT ANALYSIS & LEGAL ARGUMENTS

16. **Aerial reconnaissance photographs** –The majority of aerial images were sought to be admitted as they were related and used in the expert report by D. Manning⁵⁹ previously made for the *Krstić* case. The OTP sought admission of the expert report and the testimony from *Krstić* under both Rule 92 *bis* of the Rules of Procedure and Evidence, admission of written statements and transcripts in lieu of oral testimony and Rule 94 *bis* allowing an expert statement to be brought into evidence without requiring that person to testify in certain situations.⁶⁰ The aerial images had previously been admitted in other cases before the ICTY such as *Krstić* and *Milosevic*.⁶¹ Neither defendant’s counsel opposed Mr. Manning’s report being admitted as expert evidence.⁶² Similarly, the report and testimony of Richard Wright used aerial images and was sought to be admitted under Rule 94 *bis* and 92 *bis* without opposition from the Defence.⁶³
17. *Expert evidence argument* – The OTP filed a motion for admission of witness statements and prior testimony pursuant to rule 92 *bis* and incorporated a motion *in limine* to admit related exhibits. This was confidential but contained their arguments as to why the expert reports including Dean Manning’s should be admitted as evidence.⁶⁴
18. Vidoje Blagojević’s counsel filed a response to the Prosecutor’s first motion on 31 March 2003, which was also filed confidentially.⁶⁵
19. Dragan Jokić’s counsel filed a response to the Prosecutor’s first motion on 31 March 2003. In the submission, counsel argues that Rule 92 *bis* cannot be considered in isolation and Rule 89 must also be taken into account.⁶⁶ The argument was that implicit in the Prosecution’s argument in support of their motion is the contention that since statements go to proof of a matter other than the acts and conduct of the accused as charged in the indictment, the new witnesses should not be subject to cross examination. Mr Jokić disagreed, stating each

⁵⁹ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution’s Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [30].

⁶⁰ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution’s Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [18].

⁶¹ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution’s Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [1]-[2].

⁶² *Prosecutor v Blagojević and Jokić* (Decision on Prosecution’s Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [30].

⁶³ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution’s Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [35].

⁶⁴ Public version cannot be located, mentioned in *Prosecutor v Blagojević and Jokić* (First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*) IT-02060-T (12 June 2003) (TC I) preamble.

⁶⁵ Mentioned in *Prosecutor v Blagojević and Jokić* (First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*) IT-02060-T (12 June 2003) (TC I).

⁶⁶ *Prosecutor v Blagojević and Jokić* (Dragan Jokić’s Response to “Prosecution’s motion for admission of prior testimony and witness statements pursuant to Rule 92 *bis* and incorporated motion *in limine* to introduce related exhibits”) IT-02-60-T (31 March 2003) (TC) [5].

witness proposed in the Prosecution's motion related directly to the acts and conduct of the accused.⁶⁷

20. The Motion goes on to discuss the admission of Rule 92 *bis* transcripts and exhibits and how they violate the fundamental rights of the Accused under Articles 20 and 21 of the Statute.⁶⁸ Article 21(4)(e) preserves the basic right of the Accused to challenge the evidence against him by means of cross examination. This right is also expressly preserved by Rule 85(B) of the Rules of Procedure and Evidence, which provides that examination in chief, cross examination and re-examination 'shall be allowed in each case'.⁶⁹
21. The Motion argues by allowing the admission of evidence without cross-examination the Trial Chamber would improperly deprive the Accused of Article 21(3) and (4) rights of the Statute of the Tribunal.
22. The second reason the Motion argues that admission of evidence should not be allowed is that the authenticity and reliability of the proposed evidence cannot be tested.⁷⁰
23. The Motion goes on to state that at trial the accused is entitled to object to evidence on the ground that it is irrelevant or lacking in probative value because it is not authentic, or for any other reason (Rule 89(C)) or that its probative value is substantially outweighed by the need to ensure a fair trial (Rule 89(D)) or that it was obtained by methods which cause substantial doubt on its reliability or its admission is antithetical to and would seriously damage the integrity of the proceedings (Rule 95). In effect the right to counsel and right to object are gone.⁷¹
24. The Motion concludes by asking that the Trial Chamber deny the request by the Prosecution to admit witness testimony, witness statements and exhibits pursuant to Rule 92 *bis* and that if they are to be granted, that all witnesses called be subject to cross examination.⁷²

⁶⁷ *Prosecutor v Blagojević and Jokić* (Dragan Jokić's Response to "Prosecution's motion for admission of prior testimony and witness statements pursuant to Rule 92 *bis* and incorporated motion *in limine* to introduce related exhibits") IT-02-60-T (31 March 2003) (TC) [6].

⁶⁸ *Prosecutor v Blagojević and Jokić* (Dragan Jokić's Response to "Prosecution's motion for admission of prior testimony and witness statements pursuant to Rule 92 *bis* and incorporated motion *in limine* to introduce related exhibits") IT-02-60-T (31 March 2003) (TC) [14].

⁶⁹ *Prosecutor v Blagojević and Jokić* (Dragan Jokić's Response to "Prosecution's motion for admission of prior testimony and witness statements pursuant to Rule 92 *bis* and incorporated motion *in limine* to introduce related exhibits") IT-02-60-T (31 March 2003) (TC) [15].

⁷⁰ *Prosecutor v Blagojević and Jokić* (Dragan Jokić's Response to "Prosecution's motion for admission of prior testimony and witness statements pursuant to Rule 92 *bis* and incorporated motion *in limine* to introduce related exhibits") IT-02-60-T (31 March 2003) (TC) [23].

⁷¹ *Prosecutor v Blagojević and Jokić* (Dragan Jokić's Response to "Prosecution's motion for admission of prior testimony and witness statements pursuant to Rule 92 *bis* and incorporated motion *in limine* to introduce related exhibits") IT-02-60-T (31 March 2003) (TC) [26].

⁷² *Prosecutor v Blagojević and Jokić* (Dragan Jokić's Response to "Prosecution's motion for admission of prior testimony and witness statements pursuant to Rule 92 *bis* and incorporated motion *in limine* to introduce related exhibits") IT-02-60-T (31 March 2003) (TC) [36].

25. The Prosecution filed a consolidated reply regarding its 14 February 2003 motion for admission of evidence under Rule 92 *bis* and incorporated motion for admission of nine additional witness statements under Rule 92 on 22 April 2003. In the reply, the Prosecution responded to many of the issues raised by Blagojević and Jokić and submitted that all witnesses addressed in the Motion meet the requirements under Rule 92 *bis* and that admission in written form was consistent with the letter and spirit of the Rules of Procedure and Evidence and Statute of the Tribunal. The Prosecution also maintained no cross-examination is necessary for the witnesses at issue.⁷³
26. The Prosecution argued regarding the applicability of Rule 92 *bis* where joint criminal enterprise is charged the Defence incorrectly interprets the Tribunal jurisprudence. The charge of joint criminal enterprise is confined to acts and conduct by the accused which tends to prove the accused participated in a joint criminal enterprise or shared the requisite intent for the crimes charged with the principal offender.⁷⁴
27. The Prosecution continued that Trial Chambers will only allow cross-examination where circumstances demand it. Circumstances relevant to whether cross-examination of a Rule 92 *bis* witness should be permitted include the proximity of the accused to the person whose acts and conduct the written evidence described, and whether the evidence relates to a pivotal or critical aspect of the Prosecution's case.⁷⁵ The Prosecution argued that "the accused in their responses have failed to demonstrate with respect to any individual witness how the evidence the witness will provide demands that cross examination be permitted...Not one of the accused addressed the circumstances of any specific witness in their responses."⁷⁶ 'Cross-examination is discretionary under Rule 92 *bis* as the Tribunal recognised that the accused's rights under Article 21(4)(E) to examine Prosecution witnesses is not impregnable if it complies with the proper safeguards in place particularly under Rule 89 and Article 20(1)'.⁷⁷
28. The Statute and the Rules of Procedure and Evidence should read together and therefore the rights in Article 21(4)(E) must give way in certain circumstances to admission without

⁷³ *Prosecutor v Blagojević and Jokić* (Prosecutions consolidated reply regarding its 14 February 2003 motion for admission of evidence under Rule 92 *bis* and incorporated motion for admission of nine additional witness statements under Rule 92 *bis*) IT-02-60-T (22 April 2013) (TC) [5].

⁷⁴ *Prosecutor v Blagojević and Jokić* (Prosecutions consolidated reply regarding its 14 February 2003 motion for admission of evidence under Rule 92 *bis* and incorporated motion for admission of nine additional witness statements under Rule 92 *bis*) IT-02-60-T (22 April 2013) (TC) [9].

⁷⁵ *Prosecutor v Blagojević and Jokić* (Prosecutions consolidated reply regarding its 14 February 2003 motion for admission of evidence under Rule 92 *bis* and incorporated motion for admission of nine additional witness statements under Rule 92 *bis*) IT-02-60-T (22 April 2013) (TC) [12].

⁷⁶ *Prosecutor v Blagojević and Jokić* (Prosecutions consolidated reply regarding its 14 February 2003 motion for admission of evidence under Rule 92 *bis* and incorporated motion for admission of nine additional witness statements under Rule 92 *bis*) IT-02-60-T (22 April 2013) (TC) [12].

⁷⁷ *Prosecutor v Blagojević and Jokić* (Prosecutions consolidated reply regarding its 14 February 2003 motion for admission of evidence under Rule 92 *bis* and incorporated motion for admission of nine additional witness statements under Rule 92 *bis*) IT-02-60-T (22 April 2013) (TC) [13].

cross examination under Rule 92 *bis*.⁷⁸ Accordingly the Prosecution maintained their argument in favour of unconditional admission from the original motion as none provide evidence pertinent to the acts and conduct of the accused or which violate Rule 89 or Article 20(1).⁷⁹ For those witnesses that prior testimony was submitted under Rule 92 *bis* (D), the Prosecution noted that the witnesses had testified before in proceedings involving substantially similar events occurring during the same time frame and have been subject to a complete and thorough cross-examination by the Defence in those proceedings. “The Trial Chamber will have the opportunity to review the entire record and can make independent assessment as to the weight to be afforded to the evidence.”⁸⁰ With respect to the evidence the Prosecution proposes to offer by statement, the Prosecution noted in many cases the evidence in question is cumulative of testimony of previous witnesses, goes to the existence of the crime base, concerns the impact of crimes upon victims or otherwise falls short of the factors in favour of cross-examination set forth by the Appeals Chamber.⁸¹ The Prosecution contended that there exists no reason to compel the appearance of any 92 *bis* witness that would override the interest of managing the trial in the most efficient and effective manner possible.⁸²

29. *Written statements argument* - Under the Rules of Procedure and Evidence of the ICTY, written statements or transcripts in lieu of oral testimony may be admitted where they go to proof of a matter other than acts and conduct of the accused as charged (Rule 92 *bis*) or when the interest of justice allows it (by Rule 89(F)). The Prosecution submitted many exhibits including some aerial images should be admitted into evidence through being attached to written witness evidence as related exhibits that had previously been put to witnesses and admitted at the ICTY. For instance, the aerial image of Branjevo farm was previously put to Mr Erdemovic in *Krstic* and was sought to be admitted through his previous testimony and transcript being admitted.⁸³
30. **The forensic analysis of gravesites incorporating the aerial images in order to determine creation/disturbance dates and related testimony of expert witnesses** – As outlined above, expert reports and the testimony of experts from *Krstic* were sought to be admitted as expert evidence under Rule 92 *bis* of the Rule of Procedure and Evidence, this

⁷⁸ *Prosecutor v Blagojević and Jokić* (Prosecutions consolidated reply regarding its 14 February 2003 motion for admission of evidence under Rule 92 *bis* and incorporated motion for admission of nine additional witness statements under Rule 92 *bis*) IT-02-60-T (22 April 2013) (TC) [13].

⁷⁹ *Prosecutor v Blagojević and Jokić* (Prosecutions consolidated reply regarding its 14 February 2003 motion for admission of evidence under Rule 92 *bis* and incorporated motion for admission of nine additional witness statements under Rule 92 *bis*) IT-02-60-T (22 April 2013) (TC) [14].

⁸⁰ *Prosecutor v Blagojević and Jokić* (Prosecutions consolidated reply regarding its 14 February 2003 motion for admission of evidence under Rule 92 *bis* and incorporated motion for admission of nine additional witness statements under Rule 92 *bis*) IT-02-60-T (22 April 2013) (TC) [14].

⁸¹ *Prosecutor v Blagojević and Jokić* (Prosecutions consolidated reply regarding its 14 February 2003 motion for admission of evidence under Rule 92 *bis* and incorporated motion for admission of nine additional witness statements under Rule 92 *bis*) IT-02-60-T (22 April 2013) (TC) [15].

⁸² *Prosecutor v Blagojević and Jokić* (Prosecutions consolidated reply regarding its 14 February 2003 motion for admission of evidence under Rule 92 *bis* and incorporated motion for admission of nine additional witness statements under Rule 92 *bis*) IT-02-60-T (22 April 2013) (TC) [15].

⁸³ *Prosecutor v Blagojević and Jokić* (Prosecution’s motion for admission of written witness evidence and related exhibits pursuant to rule 92 *bis* and rule 89 (F)) IT-02-60-T (5 December 2003) (TC) 20588.

included D. Manning's and W. Wright's reports and testimony.⁸⁴ The Defence did not oppose either piece of evidence being admitted.⁸⁵

31. **Records of VRS radio communications – Rule 98(c) probative value argument** - The OTP sought the admission of the intercepted communication of the VRS, handwritten notebooks in which the intercepts were transcribed, an annotated index of intercepts processed by the SDB, the handwritten notebook of ABiH tactical intercept unit, and collection of loose-leaf handwritten intercept transcripts.⁸⁶ The OTP sought admission of this material under Rule 89(C) of the Rules of Procedure and Evidence of the ICTY.⁸⁷ A Chamber may admit any relevant evidence it deems to have probative value.⁸⁸ The Prosecutor argued that it was relevant and “taken as a whole the intercept evidence tells the story of the VRS military participation in the attack on Srebrenica and the events that follow, and forms an important part of the mosaic of evidence to be introduced by the Prosecution.”⁸⁹
32. The Prosecutor noted the reliability of the intercepts was established by witnesses who worked as intercept supervisors and operators in the ABiH and the SDB during the war and referred to the procedures used to monitor, record, transcript and transmit to command headquarters VRS communications, which in her opinion ensured maximum accuracy and reliability. The Prosecutor argued the need of accurate intercept transcripts was something the ABiH were keenly aware of and intercepted information frequently impacted military decisions. They also argued that the twenty-three notebooks in which initial transcription were made by hand were all authenticated by witnesses who recognised their handwriting and verified the transcriptions at the relevant time in 1995.⁹⁰ Specifically relating to the communications intercepted by the SDB unit at Okresanica, the Prosecutor referred to a document in which the Section Chief of the SDB's intercept office verified twenty-eight conversations that his unit had processed in 1995.⁹¹ The Prosecutor also referred to the “Intercept Project” within the OTP, where members of the office tested the accuracy and reliability of the intercepts through independent corroboration of their content.
33. The project examined internal consistency between notebooks and their printouts and also cross-referenced and corroborated the intercepts with material and information obtained

⁸⁴ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [1].

⁸⁵ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [30], [35].

⁸⁶ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [1].

⁸⁷ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [4].

⁸⁸ Rule 89(C), ICTY Rules of Procedure and Evidence.

⁸⁹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [4].

⁹⁰ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [5].

⁹¹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [5].

from other sources including “aerial imagery and seized documents.”⁹² The Prosecutor made arguments surrounding the chain of custody of the original notebooks and submitted that the rule is a variant of the principle that real evidence must be authenticated prior to its admission.⁹³ The Prosecutor also argued that under the Guidelines on the Standards Governing the Admission of Evidence, 23 April 2003⁹⁴, there is no prohibition on admitting the intercepts on the basis that each operator has not been called to testify at trial.⁹⁵ The Prosecutor also argued that considerations of authenticity and reliability of intercepts should go to weight and not the admissibility of evidence.⁹⁶

34. Defence argued that the OTP failed to make a *prima facie* showing of reliability and instead of submitting the original intercept recordings in the case, the Prosecutor was offering hearsay evidence to prove the content of transmissions allegedly transcribed by unknown personnel or by personnel with a history of unreliable transcriptions or substandard equipment with little training.⁹⁷ Therefore, they argued it is not possible to test the accuracy of the recordings, equipment, transcriptions or the voice identifications and that testimony of live witnesses shows the various other intelligence agencies including the U.S.A had more sophisticated and effective equipment than that available to ABiH. Defence argued the Prosecution could have obtained alternative corroborating evidence to prove the authenticity and reliability of the intercept evidence and its absence was suspect in and of itself.⁹⁸
35. The Defence also stated national jurisdictions have adopted a strict attitude to audio recordings as they realise tapes can be tampered with and courts therefore should insist on a complete foundation: operators’ qualifications, equipment in working condition, custody of the tape and identification of the speakers on the tape: testimonial evidence alone is insufficient.⁹⁹ Defence also argued a final decision on admissibility, reliability and authenticity of the materials was premature until all evidence relating to its reliability and authenticity was presented. Further and based on Rule 95, the Defence submitted that the evidence should be excluded because the methods used to obtain it cast substantial doubt

⁹² *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [6].

⁹³ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [7].

⁹⁴ *Prosecutor v. Blagojević and Jokić* (Decision adopting the Draft Guidelines on the Standards Governing the Admission of Evidence) (23 April 2003) (TC I).

⁹⁵ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [7].

⁹⁶ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [8].

⁹⁷ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [9].

⁹⁸ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [10].

⁹⁹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [11].

on its reliability and the admission of it would be antithetical to a fair determination of the matters before the Trial Chamber and seriously damage the integrity of the proceedings.¹⁰⁰

36. The Prosecutor replied to the Defence and stated they disagreed that the best evidence rule was not complied with because the original audio recordings were not available. The Prosecutor argued the best evidence rule does not require the exclusion of evidence of which better corroborating evidence may or may not exist, or which for a variety of reasons may not be available. The Prosecutor noted that defence's claim that all intercepts in *Krstić* were disclosed in original audio form is not true and that, of more than one-hundred in the *Krstić* trial, only one was available in its original form.¹⁰¹
37. *Judicial Notice argument* - The OTP also attempted to have a number of intercepts from the *Krstić* case admitted as evidence by requesting the Trial Chamber take judicial notice of them as pieces of documentary evidence under Rule 94(B) of the Rules of Procedure and Evidence.¹⁰²
38. The Prosecutor argued that the documentary evidence should be admitted under the Rule as it had previously been introduced by them during the *Krstić* trial and prosecution witnesses provided testimony that laid the foundation for and established the authenticity of the documentary evidence, and the Defence had an opportunity to challenge (and, in many cases did challenge) the reliability and authenticity of the evidence at trial.¹⁰³ Having heard from the parties, the *Krstić* Trial Chamber deemed the evidence reliable and authentic and admitted it into evidence. The Trial Chamber further underscored its reliability and evidentiary value by relying on them when rendering its final Judgement.¹⁰⁴ By taking judicial notice of the documentary evidence the Trial Chamber will enable the Prosecution to eliminate from its witness list a number of witnesses particularly BiH army intercept operators and reduce the length of the trial proceedings. As the reliability and authenticity of the attached intercepts and other documents was fully tested in the *Krstić* trial, the Prosecution submitted judicial notice was appropriate here.¹⁰⁵
39. Neither Defence Counsel agreed to admit the intercept evidence.¹⁰⁶

¹⁰⁰ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [11].

¹⁰¹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [12].

¹⁰² *Prosecutor v Blagojević and Jokić* (Prosecution's Notice Regarding the Agreement of the Parties on Judicial Notice) IT-02060-T (6 August 2003) (TC) Tab C – Documents to which Jokić Objects 18851-18854; Tab D – Documents to which Blagojević Objects 18845-18848.

¹⁰³ *Prosecutor v Blagojević and Jokić* (Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence) IT-02-60-T (23 June 2003) (TC) [16].

¹⁰⁴ *Prosecutor v Blagojević and Jokić* (Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence) IT-02-60-T (23 June 2003) (TC) [16].

¹⁰⁵ *Prosecutor v Blagojević and Jokić* (Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence) IT-02-60-T (23 June 2003) (TC) [17].

¹⁰⁶ *Prosecutor v Blagojević and Jokić* (Prosecution's Notice Regarding the Agreement of the Parties on Judicial Notice) IT-02060-T (6 August 2003) (TC) Tab C – Documents to which Jokić Objects 18851-18854; Tab D – Documents to which Blagojević Objects 18845-18848.

40. Blagojević's counsel argued that applying Rule 94(A) judicial notice requires the facts are of common knowledge¹⁰⁷ but under subsection (B) there was a discretionary element where after considering the issues between parties the Trial Chamber may take judicial notice of them as adjudicated facts (or documentary evidence). The legal concept must be applied consonant with the spirit of the Statute and the general principles of law and for promoting the efficacious conduct of proceedings.¹⁰⁸ Counsel outlined the test that should be applied from previous ICTY cases.¹⁰⁹ Counsel further stated the Trial Chamber should consider their approach from previous application of Rule 94(B) having regard to the need to balance judicial economy and the right of the Accused to a fair trial. The wholesale admission of facts from a previous judgment based upon assessment by the previous Trial Chamber of the evidence before it then, was not an appropriate exercise of a Trial Chamber's discretion under Rule 94(B) and conflicted with an accused's right to a fair trial.¹¹⁰
41. **The transcript of the testimony of the OTP analyst from the *Krstić* Trial – Expert evidence argument** – The Accused objected to the admission of the transcript testimony of the Prosecution analyst submitted pursuant to Rule 92 *bis* (D).¹¹¹ During the *Krstić* trial the analyst testified regarding the accuracy, authenticity and reliability of the communication intercepts. The analyst described in her testimony the different factors considered to determine intercepts reliability and found the intercepts to be “genuine” and “absolutely reliable”.¹¹² As they were confidential, we do not have a copy of Blagojević's motion objecting to this item. Jokić's are outlined above under aerial intercepts in the expert evidence argument.
42. **Military analyst, Mr Butler's reports from *Krstić* incorporating the intercept evidence** – Expert evidence argument – The OTP argument for including Mr Butler's report is outlined above and was the same as the argument advanced for Mr Manning's reports. Both Defence counsel objected to statements made within the report of Mr Butler.¹¹³ Initially Jokić objected under the ‘joint criminal enterprise’ theory it had advanced in relation to all witnesses (outlined above in relation to the OTP analyst's evidence) but during the hearing the position changed and they only asked to cross-examine Mr Butler.¹¹⁴ This was on the grounds of the expert's lack of objectivity and because he had created an updated report.¹¹⁵

¹⁰⁷ *Prosecutor v Blagojević and Jokić* (Vidoje Blagojević's Response to Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence) IT-02-60-T (7 July 2003) (TC) 9.

¹⁰⁸ *Prosecutor v Blagojević and Jokić* (Vidoje Blagojević's Response to Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence) IT-02-60-T (7 July 2003) (TC) [10]-[11].

¹⁰⁹ *Prosecutor v Blagojević and Jokić* (Vidoje Blagojević's Response to Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence) IT-02-60-T (7 July 2003) (TC) [10]-[12].

¹¹⁰ *Prosecutor v Blagojević and Jokić* (Vidoje Blagojević's Response to Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence) IT-02-60-T (7 July 2003) (TC) [13]-[14].

¹¹¹ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [34].

¹¹² *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [34].

¹¹³ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [29], [34].

¹¹⁴ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [12].

¹¹⁵ *Prosecutor v Blagojević and Jokić* (Transcript) IT-02060-T (23 July 2003) 1444, 1454-1456.

Due to the confidentiality of the document we cannot see exactly what Mr Blagojević's initial position regarding Mr Butler was, but in the course of the hearing counsel restated they objected to the reports and wanted to cross-examine Mr Butler.¹¹⁶ From the decision it can be seen it is likely counsel wished to cross-examine Mr Butler on his objectivity, as he had provided an updated report and because he may not have been adequately cross-examined at the initial trial.¹¹⁷

43. **Aerial images - Expert Evidence Argument** - In addition to the testimony of expert witnesses being admitted, the Prosecution sought that all exhibits admitted into evidence during their former testimony also be admitted.¹¹⁸ The Trial Chamber noted that although Rule 92 *bis* (D) does not explicitly provide for the admission of exhibits admitted during former testimony, those exhibits are admissible pursuant to this rule as they form an inseparable and indispensable part of the testimony.¹¹⁹ The Trial Chamber noted that the majority of exhibits attached to former testimony are maps which witnesses marked or photographs shown to witnesses but as no index was included with the first or second Prosecution motion (indicating the exact title or exhibit number for each *Krstić* case exhibit) it was difficult to identify the exact exhibits from the *Krstić* case.¹²⁰ The decision on the admission of the attached exhibits to the testimony was reserved until an index was provided.¹²¹
44. In relation to expert reports, the Court found that the appropriate test to be applied to expert testimony was Rule 94 *bis*, as it was applicable *lex specialis* as opposed to Rule 92 *bis* as *lex generalis*,¹²² and it was the Trial Chamber's standard practice.¹²³ The Trial Chamber applied Rule 94 *bis* and determined D.Manning was a live witness, whose report was highly relevant to the case, compiled with Rule 89 of its Guidelines on the Standards Governing the Admission of Evidence and the Defence would be able to cross examine.¹²⁴ Once satisfied that the authors of all reports were qualified as experts¹²⁵, that there was probative value in the evidence and it was relevant and the evidence assisted in providing a complete picture

¹¹⁶ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) fn 29.

¹¹⁷ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) fn 29.

¹¹⁸ *Prosecutor v Blagojević and Jokić* (First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*) IT-02060-T (2 June 2003) [30].

¹¹⁹ *Prosecutor v Blagojević and Jokić* (First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*) IT-02060-T (2 June 2003) [30].

¹²⁰ *Prosecutor v Blagojević and Jokić* (First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*) IT-02060-T (2 June 2003) [31].

¹²¹ *Prosecutor v Blagojević and Jokić* (First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*) IT-02060-T (2 June 2003) [32].

¹²² *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [28].

¹²³ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [20].

¹²⁴ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [30].

¹²⁵ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [29].

the evidence of experts was admitted including the aerial images attached or used in their reports.¹²⁶

45. *Written statements argument* - In relation to the Mr Erdemovic's evidence the Court ultimately did not accept the Prosecution's argument relating to Rule 94*bis* or Rule 89(F) but admitted the evidence under Rule 92*bis*. The Chamber found it more appropriate to admit the aerial images that were attached to previous witness's evidence under 94*bis* as written statements and transcripts in lieu of oral testimony. Accordingly, the aerial image of Branjevo farm attached to Mr Erdemovic's previous evidence would have been admitted as a related exhibit.¹²⁷ (it was not required to be as it was previously admitted with the D.Manning expert evidence).
46. **The forensic analysis of gravesites incorporating the aerial images** – As outlined above, Mr. Manning's evidence (report and transcript) which summarised the forensic evidence and included the aerial images was admitted under Rule 94*bis*.¹²⁸
47. Mr. Richard Wright's evidence was admitted under both Rule 94 *bis* and 92 *bis* (D) of the Rules as argued by the Prosecutor.

Records of VRS radio communications –

48. *Expert evidence argument* - The Trial Chamber noted two rules were particularly relevant: Rule 89 and 95 of the Rules of Procedure and Evidence. Rule 89 requires the Chamber apply the rules of evidence which best favour a fair determination of the matter before it and are consonant with the spirit of the statute. The Chamber may admit any relevant evidence it deems to have probative value and can exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. Rule 95 states no evidence shall be admissible of obtained by methods which cast substantial doubt on its reliability or of its admission is antithetical to and would seriously damage the integrity of proceedings.¹²⁹ In the Guidelines adopted by the Trial Chamber parties are urged to bear in mind the distinction between admissibility of documentary evidence and the weight attributed to admitted documentary evidence under the principle of free evaluation of evidence. This means admission of a particular piece of evidence into evidence does not mean the information contained therein is necessarily an accurate portrayal of facts.¹³⁰ Under Rule 89, the Trial Chamber noted that the approach adopted favours admission of evidence. However, when determining whether to admit evidence it will consider the reliability of the evidence because if evidence is not reliable it cannot have probative value or be relevant to the case. Under Rule 89 (c) unreliable

¹²⁶ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [35].

¹²⁷ *Prosecutor v Blagojević and Jokić* (Transcript) IT-02060-T (17 December 2003) 6112, lines 14-17.

¹²⁸ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [43].

¹²⁹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [13].

¹³⁰ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [13].

evidence must be excluded. In considering reliability the Trial Chamber examines all indicia thereof, for statements this includes aspects such as truthfulness, voluntariness and trustworthiness of the evidence. A determination of the reliability of a piece of evidence will also consider the circumstance under which the evidence arose and the content of the evidence.¹³¹ The Trial Chamber noted that when examining relevant and probative value of evidence sought to be admitted it may be excluded on balance with the need to ensure a fair trial for an accused even after being admitted (under Rule 89 (D)).¹³² The Trial Chamber noted relevance and probative value have a relationship, probative evidence is evidence that tends to prove or disprove an issue.¹³³ The Trial Chamber also noted when objection against evidence are raised on the grounds of authenticity the Trial Chamber followed the previous practice of the Tribunal, to admit documents and video recordings and decide on the weight to be given to them within the trials context as a whole.¹³⁴

49. The Trial Chamber found all the materials were relevant within Rule 89(C) as they related directly in time to events the indictment alleges unfolded at the relevant time in 1995 and concern alleged communications between units in the VRS chain of command, therefore satisfying the requirement of relevancy.¹³⁵ The Chamber examined the reliability and probative value of each item of evidence separately.
50. The intercepts – The Trial Chamber noted it had heard testimony of six intercept supervisors and operators from the ABiH or SDB and had transcript of three intercept operators from the *Krstić* case before it under Rule 92 bis (D).¹³⁶ The Trial Chamber noted the witnesses gave virtually identical descriptions of procedures for monitoring intercepting, transcribing and processing intercepted VRS communications, the procedure showed the units took their task seriously and were aware of the necessity for correct transcriptions. The Trial Chamber did not accept the Defence suggestion the intercepts were transcribed by unknown personnel.¹³⁷ The Trial Chamber noted that some intercept operators had long-standing interest in amateur radio with a solid technical education. Many had obtained civil and military professional levels of radio certification or were experienced army signalmen, those with the shortest interception experience still served seven-day shifts from March 1995 through to the relevant period of the present case. Five of the witnesses were fulltime between two and three and a half years and the remaining two had been there from August

¹³¹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [15].

¹³² *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [16].

¹³³ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [17].

¹³⁴ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [18].

¹³⁵ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [19].

¹³⁶ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [21].

¹³⁷ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [21].

and December 1994 through the relevant period to the case.¹³⁸ The Trial Chamber had difficulty finding support in the evidence for the Defence contention of a history of unreliable transcriptions for some operators. While due to the electromagnetic spectrum and geography of the zone the unties covered it was not always possible to hear entire conversation of all participations, the evidence revealed the operators would with their colleagues' assistance re-listen to recorded conversation until unclear portions could be deciphered. Where they remained unintelligible, they would indicate this in the transcript with three dots. The Trial Chamber found the procedure adopted and recording intercepts that do not reflect the whole conversation indicate an awareness among operators that accuracy was critical and speculation was not accepted.¹³⁹

51. The Trial Chamber examined the evidence of Stephanie Frease, the ex-member of the OTP intercept project and the work to established the reliability of intercepts by cross-referencing them and examining the internal consistency between the handwritten notebooks and computer print outs from them being forwarded to superior command. The Trial Chamber noted that one aspect reinforcing the intercepts reliability was several communications were intercepted with only slight variation by units at different locations and the Chamber reiterated her words that they were "absolutely reliable".¹⁴⁰ Regarding the argument that original audio should have been provided, the Trial Chamber noted neither party is under an obligation to tender perfect evidence and that under the Guidelines documents could be admitted to prove context and complete a picture presented by evidence in general.¹⁴¹ Given the large amount of documentary evidence and the testimonial evidence the trial chamber did not find it necessary to have the original audio recordings.¹⁴² Ultimately the Trial Chamber ruled the intercepts were *prima facie* reliable and have probative value under the Rules. The Chamber stated this was given the level of detail and internal consistency of the intercepts as well as the methods employed to intercept VRS communications. As they had reliability and probative value the Trial Chamber did not examine the claim there was substantial doubt on their reliability due to the methods used to obtain them.¹⁴³
52. Handwritten notebooks – The Trial Chamber noted the handwritten notebooks were not translated into English. Despite being relevant, the Trial Chamber found they did not have probative value in their current state and noted that the Prosecutor had already tendered intercepts they consider relevant for the case in translated form.¹⁴⁴

¹³⁸ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [22].

¹³⁹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [23].

¹⁴⁰ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [24].

¹⁴¹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [25].

¹⁴² *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [25].

¹⁴³ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [26].

¹⁴⁴ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [27].

53. Annotated index of intercepts processed by the SDB – These were annotated and testified to by witness P118 and concerned the above-mentioned intercepts and was relevant to the present case. The Trial Chamber did not see any reason to doubt the exhibits reliability and found the index assisted the Trial Chamber determine the reliability of the communications intercepted by the SDB.¹⁴⁵
54. Handwritten intercept notebook and handwritten intercept transcripts – The Trial Chamber was satisfied that the methods employed by the intercept operators to intercept the communications, particularly given the tactical character of the intercepts and the experience of the operators was sufficient to produce reliable transcripts. However, the Trial Chamber noted the intercept transcripts in these exhibits had only been translated in case of exhibit 121B for days 11-20 July 1995 and for exhibit 122B for days 6-7, 11-12, 17-21 July 1995. The Trial Chamber therefore was of the opinion only these parts were relevant to and had probative value in the present case.¹⁴⁶
55. **Adjudicated facts argument** – Regarding the non-agreed facts (which included all of the intercept evidence), the Trial Chamber noted that the Parties came to no agreement during the pre-trial phase and this motion was brought after the trial had proceeded.¹⁴⁷ Since then the Trial Chamber had heard and admitted a significant amount of evidence, related to the facts that the Prosecution had proposed the Trial Chamber take judicial notice of. The Trial Chamber noted both defendants had vigorously cross-examined many of the Prosecution witnesses on points related to the non-agreed facts proposed by the Prosecution.¹⁴⁸ Given the advanced stage of the evidence, the Trial Chamber found it would be inappropriate to take judicial notice of the remaining facts proposed by the Prosecution. Therefore, in the interest of justice, the Trial Chamber exercised its discretion and declined to take judicial notice of the remaining facts proposed on the Motion, preferring to make its on determination of these facts based on evidence presented, rather than adopting as rebuttable presumptions the findings of the previous trial chambers.¹⁴⁹ The Trial Chamber noted it had already admitted former testimony of more than thirty witnesses from *Krstić* under Rule 92 *bis* (D) and therefore had already used one of the tools available to ensure the trial is fair and expeditious.¹⁵⁰

¹⁴⁵ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [28].

¹⁴⁶ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [29].

¹⁴⁷ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence) IT-02-60-T (19 December 2003) [22].

¹⁴⁸ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence) IT-02-60-T (19 December 2003) [22].

¹⁴⁹ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence) IT-02-60-T (19 December 2003) [23].

¹⁵⁰ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence) IT-02-60-T (19 December 2003) [24].

56. The Trial chamber noted there was no express reference for admission of agreed documentary evidence by parties.¹⁵¹ The Trial Chamber noted Rule 89 (B) provided that in cases not otherwise provided for in this section, a Chamber shall apply rules of evidence that will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law. Rule 65 (*ter*) (H) permits agreement of facts and points of law between parties and it was the Tribunal's general practice to allow admission of documentary evidence by party agreement during trial. Accordingly, the agreed documentary evidence was admitted under Rule 65 *ter* (H).¹⁵² Although as mentioned in the above paragraph no intercept evidence ended up being admitted under this method.
57. **The transcript of the testimony of the OTP analyst from the *Krstić* Trial** – The Trial Chamber was satisfied of the relevance and probative value of the transcript of the analyst's testimony to the current proceedings.¹⁵³ It was further satisfied the testimony did not go to proof of the acts and conduct of the accused. In considering whether the expert shall be called pursuant to Rule 92 *bis* (E) to appear for cross-examination, the Trial Chamber referred to its first decision on the admission of witness statements pursuant to 92 *bis* laying out the relevant criteria. The Trial Chamber has to assess whether the testimony goes to proof of a critical element of the Prosecution's case against the Accused and whether the cross-examination of the witness in the *Krstić* Trial dealt adequately with the issues relevant to the Defence in the current proceedings.¹⁵⁴ The Trial Chamber found it was not necessary to call the Prosecution Analyst for cross examination as the Defence had not identified any issues concerning the accuracy, authenticity and reliability of the communication intercepts which were not addressed during the examination, cross-examination and questioning by the judges in the *Krstić* Trial.¹⁵⁵
58. **Military analyst, Mr Butler's reports incorporating the intercept evidence from the *Krstić* Trial** – The Court's response to Mr Butler's reports was identical to that of Mr Manning's, who provided the summary of the forensic reports. The Trial Chamber found the reports to be highly relevant to the case and admissible under Rule 89. Cross-examination was granted of the witness during their testimony.¹⁵⁶

What arguments/findings were used to support the admission of DDE?

¹⁵¹ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence) IT-02-60-T (19 December 2003) [25].

¹⁵² *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Documentary Evidence) IT-02-60-T (19 December 2003) [25].

¹⁵³ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [34].

¹⁵⁴ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [34].

¹⁵⁵ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [34].

¹⁵⁶ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [30].

59. **Aerial recognisance photographs** – The aerial imagery was used by the Court to gain an understanding of the geographic lay out of the Srebrenica area:

“The SDS offices were located immediately next to the Hotel Fontana in Bratunac”¹⁵⁷

“Blagojević’s apartment was approximately 200 metres from the Bratunac Brigade headquarters”¹⁵⁸

“Photographic evidence shows that the football stadium is very near the Vuk Karadžić School”¹⁵⁹

60. To provide a historical background to how the events unfolded:

“On 27 July 1995 the United States Government took an aerial photograph of an area near Nova Kasaba, which showed the presence of disturbed earth in four distinct locations”¹⁶⁰

“On 10 August 1995, the Security Council was briefed by the United States representative, who showed the Council aerial photographs indicating the existence of mass graves near Konjević Polje and Nova Kasaba.”¹⁶¹

61. Were combined with other forms of evidence such as testimony or reports to make findings of fact as to how events unfolded:

“The prisoners sat in rows close together and surrounded by Bosnian Serb soldiers.”¹⁶²

“Aerial imagery of the area around Glogova shows that sometime between 17 and 27 July the surface in a location, later identified as Glogova L, which is part of the Glogova 1 grave, was disturbed. Richard Wright headed the forensic investigation into the Glogova grave site in the year 2000.”¹⁶³

“The aerial images also showed disturbed earth at the grave sites.”¹⁶⁴

“The aerial images showed disturbed earth in areas removed from the primary graves, which disturbances appeared at simultaneously with the disturbance of the primary graves. That is how the investigators found some secondary graves.”¹⁶⁵

62. **Forensic analysis of grave sites incorporating the aerial images in order to determine creation/disturbance dates and related testimony from the *Krstić* Trial** – The aerial images were used by investigators and forensic teams to determine possible locations of the sites themselves. After this, the aerial images were useful for determining the approximate times of when the graves were created or disturbed by looking for changes in the topography.

¹⁵⁷ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [83].

¹⁵⁸ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [265].

¹⁵⁹ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [265].

¹⁶⁰ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [255].

¹⁶¹ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [380].

¹⁶² *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [253].

¹⁶³ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [313].

¹⁶⁴ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 1397.

¹⁶⁵ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 1398.

“On 27 July 1995 the United States Government took an aerial photograph of an area near Nova Kasaba, which showed the presence of disturbed earth in four distinct locations.”¹⁶⁶

“Between 14 and 16 July, the bodies of the Bosnian Muslim men were taken in trucks from the Kravica Warehouse to be buried at grave sites in Glogova and Ravnice.”¹⁶⁷

Investigators of the Office of the Prosecutor were first allowed to visit the area in January 1996. In April 1996, they commenced forensic examinations of suspected execution points and exhumation of mass graves. It became apparent to the investigators from an analysis of tire tracks and soil composition, that the mass graves had been disturbed.¹⁶⁸

63. The aerial images and forensic analysis of the graves were used by the Court to come to findings of where mass graves were found and whether there had been attempts to move graves to secondary sites.¹⁶⁹

64. **Records of VRS radio communications** – “During the Prosecution’s case, the Jokić Defence questioned the validity and reliability of the intercept evidence. The Trial Chamber has found that the intercept evidence is relevant to the case at hand, as it relates directly in time and in place to the events alleged in the Indictment, and that the evidence has probative value within the meaning of Rule 89(C) of the Rules. The Trial Chamber is convinced that the intercept-related evidence admitted is a reliable source of information. The probative value of this evidence will be considered in light of the trial record as a whole.”¹⁷⁰

65. The above paragraph was supported by a footnote which explained that this was the Tribunal’s practice in such cases (being those where the Trial Chamber is convinced of the validity and reliability of challenged evidence on the basis of it relating directly in time and place to the alleged events and had probative value within the meaning of Rule 89(C). The practice is one of admitting the evidence once satisfied of these prerequisites and later deciding on its weight based of the trial record as a whole. The footnote also listed a number of cases in which this practice has occurred.¹⁷¹

66. The admitted intercept evidence (the recorded intercepts, the annotated index, translated parts of the logs) were used in conjunction with other pieces of evidence including expert and witness testimony, to allow the Trial Chamber to come to conclusions of facts as to how events unfolded. See: *Prosecutor v Blagojević and Jokić (Judgment) IT-02-60-T (17 January 2005) (TC I)* para 38; para 325; para 464; 466; para 510; para 513 and para 763

67. **The transcript of the testimony of the OTP analyst from the Krstić Trial** – As noted above, the testimony of the ex-OTP analyst from the *Krstić* Trial (Ms Frease’s evidence) was admitted as expert evidence and was not subject to cross-examination. From the Trial Judgement, it is unclear exactly how much weight was placed on the testimony as the Trial Chamber did not specifically state this. However, the Trial Chamber did note that:

¹⁶⁶ *Prosecutor v Blagojević and Jokić (Judgment) IT-02-60-T (17 January 2005) (TC I)* [255].

¹⁶⁷ *Prosecutor v Blagojević and Jokić (Judgment) IT-02-60-T (17 January 2005) (TC I)* [306].

¹⁶⁸ *Prosecutor v Blagojević and Jokić (Judgment) IT-02-60-T (17 January 2005) (TC I)* [381].

¹⁶⁹ *Prosecutor v Blagojević and Jokić (Judgment) IT-02-60-T (17 January 2005) (TC I)* [382].

¹⁷⁰ *Prosecutor v Blagojević and Jokić (Judgment) IT-02-60-T (17 January 2005) (TC I)* [30].

¹⁷¹ *Prosecutor v Blagojević and Jokić (Judgment) IT-02-60-T (17 January 2005) (TC I)* fn 73.

“Before admitting evidence pursuant to Rule 92 *bis*, the Trial Chamber found that each written statement or transcript did not go to the acts and conduct of the Accused; was relevant to the present case; had probative value under Rule 89(C) of the Rules; and was cumulative in nature.

68. The Trial Chamber further decided whether it was necessary to call each witness for cross-examination, taking into consideration *inter alia* that the evidence admitted pursuant to Rule 92 *bis* (D) has already been subjected to cross-examination and questioning by a Trial Chamber in former proceedings before this Tribunal. In its first decision pursuant to Rule 92 *bis*, the Trial Chamber recalled the observation of the Appeals Chamber in the *Galić* case that “where the witness who made the statement is not called to give the accused an adequate and proper opportunity to challenge the statement and to question that witness, the evidence which the statement contains may lead to a conviction only if there is other evidence which corroborates the statement,” and reminded the Parties that such “other evidence” will be necessary to corroborate evidence put forward by a single Rule 92 *bis* witness who was not called for cross-examination in order to lead to a conviction on that charge in the Indictment. Such evidence may include other witness’s testimony, documentary evidence or video evidence.”¹⁷²
69. The purpose of seeking the admission of the analyst’s testimony was to convince the Trial Chamber of its reliability. Applying the above quoted paragraph to the analyst’s testimony, the Trial Chamber must have determined it did not go to the acts and conduct of the Accused, was relevant and had probative value under Rule 89(c) of the Rules and was cumulative in nature. The Trial Chamber decided it was not necessary to call the witness for cross-examination and considered the fact that the witness was cross-examined during the *Krstić* trial.
70. The Trial Chamber also assessed and weighed the testimony of the expert witnesses (including the evidence of Ms Frease).

“When assessing the probative value of the expert’s oral and written evidence, the Trial Chamber endorses the *Vasiljević* Trial Chamber’s view that the factors to consider are “the professional competence of the expert, the methodologies used by the expert and the credibility of the findings made in light of these factors and other evidence accepted by the Trial Chamber.”¹⁷³

71. Applying this to the evidence of Mr Butler and Ms Frease, the probative value of their evidence would have been determined taking into account: Their professional competence; the methodology of their project/work; and credibility of their findings in light of these factors and all other evidence accepted by the Trial Chamber.
72. **Military analyst, Mr Butler’s reports incorporating the intercept evidence from the *Krstić* Trial** – Mr Butler’s reports were also admitted as expert evidence accordingly the same factors outlined above would have been applied by the Trial Chamber, although Mr Butler was subject to cross-examination during this Trial.

¹⁷² *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [26].

¹⁷³ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [27].

73. Mr Butler's reports combined the intercept evidence with military documents and selected testimony of ex-combatants to make findings about how events unfolded and who was giving and carrying out the orders. As the reports and intercepts were used as support in the footnotes for these findings it is clear the Trial Chamber accepted and placed weight on them.¹⁷⁴
74. The following statements of the judgement were based off of Mr Butler's report which incorporated an intercept –
“At 12:20, Blagojević is reported at the head of the convoy of the Bratunac Brigade going to Žepa.”¹⁷⁵
“At 22:27, Major Jokić contacted a “General Vilotić”, whom the Trial Chamber believes to be the above-mentioned General Miletić, and informed him about the movements of the Bosnian Muslims in the Zvornik Brigade area as well as their surrender to VRS forces.”¹⁷⁶
75. Mr Butler testified that his interpretation of one particular intercept changed based on testimony from a witness during the *Krstić* Trial.¹⁷⁷

Was the DDE admitted and/or relied upon?

76. **Aerial reconnaissance photographs** – As the aerial reconnaissance photos were not challenged by the Defence the Court did not discuss their reasoning in respect of them. However, the Trial Chamber did clearly admit and place weight on the photographs suggesting they were deemed reliable, had probative value and were accepted as authentic. See above “arguments and findings the DDE was used to support” to see how the Court used the aerial imagery.
77. **Forensic analysis of grave sites incorporating the aerial images in order to determine creation/disturbance dates and related testimony from *Krstić***
78. The Trial Chamber admitted the evidence of Dean Manning and Richard Wright. Dean Manning's evidence was admitted under Rule 94 *bis*. The Court determined:
“The military analyst Richard Butler and the investigator Dean Manning are live witnesses whose reports were exclusively submitted pursuant to Rule 94 *bis*. Richard Butler's reports deal with the Army of Republika Srpska (“VRS”) Brigade Command Responsibility and information allegedly linking the VRS to the crimes committed in the Srebrenica ‘safe area’ in July 1995. Dean Manning's reports provide a summary of the forensic evidence regarding the execution points and mass graves. The Trial Chamber finds these reports to be highly relevant to the case and admissible under Rule 89 and its Guidelines on the Standards Governing the Admission of Evidence. The Defence will have the opportunity to cross-examine Richard Butler and Dean Manning during their testimony before the Trial Chamber.”¹⁷⁸

¹⁷⁴ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [38], fn 95-102.

¹⁷⁵ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [466].

¹⁷⁶ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [513].

¹⁷⁷ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) fn 1314.

¹⁷⁸ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [30].

79. Applying paragraph 27 of the Judgment, the Trial Chamber must have assessed the weight and testimony of each of Manning and Wright based off of factors such as their professional competence, methodologies used and credibility of their findings in light of the factors and in light of other evidence before the Trial Chamber.¹⁷⁹ This was not carried out explicitly by the Trial Chamber but is said to have occurred when determining the weight to be placed on those expert's reports.
80. Richard Wright's evidence was accepted under both Rule 94 *bis* and 92 *bis*. Accordingly, Mr Wright was not required to be cross-examined. The Trial Chamber took the following factors into account in determining its admission.

“The Accused do not object to the admission of the statements and transcript testimony of John Clark, William Haglund, Christopher Lawrence, Richard Wright and José Pablo Baraybar submitted pursuant to 94 *bis* and 92 *bis* (D). This expert evidence deals with exhumations of mass graves and forensic examination to determine the gender, age and cause of death of the exhumed people from these mass graves. The Trial Chamber is satisfied of the relevance and probative value of these reports and transcripts to these proceedings. The Trial Chamber is further satisfied that none of the information contained in the statements or transcripts dealing with forensic evidence relates to the acts and conduct of the accused as charged in the Indictment. It further finds that the transcript testimonies presented to the Trial Chamber pursuant to 92 *bis* (D) provides together with the reports submitted under Rule 94 *bis* a complete picture of the expert evidence.”¹⁸⁰

81. In admitting evidence under Rule 92 *bis* the Trial Chamber stated:
“Both the Prosecution and Defence made applications under Rule 92 *bis*, which permits parties to tender evidence of a witness through means other than *viva voce* testimony. The Trial Chamber permitted the Parties to tender certified written statements or former testimony of witnesses under Rule 92 *bis* in lieu of live testimony.”¹⁸¹

“In evaluating the evidence given *viva voce*, the Trial Chamber has considered the demeanour, conduct and character (as far as possible) of the witnesses, and their knowledge of the facts upon which they gave evidence. It has also given due regard to the individual circumstances of a witness, including testifying with the status of ‘suspect’, and testifying with protective measures. The Trial Chamber has considered the internal consistency of each witness's testimony and other features of their evidence, as well as whether corroborating evidence exists in the trial record. Recalling that the evidence presented in this case relates to events that occurred nine years ago, the Trial Chamber endorses the conclusion of the *Krnjelac* Trial Chamber such that it did not treat minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness had nevertheless recounted the essence of the incident charged in acceptable detail. [...] Although the absence of a detailed memory on the part of these witnesses did make the task of the Prosecution more difficult, the lack of detail in relation to peripheral matters was in general not regarded as necessarily discrediting their evidence.

However, in cases of repeated contradictions within a witness's testimony, the Trial

¹⁷⁹ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [27].

¹⁸⁰ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [35].

¹⁸¹ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [22].

Chamber has disregarded his or her evidence unless it is sufficiently corroborated.”¹⁸²

82. Again, this evaluation by the Trial Chamber did not take part explicitly once the evidence was admitted.
83. **Records of VRS radio communications** – The Trial Chamber admitted the evidence of the intercepts marked P170 to P317 and the annotated index of intercepts marked P347 (and gave it the corresponding exhibit number), admitted the translated parts of the exhibits P121B and P122B (and gave them corresponding exhibit numbers) and rejected the admission of the handwritten intercept notebooks and untranslated parts of exhibits P121B and P122.¹⁸³
84. The Trial Chamber did not explain which intercepts they believed had probative value in light of the trial record as a whole but did use a number of intercepts throughout the Trial Judgment.
85. **The transcript of the testimony of the OTP analyst from the *Krstić* Trial** – The transcript was admitted but it is unclear exactly how the Court used the transcript once it was admitted. The Trial Chamber did note:
“During the Prosecution’s case, the Jokić Defence questioned the validity and reliability of the intercept evidence. The Trial Chamber has found that the intercept evidence is relevant to the case at hand, as it relates directly in time and in place to the events alleged in the Indictment, and that the evidence has probative value within the meaning of Rule 89(C) of the Rules. The Trial Chamber is convinced that the intercept-related evidence admitted is a reliable source of information. The probative value of this evidence will be considered in light of the trial record as a whole.”¹⁸⁴
86. It is likely the testimony surrounding the reliability of the intercept evidence was used by the Court to determine its reliability. This was certainly a factor in the intercepts admission and use during the *Krstić* trial.¹⁸⁵
87. **Military analyst, Mr Butler’s report from the *Krstić* Trial which incorporated the intercept evidence**
88. The Court’s reasoning in respect of Mr Butler’s evidence was identical to Mr Manning’s which is outlined above. Both expert’s reports were admitted, and they were subject to cross examination.

General Legal Submissions on DDE

89. The Trial Chamber dedicated a portion of their judgement to general considerations regarding the evaluation of evidence.¹⁸⁶ Much of these considerations pertain directly to the DDE used in the trial. For instance, despite being expert evidence much of the findings

¹⁸² *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [23].

¹⁸³ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [30].

¹⁸⁴ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [30].

¹⁸⁵ *Prosecutor v Krstić* (Judgement) IT-98-33 (2 August 2001) (TC) [114].

¹⁸⁶ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [17-31].

made by Mr Butler in his report could be classified as hearsay evidence as it is evidence created from looking at reports or intercept material and not within his first-hand knowledge of events.

“As reflected in the Rules, there is a preference for witnesses to give evidence orally. In addition to direct evidence, the Trial Chamber has admitted hearsay and circumstantial evidence. Hearsay evidence is evidence of facts not within the testifying witness’ own knowledge. In evaluating the probative value of hearsay evidence, the Trial Chamber has carefully considered indicia of its reliability and, for this purpose, it has evaluated whether the statement was “voluntary, truthful and trustworthy” and has considered the content of the evidence and the circumstances under which it arose. Circumstantial evidence is evidence of circumstances surrounding an event or offence from which a fact at issue may be reasonably inferred. In some instances, the Trial Chamber has relied upon circumstantial evidence in order to determine whether or not a certain conclusion could be drawn. The Trial Chamber follows the Appeals Chamber when considering that “[s]uch a conclusion must be established beyond reasonable doubt. [...] [It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is [as] consistent with the [innocence of an accused as] with his or her guilt], he or she must be acquitted.”¹⁸⁷

“The Trial Chamber has evaluated and considered the agreed facts and documentary evidence from the Krstić Trial Judgement, which were admitted into evidence in this case on 19 December 2003. The Trial Chamber decided to accept the agreed facts and documents under Rule 65 ter(H) of the Rules, and not to take judicial notice of them under Rule 94(B) of the Rules. Agreed facts and documents were subjected, as all other evidence, “to the tests of relevance, probative value and reliability,” according to Rule 89 of the Rules.”¹⁸⁸¹⁸⁹

90. Concerning authenticity of documents (which would include the intercepted recordings logs) the Trial Chamber stated:

“In order to assess the authenticity of documents, the Trial Chamber considered evidence as to the source and chain of custody. The Trial Chamber did not consider unsigned, undated or unstamped documents, *a priori*, to be void of authenticity. Even when the Trial Chamber was satisfied of the authenticity of a particular document, it did not automatically accept the statements contained therein to be an accurate portrayal of the facts. The Trial Chamber evaluated this evidence within the context of the trial record as a whole.”¹⁹⁰

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

91. Rule 92 *bis* –

(A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal,

¹⁸⁷ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [21].

¹⁸⁸ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [28].

¹⁸⁹ See for a further example: *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) para 17

¹⁹⁰ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [29].

in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

i) Factors in favour of admitting evidence in the form of a written statement or transcript include, but are not limited to, circumstances in which the evidence:

a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;

b) related to a relevant historical, political or military background;

(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;

(d) concerns the impact of crimes upon victims;

(e) relates to issues of the character of the accused; or

(f) relates to factors to be taken into account in determining sentence.

(ii) Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether:

(a) there is an overriding public interest in the evidence in question being presented orally;

(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or

(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

(B) If the Trial Chamber decides to dispense with the attendance of a witness, a written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and

(i) the declaration is witnessed by:

(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or

(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and

(ii) the person witnessing the declaration verifies in writing:

(a) that the person making the statement is the person identified in the said statement; (b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;

(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and

(d) the date and place of the declaration. The declaration shall be attached to the written statement presented to the Trial Chamber.

(C) The Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination; if it does so decide, the provisions of Rule 92 ter shall apply.

(D) A Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused.

92. Rule 89 [specifically (C), (D) and (F)]

(A) A Chamber shall apply the rules of evidence set forth in this Section and shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

93. Rule 70 (B)

(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin

94. Rule 94 *bis*

(A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge.

(B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:

(i) it accepts the expert witness statement and/or report; or

(ii) it wishes to cross-examine the expert witness; and

(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.

95. Rule 65 *bis* (H)

(H) The pre-trial Judge shall record the points of agreement and disagreement on matters of law and fact. In this connection, he or she may order the parties to file written submissions with either the pre-trial Judge or the Trial Chamber.

96. Rule 95

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Application of Rules of Evidence

97. Rule 70 was likely applied in respect of the aerial images and prevented the Defence from asking specific question regarding their provenance.¹⁹¹

98. Rule 92 *bis* was applied in respect of the ex-OTP analyst who worked on the Intercept Project (Ms Frease) and ultimately allowed her testimony to be admitted and used by the Trial Chamber without the witness being called. This was despite both accused counsel objecting to the evidence. Cross-examination was not allowed as neither accused raised any objection that had not previously been raised at first instance in *Krstić* and which the counsel in that trial had not already cross-examined on.¹⁹²

99. Dean Manning and Richard Butlers evidence regarding respectively the forensic evidence of graves and their locations and the military chain of command and logistics of command were both admitted under Rule 92 *bis*. Both were called to be cross-examined. Before accepting their evidence, the Trial Chamber was satisfied as to their qualifications as expert, their reports probative value and relevance. Cross-examination was required because they were both giving live evidence and, in any event, their reports were highly relevant to the case and Rule 89 suggested cross examination should occur.¹⁹³

100. The records of VRS radio communications were found to be relevant under Rule 89(C) as they related directly in time to the events alleged in the Indictment and concern alleged communications between the VRS chain of command.¹⁹⁴ Under Rule 92 *bis* (D) The Trial Chamber already had three intercept operators from the *Krstić* cases evidence before them and heard from six during the trial.¹⁹⁵ The Trial Chamber noted they gave virtually identical version of how they went about their tasks and took into account their training and how much experience they had by the time they carried out the relevant intercepts.¹⁹⁶ While the Trial Chamber found that all records that the Prosecution sought to admit were relevant it held that those that had not been interpreted into English (in circumstances when those relied upon by the Prosecution had) their probative value was limited and therefore ruled they should be admitted.¹⁹⁷ A similar ruling was made regarding the handwritten intercept notebooks and handwritten intercept transcripts; only those translated were deemed to have probative value and admitted.¹⁹⁸ This ruling is consistent with Rule 89 due to lack of probative value the Chamber did not believe admission was required.

¹⁹¹ *Prosecutor v Blagojević and Jokić* (Transcript) IT-02060-T (5 February 2004) (TC) 7225.

¹⁹² *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [34].

¹⁹³ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [30].

¹⁹⁴ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [19].

¹⁹⁵ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [21].

¹⁹⁶ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [22].

¹⁹⁷ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [27].

¹⁹⁸ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [29].

101. The Trial Chamber applied Rule 94 *bis* and determined D. Manning was a live witness, whose report was highly relevant to the case, compiled with Rule 89 of its Guidelines on the Standards Governing the Admission of Evidence and the Defence would be able to cross examine. Once satisfied that the authors of all reports were qualified as experts¹⁹⁹, that there was probative value in the evidence, and it was relevant and the evidence assisted in providing a complete picture the evidence of experts was admitted including the aerial images attached or used in their reports.

102. The Court applied Rule 89(B) and assessed evidence in such a way as to best favour a fair determination of the case.²⁰⁰

103. Rule 89(C) was taken into consideration (allowing admission of any evidence deemed of probative value) but the Trial Chamber remained mindful that it was a joint trial of two accused and the charges were considered against each Accused in light of the entire record including all evidence from the Prosecution and each Defendant.²⁰¹

104. The Trial Chamber noted the preference for oral evidence from witnesses (in Rule 89(F)) and noted it had admitted direct evidence but also admitted hearsay and circumstantial evidence. The Trial Chamber considered the indicia of reliability and for that purpose evaluated whether statements were voluntary, truthful and trustworthy, and has considered the content of the evidence and the circumstances under which it arose. Where the Trial Chamber relied on circumstantial evidence in order to determine whether or not a certain conclusion could be drawn the Trial Chamber considered that if it must be beyond reasonable doubt it must be the *only* reasonable conclusion available. If another conclusion was open consistent with the accused's innocence, then they must be acquitted.²⁰²

105. The Prosecution and Defence made applications under Rule 92 *bis* which allows parties to tender evidence in written form rather than oral. The Trial Chamber permitted the Parties to tender certified written statements or former testimony of witnesses under Rule 92 *bis* in lieu of live testimony.²⁰³

106. In evaluating evidence that was given live in Court, the Trial Chamber has considered the demeanour, conduct and character (as far as possible) of the witness, and their knowledge of the facts upon which they gave evidence. The Trial Chamber considered the internal consistency of each witnesses' testimony and other features of their evidence as well as whether it was corroborated with other evidence on the trial record. The Trial Chamber noted that 9 years had elapsed since the events that the Trial related to had occurred and therefore minor discrepancies in evidence between various witnesses or between evidence of a particular witness and previous statement of that witness were not viewed as discrediting evidence where the witness nevertheless recounted the essence of the incident in acceptable detail. The Court noted absence of detailed memory on the part of these witnesses did make the Prosecution's task more difficult but lack of detail into peripheral matters was generally not regarded as discrediting evidence. However, repeated

¹⁹⁹ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [29].

²⁰⁰ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [17].

²⁰¹ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [20].

²⁰² *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [21].

²⁰³ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [22].

contradictions in witnesses, the Trial Chamber disregarded the evidence unless it was sufficiently corroborated.²⁰⁴

107. As outlined previously above (under Court's reasoning's), prior to admission of the DDE under Rule 92 *bis* the Trial Chamber ensured each witness statement or transcript did not go to acts and conduct of the Accused; was relevant to the present case; had probative value under Rule 89(C) of the Rule and was cumulative in nature. The Trial Chamber further decided whether it was necessary to call each witness for cross, examination taking into consideration *inter alia* that the evidence admitted pursuant to Rule 92 *bis*(D) had already been subjected to cross-examination and question in a former proceeding before the Tribunal (i.e., *Krstić*). The Trial Chamber noted the *Galić* Appeals Chamber decision that where the witness who made the statement is not called to give the accused an adequate and proper opportunity to challenge the statement and to question that witness, the evidence which the statements contains may lead to a conviction only if there is other evidence which corroborates the statement", and reminded the Parties that "other evidence" will be necessary to corroborate evidence put forward by a single Rule 92 *bis* witness who was not called for cross-examination in order to lead to a conviction on that charge in the Indictment. Such evidence can include other witnesses' testimony, documentary evidence or video evidence.

108. The Trial chamber evaluated and considered the agreed facts and documentary evidence from the *Krstić* Trial Judgement which were admitted in the previous case. The Trial Chamber ultimately decided to accept the agreed facts and documents under Rule 65 *ter*(H) of the Rules, and not to take judicial notice of them under Rule 94(B) of the Rules. Agreed facts and documents were subject, as all other evidence, to the tests of relevance, probative value and reliability as per Rule 89 of the Rules.²⁰⁵

109. In order to assess the authenticity, the Trial Chamber considered evidence as to the source and its chain of custody. The Trial Chamber did not consider unsigned, undated or unstamped documents, *a priori* to be void of authenticity. Even where the Trial Chamber was satisfied of the authenticity of a document it does not automatically accept the statement contained within it to be an accurate portrayal of facts. The Trial Chamber evaluated evidence within the context of the trial record as a whole.²⁰⁶

110. The Trial Chamber noted that the Jokić Defence questioned the validity and reliability of the intercept evidence. The Trial Chamber ruled this evidence was relevant to the case at hand as it related direct in time and place to the events alleged in the Indictment and the evidence has probative value within the meaning of Rule 89(C) of the Rules. The Trial Chamber was convinced the intercept related evidence was a reliable source of information and its probative value was considered in light of the trial record as a whole.²⁰⁷

²⁰⁴ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [23].

²⁰⁵ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [28].

²⁰⁶ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [29].

²⁰⁷ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [30].

V. EXTRAPOLATIONS

111. Some courts have provisions that enable the admission of transcript that has been admitted in previous cases/situations that have gone before the court, provided that evidence goes to proof of a matter besides the acts and conduct of the accused. (See Rule 92 *bis* D)

112. Where the court has provisions such as the one outlined above, the court may on admitting the testimony of a previous witness also allow the admission of exhibits from the previous case that were admitted during the former testimony. This may be despite no explicit provision allowing this, provided the related exhibits form an inseparable and indispensable part of the testimony.²⁰⁸

113. There is a distinction between admissibility of documentary evidence and the weight that is attributed to the admitted documentary evidence under the principle of free evaluation of evidence. This means admission of evidence does not mean the information contained therein is necessarily an accurate portrayal of facts.²⁰⁹

114. Reliability of evidence is important to its admission because if evidence is not reliable it cannot have probative value or be relevant to the case. Therefore, unreliable evidence should be excluded. When determining reliability of evidence, the court examines all indicia of that evidence if this is a statement it includes aspects such as truthfulness, voluntariness and trustworthiness of the evidence. The determination of reliability also considers the circumstances in which the evidence arose and its contents.²¹⁰

115. Probative value is evidence that tends to prove or disprove an issue. Relevance and probative value have a relationship, in that if evidence is relevant it must have some probative value.²¹¹

116. A court on examining the relevance and probative value of evidence sought to be admitted may decide to exclude it on balance with the need to ensure a fair trial. This can take place even after evidence was previously admitted.²¹²

117. Where an objection is made to evidences' authenticity the court may decide to admit the evidence at that moment in time and later decide on the weight to be given to that evidence within the trial's context as a whole.²¹³

²⁰⁸ *Prosecutor v Blagojević and Jokić* (First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*) IT-02060-T (2 June 2003) (TC) [30].

²⁰⁹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [13].

²¹⁰ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [15].

²¹¹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [17].

²¹² *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [16].

²¹³ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [18].

118. Whether materials are relevant will depend on factors such as whether they relate directly in time to when the indictment alleges events unfolded and whether they concern matters related to the indictment charges such as command responsibility.²¹⁴

119. To establish the authenticity and reliability of intercepted radio communications, the Trial Chamber may require testimonial evidence from those who took part in its collation, collection and transcription.²¹⁵

120. The appropriate test to be applied to expert testimony reports is Rule 94 *bis*, as it is applicable *lex specialis* (as opposed to Rule 92 *bis* for *lex generalis*).²¹⁶

121. One factor that may go towards establishing the reliability and authenticity of the evidence is where the witnesses all give virtually identical description of the procedures, they use including evidence the task is taken seriously and that the witnesses are aware of the necessity of the task's precision.²¹⁷ Where a procedure is adopted showing that accuracy is critical and speculation not accepted, this will factor in favour of the evidence's reliability.²¹⁸

122. The experience of those who carry out procedures of transcription, interception and logging of intercepted radio communications may factor in the court's reasoning as to the reliability of the evidence.²¹⁹

123. Intercept evidence is more likely to be deemed reliable by a Court when it can be authenticated, cross checked and corroborated through internal means such as multiple operators intercepting the same message.²²⁰

124. Where there is a large amount of documentary and testimony evidence concerning the process of collection of intercept evidence and its collation and cross-checking before a court, there is no requirement that the original audio be placed before the court for its admission.²²¹

125. A court can admit past testimony of an expert witness from a previous case where it is satisfied of the relevance and probative value of that evidence to the current proceedings.²²² Where a court allows expert testimony from a previous case to be admitted and the accused's counsel wish to cross-examine that expert, the court must determine whether they will allow such cross-examination. In making a decision on this question the

²¹⁴ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [19].

²¹⁵ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [21].

²¹⁶ *Prosecutor v Blagojević and Jokić* ([Decision on Prosecution's Motions for admission of expert statements](#)) IT-02-60-T (7 November 2003) (TC I) [28].

²¹⁷ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [21].

²¹⁸ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [23].

²¹⁹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [22].

²²⁰ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [24].

²²¹ *Prosecutor v Blagojević and Jokić* (Decision on the admission into evidence of intercept-related materials) IT-02-60-T (18 December 2003) (TC I) [25].

²²² *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [34].

court should assess whether the testimony goes to a critical element of the prosecution's case against the accused and whether the cross-examination of the witness in the previous case dealt adequately with the issues relevant to the defence in the current proceedings.²²³ Where the defence do not identify any issues concerning the accuracy, authenticity and reliability regarding the subject of the testimony which were not previously addressed during the examination, cross-examination and questioning of the previous case this will factor against calling that witness to testify.²²⁴

126. Exhibits admitted during former testimony are admissible alongside the former testimony pursuant to Rule 92 bis (D) as the exhibits form an inseparable and indispensable part of the testimony.²²⁵

127. In assessing the probative value of an expert's evidence, a court should consider the professional competence of the expert, their methodologies used and the credibility of their findings in light of those factors and other evidence accepted by the court.²²⁶

128. Multiple aerial and satellite imagery exhibits tendered together should be submitted with an index.²²⁷

VI. CITATIONS

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²²³ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [34].

²²⁴ *Prosecutor v Blagojević and Jokić* (Decision on Prosecution's Motions for admission of expert statements) IT-02-60-T (7 November 2003) (TC I) [34].

²²⁵ *Prosecutor v Blagojević and Jokić* (First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 bis) IT-02-60-T (12 June 2003) (TC I) [30].

²²⁶ *Prosecutor v Blagojević and Jokić* (Judgment) IT-02-60-T (17 January 2005) (TC I) [27].

²²⁷ *Prosecutor v Blagojević and Jokić* (First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 bis) IT-02-60-T (12 June 2003) (TC I) [32].

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https://www.icty.org/x/cases/blagojevic_jokic/ind/en/bla-aji030526e.pdf;

Prosecutor v Blagojević and Jokić (Srebrenica Trial Video (Subtitles Transcript)) IT-02-60-T (19 May 2003)
<http://icr.icty.org/LegalRef/CMSDocStore/Public/English/Exhibit/NotIndexable/IT-02-60%23/ACE18694R0000102425.TIF>;

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Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07)

I. CASE DETAILS

- **Case name:** *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07)
- **Tribunal/Court:** International Criminal Court (“ICC”)
- **Offence charged:** Both defendants were charged with crimes allegedly committed during an attack against the Bogoro village in the DRC on 24 February 2003. The Prosecution submitted new materials which were obtained in the course of the investigation conducted during the mission to Bogoro or based upon the materials obtained during the mission. The mission took place six years after the crimes were allegedly committed. On this basis, the Defence challenged the admission of this evidence.
 - **Katanga:**
 - One count of crime against humanity (murder) (Article 7(1)(a));
 - Four counts of war crimes: murder (Article 8(2)(a)(i)); attacking a civilian population (Article 8(2)(b)(i)); destruction of property (Article 8(2)(b)(xiii)); and pillaging (Article 8(2)(b)(xvi)).
 - **Chui:**
 - Three crimes against humanity: murder (Article 7(1)(a)); sexual slavery and rape (Article 7(1)(g));
 - Seven war crimes: using children under the age of 15 to take active part in hostilities (Article 8(2)(b)(xxvi)); deliberately directing an attack on a civilian population as such or against individual civilians or against individual civilians not taking direct part in hostilities (Article 8(2)(b)(i)); willful killing (Article 8(2)(a)(i)); destruction of property 8(2)(b)(xiii); pillaging (Article 8(2)(b)(xvi)); sexual slavery and rape (Article 8(2)(b)(xxii)).
- **Stage of the proceedings:** Katanga was convicted at trial (no pending appeals); Chui was acquitted at trial (verdict upheld on appeal).
- **Keywords:** Probative value, Fair trial rights, Late disclosure, Transcripts, Translation, Originality, Integrity, Relevance

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. **Videos**
 - a. **DRC-OTP-0116-0002, DRC-OTP-0124-0008, DRC-OTP-0036-0194, DRC-OTP-0124-0014** - in a category that comprised five videos, obtained from MONUC, the Congolese Ministry of Human Rights and a private individual.¹

¹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the Prosecutor’s Bar Table Motions) ICC-01/04- 01/07-2635 (17 December 2010) (TC II) [6].

- b. **DRC-OTP-0080-0011** - video recorded in late March 2003 showing a meeting at Bunia airport.² The origin was not discussed.
- c. **DRC-OTP-0087-0014, DRC-OTP-0080-0006, DRC-OTP-0082-0004, DRC-OTP-0081-0006** - specific information on what the videos depict was redacted;³ five excerpts were selected and brought by the Prosecution for admission; four excerpts “do not directly relate to the attack on Bogoro on 24 February 2003” but “are relevant to the alleged existence of an armed conflict and the political and military situations in the Ituri district in the first half of 2003”.⁴ The origin was not discussed. The annexes with further information were confidential.⁵
- d. **DRC-OTP-0127-0065** - an excerpt “allegedly shows a reconciliation meeting of the Commission de Pacification de l’Ituri attended by representatives of the United Nations Mission in DR Congo (“MONUC”) and representatives of different politico-military factions.”⁶ Brought by the Prosecution. Origin was not discussed.⁷
- e. **DRC-OTP-0083-0002, DRC-OTP-1017-1482, DRC-OTP-0113-0218, DRC-OTP-0080-0010, DRC-OTP-0081-0004, DRC-OTP-0127-0061, DRC-OTP-0081-0007, DRC-OTP-1018-0145, DRC-OTP-0035-076, DRC-OTP-0120-0294, DRC-OTP-0081-0009, DRC-OTP-0151-0665, DRC-OTP-0081-0012, DRC-OTP-0081-0011, DRC-OTP-0155-0004** - no information found on the content of these videos.⁸ Brought by the Prosecution. Origins were not discussed.⁹
- f. **DRC-OTP-1039-0019, DRC-OTP-1039-0021** - A video showing footage of the crime scene investigation by the ballistic experts and the log of this video (Request 1305).¹⁰
- g. **DRC-OTP-1039-0002, 0006, 0010, 0014, 0025 and 0032** – Six videos, recorded during the site visit of the “Institut de Bogoro”, showing the exhumation and

² *Prosecutor v Katanga* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-Teng (7 March 2014) (TC II) [674], fn 1555.

³ *Prosecutor v Katanga and Ngudjolo Chui* (Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts) ICC-01/04-01/07-2289-Corr-Red (27 August 2010) (TC II) [18].

⁴ *Prosecutor v Katanga and Ngudjolo Chui* (Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts) ICC-01/04-01/07-2289-Corr-Red (27 August 2010) (TC II) [18].

⁵ *Prosecutor v Katanga and Ngudjolo Chui* (Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts) ICC-01/04-01/07-2289-Corr-Red (27 August 2010) (TC II) [18], fn 70.

⁶ *Prosecutor v Katanga and Ngudjolo Chui* (Corrigendum, Decision on Request to admit prior recorded testimony of P-30 as well as related video excerpts) ICC-01/04-01/07-2233-Corr (15 July 2010) (TC II) [14].

⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Corrigendum, Decision on Request to admit prior recorded testimony of P-30 as well as related video excerpts) ICC-01/04-01/07-2233-Corr (15 July 2010) (TC II) [14].

⁸ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07 (27 July 2009) (TC II) 16.

⁹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07 (27 July 2009) (TC II) 16.

¹⁰ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

examination of human remains and video log for each of these videos (Annex J to Request 1401).¹¹

- h. **DRC-OTP-0087-0014, DRC-OTP-0080-0006, DRC-OTP-0082-0004, DRC-OTP-0081-0006** – Brought by the Prosecution. Origin was not discussed. The annexes with further information were confidential.¹²

2. Photographs

- a. Over 200 photographs, taken by the visual expert and by drone, which were used for the production of the visual presentation (Annex G to Request 1305).¹³ Obtained by the Prosecution in the course of the forensic expert mission to the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009.¹⁴
- b. **DRC-OTP-1041-0135; DRC-OTP-1041-0161; DRC-OTP-1041-0208; DRC-OTP-1041-0205; DRC-OTP-1041-0209; DRC-OTP-1041-0227 and DRC-OTP-1041-0217** – Seven photographs of human remains (Request 1305).¹⁵ Obtained by the Prosecution in the course of the forensic expert mission to the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009.¹⁶
- c. **DRC-OTP-1044-0506 to 0520** - 15 photographs of the forensic examination of the “Institut de Bogoro” (Request 1345).¹⁷ Obtained by the Prosecution in the course of the forensic expert mission to the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009.¹⁸
- d. **DRC-OTP-1037-0014, 0018, 0025, 0050, 0060 and 0065** - Six aerial photographs of the “Institut de Bogoro” and immediate surrounding area

¹¹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

¹² *Prosecutor v Katanga and Ngudjolo Chui* (Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts) ICC-01/04-01/07-2289-Corr-Red (27 August 2010) (TC II) [18], fn 70.

¹³ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

¹⁴ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

¹⁵ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

¹⁶ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

¹⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

¹⁸ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

- (Request 1401).¹⁹ Obtained by the Prosecution in the course of the forensic expert mission to the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009.²⁰
- e. 162 photographs of the exhumation and human remains, which are used by the experts in their report (Annex C to Request 1401).²¹
 - f. **DRC-OTP-1040-340 and 343 and DRC-OTP-1046-0317 and 0392** - Four photographs of the contents of two of the sealed containers (Request 1401).²²
 - g. 395 photographs that were taken of the exhumation and autopsy (Annex N to request 1401).²³ Obtained by the Prosecution in the course of the forensic expert mission to the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009.²⁴
 - h. **DRC-OTP-1046-0113 to 0127** – 15 photographs relevant for the ballistic report (Request 1401).²⁵ Obtained by the Prosecution in the course of the forensic expert mission to the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009.²⁶
 - i. 101 photographs depicting the exhumation by the experts and the subsequent inhumation of the remains (Annex B to Request 1456).²⁷ Obtained by the Prosecution in the course of the forensic expert mission to the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009.²⁸
 - j. **DRC-OTP-1039-0019, DRC-OTP-1039-0021** – Obtained by the Prosecution in the course of the forensic expert mission to the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009.²⁹

¹⁹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

²⁰ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) 6 [2].

²¹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

²² *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

²³ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

²⁴ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) 7 [2].

²⁵ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

²⁶ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) 7 [2].

²⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

²⁸ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) 7 [2].

²⁹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) 5 [2].

- k. **DRC-OTP-1039-0002, 0006, 0010, 0014, 0025 and 0032** – Obtained by the Prosecution in the course of the forensic expert mission to the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009.³⁰
 - l. **162 photographs** – Obtained by the Prosecution in the course of the forensic expert mission to the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009.³¹
 - m. **395 photographs** – Obtained by the Prosecution in the course of the forensic expert mission to the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009.³²
3. Visual Aids
- a. DRC-OTP-1044-0099 – A digital 360° visual representation of the “Institut de Bogoro” (Request 1305).³³ Obtained by the Prosecution in the course of the forensic expert mission to the ‘Institut de Bogoro’ on 28, 29 and 31 March 2009.³⁴ The Trial Chamber II authorised the Prosecution to disclose the visual representation of the “Institut de Bogoro” and add it to its List of Incriminating Evidence; it ordered the Prosecution to communicate the expert reports and the related items of evidence as Rule 77 material.³⁵

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

Videos

Belated disclosure of transcripts and translations of 25 videos

- 4. The Prosecution sought permission to add the 25 transcripts and 14 translations to its List [of Incriminating Evidence] pursuant to Regulation 35 of the Regulations of the

³⁰ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) 7 [2].

³¹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) 6 [2].

³² *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) 7 [2].

³³ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [2].

³⁴ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) 4 [2].

³⁵ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) 38.

Court after the deadline for disclosure of all incriminating evidence.³⁶ The Prosecution argued that several reasons “establish good cause within the meaning of Regulation 35(2) of the Regulations of the Court, to permit the addition of the 25 transcripts and 14 translations to the Prosecution’s List.”³⁷

5. The Prosecution applied for such permission “as it was not possible to finalise these transcripts and translations earlier because of the length of time required to undertake such a task”.³⁸ It noted that “the time necessary to translate one hour of video fluctuates significantly according to scenes and language, but on average amounts to 10 days.”³⁹
6. It added that “although these transcripts and translations are not yet disclosed, the actual videos were disclosed as incriminating evidence prior to 30 January 2009 (at least seven months prior to the commencement of the Trial)”⁴⁰ and that, “[a]ccordingly, the Defence has been well positioned to prepare its defence on the basis of the video footage already provided”.⁴¹
7. It also added that “[i]f the current request is granted by the Chamber, the Defence will have access to the 25 transcripts and 14 translations in a timely manner, i.e. approximately three months prior to the commencement of the Trial.”⁴²
8. Request for redactions in transcript and translation of video DRC-OTP-0155-0004: “Should the Chamber grant the current request to present as incriminating evidence the 25 transcripts and 14 translations, the Prosecution requests that it be authorized to make redactions to the transcript and translation of video DRC-OTP-0155-0004 that correspond to the protective measures set out in paragraph 18”.⁴³ The protective

³⁶ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [7].

³⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [11].

³⁸ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [7].

³⁹ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [7], fn 10.

⁴⁰ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [8].

⁴¹ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [8].

⁴² *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [9].

⁴³ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [19].

measures sought and obtained when disclosing video DRC-OTP-0155-0004 to the Defence were various voice distortions and the redaction of a name.⁴⁴

9. “The Prosecution submits that such redactions will be necessary to ensure the continued effectiveness of the protective measures applied to video DRC-OTP-0155-0004”.⁴⁵
10. Request for additional disclosure of new incriminating video evidence DRC-OTP-1042-0006: The Prosecution sought to add video DRC-OTP-1042-0006 to its List of Incriminating Evidence after the deadline for disclosure.⁴⁶
11. “The Prosecution determined that the video footage within it mostly overlaps with video DRC-OTP-0155-0004 [previously disclosed as incriminating evidence]”⁴⁷ but is of “superior video and audio quality” and contains “limited, but relevant, additional footage contained within it.”⁴⁸
12. It argued that several “reasons establish good cause within the meaning of Regulation 35(2) of the Regulations to add video DRC-OTP-1042-0006 on the Prosecution’s List of Incriminating Evidence,”⁴⁹ such as: “the Defence will not suffer prejudice from the addition of video DRC-OTP-1042-0006 to the Prosecution’s List, since much of the footage in video DRC-OTP-1042-0006 is contained in video DRC-OTP- 0155-0004”; “[i]f this application is granted, Defence will receive video DRC-OTP- 1042-0006 three months in advance of the Trial”; and “video DRC-OTP-1042-0006 also includes footage with the accused Mathieu Ngudjolo Chui.”⁵⁰

⁴⁴ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [18].

⁴⁵ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [19].

⁴⁶ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [14].

⁴⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [13].

⁴⁸ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [14].

⁴⁹ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [16].

⁵⁰ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [15].

13. “The Prosecution proposes to interview Witness 444 during the week of 20 July 2009 to authenticate video DRC-OTP-1042-0006 and obtain certain clarifications regarding its contents.”⁵¹
14. Videos DRC-OTP-1039-0019, DRC-OTP-1039-0021: The Prosecution submitted that, “the addition [of these videos] is useful and justified: they are objective material elements relating to the use of firearms during the attack on Bogoro; they participate in the revelation of the truth in the present case.”⁵²
15. Request for late disclosure of evidence including videos (DRC-OTP-1039-0002, 0006, 0010, 0014, 0025 and 0032): “The Prosecutor asked permission for late disclosure of evidence including videos, arguing that the documents are relatively short, and the Defence will have sufficient time to prepare response.”⁵³
16. Defence's arguments: With regard to the belated disclosure of transcripts and translations of 25 videos, no reasoning was given as to why the Defence did not object. The Defence stated “The Prosecution has not indicated in its filings when it started the transcription and translation of the videos. The Defence, which has had some experience translating documents (there is no general translation facility provided to the Defence) is sceptical of footnote 10 [i.e. the time necessary to translate one hour of video on average amounts to 10 days] [...] Even if these times are accurate the Prosecution must have been aware of the facilities available to it after so many years.”⁵⁴
17. The Defence submitted that “[the current Prosecution’s request concerns too many documents and is too late”⁵⁵, and furthermore that “ the Prosecution should have anticipated the amount of work required by the transcripts and translations of videos and organised its resources in consequence in order to respect the imperative deadlines

⁵¹ *Prosecutor v Katanga and Ngudjolo Chui* (Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) [17].

⁵² *Prosecutor v Katanga and Ngudjolo Chui* (Mémoire de l’Accusation, en application de la norme 35, aux fins de divulgation d’éléments à charge ou relevant de la règle 77, de modification de la liste des éléments à charge et de la liste des témoins à charge) ICC-01/04-01/07-1305 (15 July 2009) (TC II) [32].

⁵³ *Prosecutor v Katanga and Ngudjolo Chui* (Mémoire de l’Accusation, en application de la norme 35, aux fins de divulgation d’éléments à charge ou relevant de la règle 77, et de modification de la liste des éléments à charge et de la liste des témoins à charge) ICC-01/04-01/07-1401 (18 August 2009) (TC II) [30].

⁵⁴ *Prosecutor v Katanga and Ngudjolo Chui* (Defence Objections to the Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)) ICC-01/04-01/07-1284 (9 July 2009) (TC II) [11].

⁵⁵ *Prosecutor v Katanga and Ngudjolo Chui* (Defence Objections to the Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)) ICC-01/04-01/07-1284 (9 July 2009) (TC II) [13].

set in the Chamber's Order [...] and in the Decisions on the disclosure of the Table of Incriminating Evidence".⁵⁶

18. "The Prosecution's Application does not demonstrate good cause but, instead, reveals that the Prosecution has not displayed enough diligence."⁵⁷
19. Request for redactions in transcript and translation of video DRC-OTP-0155-0004: The Defence did not oppose any arguments.
20. Request for additional disclosure of new incriminating video evidence DRC-OTP-1042-0006; "The Defence [...] objects to the inclusion in the List of Incriminating Evidence of the 'newly received' video DRC-OTP-1042-0006 because it is proposed to submit it after the initial deadline for the disclosure of incriminating material and because of its limited relevance."⁵⁸
21. "[The Prosecution] has already disclosed a video, DRC-OTP-0155-0004, which includes most parts of this new video DRC-OTP-1042- 0006."⁵⁹
22. "Besides, the Prosecution would like to interview the witness, W-444, who has provided it with the new video, to authenticate it and obtain certain clarification regarding its contents, which would lead to the disclosure of further material (transcript and eventual translation of this interview) to the Defence."⁶⁰ Defence for Mr Katanga – no objections.
23. Defence for Mr Ngudjolo argued that the Prosecution should not invoke simple problems of coordination of agendas or logistical obstacles to extract itself from its responsibilities under Article 54 of the Statute and accused the Prosecution of a lack of diligence. It furthermore argued that, since the mission took place in March 2009,

⁵⁶ *Prosecutor v Katanga and Ngudjolo Chui* (Defence Objections to the Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)) ICC-01/04-01/07-1284 (9 July 2009) (TC II) [14].

⁵⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Defence Objections to the Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)) ICC-01/04-01/07-1284 (9 July 2009) (TC II) [15].

⁵⁸ *Prosecutor v Katanga and Ngudjolo Chui* (Defence Objections to the Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)) ICC-01/04-01/07-1284 (9 July 2009) (TC II) [16].

⁵⁹ *Prosecutor v Katanga and Ngudjolo Chui* (Defence Objections to the Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)) ICC-01/04-01/07-1284 (9 July 2009) (TC II) [16].

⁶⁰ *Prosecutor v Katanga and Ngudjolo Chui* (Defence Objections to the Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)) ICC-01/04-01/07-1284 (9 July 2009) (TC II) [16].

the Prosecution could easily have applied to the Chamber for an extension of time limit at that point. The Defence was furthermore concerned about the possible alteration and loss of evidence. Six years had passed between the alleged facts and the expert mission, which the Defence argued raises questions about the late stage in which the Prosecution decided to carry out such important investigations.⁶¹

Photographs

24. Prosecution's arguments with respect to DRC-OTP-1041-0135; DRC-OTP-1041-0161; DRC-OTP-1041-0208; DRC-OTP-1041-0205; DRC-OTP-1041-0209; DRC-OTP-1041-0227 and DRC-OTP-1041-0217 – Seven photographs of human remains (Request 1305): Submitted alongside the Videos DRC-OTP-1039-0019 and DRC-OTP-1039-0021, the Prosecution submitted the same reasoning that: The addition is useful and justified: they are objective material elements relating to the use of firearms during the attack on Bogoro; they participate in the revelation of the truth in the present case.⁶²
25. With regard to the over 200 photographs, taken by the visual expert and by drone, which were used for the production of the visual presentation (Annex G to Request 1305): Despite their number, the photos do not present any difficulty in interpretation and were taken on a single site. In addition, many shots of the drone are duplicates in low definition with additional details such as the time when the corresponding shot in high definition was taken. The Prosecution considered that the disclosure of such photographs did not prejudice the Defence.⁶³
26. With regard to DRC-OTP-1044-0506 to 0520 - 15 photographs of the forensic examination of the “Institut de Bogoro” (Request 1345): The addition of the photographs is useful and justified. These are physical evidence relating to the murders committed in the attack on Bogoro; it assists in establishing the truth in the present case.⁶⁴

⁶¹ *Prosecutor v Katanga and Ngudjolo Chui* (Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1305) ICC-01/04-01/07-1317 (17 July 2009) (TC II) [17]-[24].

⁶² *Prosecutor v Katanga and Ngudjolo Chui* (Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, de modification de la liste des éléments à charge et de la liste des témoins à charge) ICC-01/04-01/07-1305 (15 July 2009) (TC II) [32].

⁶³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, de modification de la liste des éléments à charge et de la liste des témoins à charge) ICC-01/04-01/07-1305 (15 July 2009) (TC II) [43].

⁶⁴ *Prosecutor v Katanga and Ngudjolo Chui* (Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge et de modification de la liste des éléments à charge) ICC-01/04-01/07-1345 (30 July 2009) (TC II) [18].

27. Request 1401: The Prosecutor asked permission for late disclosure of the evidence, arguing that the documents are relatively short, and the Defence will have sufficient time to prepare its response.⁶⁵
28. In particular, with regard to DRC-OTP-1046-0113 to 0127 (15 photos relevant for the ballistic report), the Prosecution submitted that the quality of the 15 photo originals seemed better than that of the “prints” of the same photographs inserted in the ballistics report, and the use of better-quality snapshots at a hearing contributes to better direction or unfolding of the debates.⁶⁶
29. With regard to 101 photographs depicting the exhumation by the experts and the subsequent inhumation of the remains (Annex B to Request 1456): The Prosecution submitted that late disclosure would not prejudice the Defence. The production of these documents should have been made with request 1401 of 18 August 2009. The Prosecution did not have these photographs in its possession on that date.⁶⁷
30. Defence's arguments with respect to DRC-OTP-1041-0135; DRC-OTP-1041-0161; DRC-OTP-1041-0208; DRC-OTP-1041-0205; DRC-OTP-1041-0209; DRC-OTP-1041-0227 and DRC-OTP-1041-0217 – Seven photographs of human remains (Request 1305): The Defence for Mr. Katanga did not raise any objection to the addition to the List of Evidence of the material in question.⁶⁸
31. The Defence of Mr. Ngudjolo questioned seven photos of human remains in Prosecution's Request 1305; in particular, these photos did not form part of the ballistic report, and it was not clear for the Defence whether they could be included separately.⁶⁹ The Court did not respond to this query.
32. There were over 200 photographs, taken by the visual expert and by drone, which were used for the production of the visual presentation (Annex G to Request 1305) but there is no discussion of their legal considerations.
33. DRC-OTP-1044-0506 to 0520 – 15 photographs of the forensic examination of the “Institut de Bogoro” (Request 1345).

⁶⁵ *Prosecutor v Katanga and Ngudjolo Chui* (Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, et de modification de la liste des éléments à charge et de la liste des témoins à charge) ICC-01/04-01/07-1401 (18 August 2009) (TC II) [30].

⁶⁶ *Prosecutor v Katanga and Ngudjolo Chui* (Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, et de modification de la liste des éléments à charge et de la liste des témoins à charge) ICC-01/04-01/07-1401 (18 August 2009) (TC II) [44].

⁶⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Addendum et corrigendum à certaines Requêtes de l'Accusation déposées en application de la norme 35 aux fins de dépôt d'expertises) ICC-01/04-01/07-1456 (4 September 2009) (TC II) [6].

⁶⁸ *Prosecutor v Katanga and Ngudjolo Chui* (Defence Response to the Prosecution Requests to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1305 and 1345)) ICC-01/04-01/07-1352 (5 August 2009) (TC II) [5].

⁶⁹ *Prosecutor v Katanga and Ngudjolo Chui* (Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1305)) ICC-01/04-01/07-1317 (17 July 2009) (TC II) [5].

34. The Defence for Mr. Katanga did not object to the addition of the photographs to the List of Incriminating Evidence of the items to which Request 1345 pertained.⁷⁰ However, Mr Katanga's Defence reserved its position as regards their admissibility as evidence for the following reasons: the mission where the evidence was obtained took place many years after the event, and the Prosecution could have conducted it earlier; the eventual prejudicial character of the evidence resulting from this mission; the short time left for the preparation of the Defence.⁷¹
35. The Defence for Mr Ngudjolo similarly questioned the credibility that may be attached to material that was collected six years after the alleged facts.⁷² The Defence also challenged the validity of the Prosecution's justification for not having been able to conduct the examination of the site earlier.⁷³
36. Request 1401: the Defence for Mr Katanga had no objections. The Defence for Mr Ngudjolo: the Prosecution should not invoke simple problems of coordination of agendas or logistical obstacles to extract itself from its responsibilities under Article 54 of the Statute and accused the Prosecution of a lack of diligence; since the mission took place in March 2009, the Prosecution could easily have applied to the Chamber for an extension of time limit at that point; the Defence was concerned about the possible alteration and loss of evidence, given that six years have passed between the alleged facts and the expert mission and raises questions about the late stage in which the Prosecution decided to carry out such important investigations.⁷⁴
37. With regard to 101 photographs depicting the exhumation by the experts and the subsequent inhumation of the remains (Annex B to Request 1456): The Defence for Mr Katanga had no objections. No information was available from the responses of the Defence.

Visual Aid

38. According to the Prosecution, adding the presentation as a whole and the report to the list of charges is useful and relevant: it will allow the Chamber, the parties and the

⁷⁰ *Prosecutor v Katanga and Ngudjolo Chui* (Defence Response to the Prosecution Requests to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1345 and 1360)) ICC-01/04-01/07-1406 (19 August 2009) (TC II).

⁷¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Defence Response to the Prosecution Requests to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1305 and 1345)) ICC-01/04-01/07-1352 (5 August 2009) (TC II) [7].

⁷² *Prosecutor v Katanga and Ngudjolo Chui* (Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1345) ICC-01/04-01/07-1355 (7 August 2009) (TC II) [13].

⁷³ *Prosecutor v Germain Katanga and Ngudjolo Chui* (Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1345) ICC-01/04-01/07-1355 (7 August 2009) (TC II) [14]-[17].

⁷⁴ *Prosecutor v Katanga and Ngudjolo Chui* (Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1305)) ICC-01/04-01/07-1317 (17 July 2009) (TC II) [17]-[24].

participants to visualize the places described by witnesses during the proceedings to come.⁷⁵

39. The Defence for Mr. Katanga did not raise any objection to the addition to the List of Evidence of the material in question.⁷⁶

Was the DDE admitted and/or relied upon?

Videos

40. **Belated disclosure of transcripts and translations of 25 videos.** The Court allowed the late submission of transcripts and translations of the videos.⁷⁷ By ruling this way, it reaffirmed the prosecution.
41. Even though [the length of time required to produce the 25 transcripts and translations] is certainly a reasonable and understandable explanation for why the transcripts and translations could not be disclosed earlier, the Court must ascertain whether it is a ‘reason outside of his or her control’, as required by regulation 35(2) of the Regulations.⁷⁸
42. The Chamber notes “the reality is that this Court, like any other judicial institution, has to operate with finite means, which, in this case, may translate into a limited capacity of the Prosecution for generating transcripts and translations. The Chamber therefore considers that in absence of any specific indications, the Defence’s allegation that the delay in producing the transcripts and translations is due to a lack of sufficient diligence on the part of the Prosecution, is unfounded.”⁷⁹
43. “However, the Chamber notes with concern that the Prosecution seems to invoke the fact that transcribing and translating video material is a very labour intensive process and its resources are limited, as a justification for not complying with its obligations under the statutory framework of the Court, as well as for missing deadlines imposed by the Chamber. The Chamber stresses in this regard that a persistent lack of resources can never be an excuse for not complying with legal obligations or not respecting deadlines, much less for ignoring the rights of the Defence to have adequate time for

⁷⁵ *Prosecutor v Katanga and Ngudjolo Chui* (Mémoire de l’Accusation, en application de la norme 35, aux fins de divulgation d’éléments à charge ou relevant de la règle 77, de modification de la liste des éléments à charge et de la liste des témoins à charge) ICC-01/04-01/07-1305 (15 July 2009) (TC II) [22].

⁷⁶ *Prosecutor v Katanga and Ngudjolo Chui* (Defence Response to the Prosecution Requests to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1305 and 1345)) ICC-01/04-01/07-1352 (5 August 2009) (TC II) [5].

⁷⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [15].

⁷⁸ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [5].

⁷⁹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [5].

preparation and to be tried without undue delay. In this context, the chamber refers to the well-established jurisprudence of the European Court of Human Rights to the effect that excessive workload or lack of necessary means is no justification for violating the right to be tried without undue delay.”⁸⁰

44. However, the Court held that “the exception of regulation 35(2) (last sentence) is only available in case the applicant can show the existence of “exceptional circumstances”, such as incapacitating illness, to demonstrate that there is a “reason outside his/her control.” [...] [T]he fact that transcribing and translating video material is especially time consuming, cannot be considered as an ‘exceptional circumstance’”.⁸¹
45. “Although limited resources and labour-intensiveness are clearly not ‘exceptional circumstances’ in the sense of regulation 35(2) (last sentence), the Chamber considers that they may constitute a ‘good cause’ in the sense of regulation 35(2) (first sentence). However, no mention of forthcoming transcripts or translations was made in the relevant disclosure notes. The disclosure notes did not even indicate clearly that such transcripts and translations were still missing and forthcoming.”⁸²
46. The Court considered that “a video is only disclosed to the Defence from the moment it can fully understand what its precise content is [...] [I]n most cases, it will only be possible for the Defence to fully understand the contents of a video after:
- a. the relevant persons appearing in the recording have, to the extent possible, been identified;
 - b. the location(s) of the recording has or have been indicated as precisely as possible;
 - c. the date and time of the recording has been indicated as precisely as possible; and
 - d. the audible spoken words and visible written texts have, to the extent that they are relevant to the evidence, been translated into one of the working languages of the Court.”⁸³
47. “The Chamber accepts that there are several ways in which the Prosecution can provide this information to the parties and the Chamber. For example, the videos could have sub-titles or spoken commentary. In the present case, the Prosecution

⁸⁰ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [6].

⁸¹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [7].

⁸² *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [8].

⁸³ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [11].

chose to rely on transcripts and the translation thereof in order to comply with its disclosure obligations.”⁸⁴

48. “The Chamber is of the view that the transcripts and translations form an integral part of the video and must for that reason be considered as constituting one and the same piece of evidence – when one is missing, the evidence is not complete. Therefore, until the transcript and the necessary translations into one of the working languages of the Court have been provided to the Defence, the Prosecution has not complied with its disclosure obligations and its obligations under regulation 39(1) of the Regulations.”⁸⁵
49. However, the Defence teams do not seem to object to the continued reliance of the Prosecution on the 25 videos.⁸⁶ Therefore, the Chamber is in a position “where it is requested to reject the submission of the transcripts and translations as being unjustifiably late, while the videos would still remain on the List of Incriminating Evidence. Given that the Chamber needs the transcripts and translations in order to understand the original videos, it considers that it has a proper interest in receiving the transcripts and translations and therefore allows their submission.”⁸⁷
50. **Request for redactions in transcript and translation of video DRC-OTP-0155-0004.** The Court allowed for the redactions of the transcript and redaction of the video translation.⁸⁸ By ruling this way, it reaffirmed the prosecution.
51. The Court considered that “this request [apply the same protective measures with regard to the transcript and translation of the video as it was authorized to apply to the video itself] is a logical consequence of the protective measures it authorized with regard to video DRC-OTP-0155-0004.”⁸⁹

⁸⁴ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [12].

⁸⁵ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [13].

⁸⁶ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [14].

⁸⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [15].

⁸⁸ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [18].

⁸⁹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [18].

52. It held that “a video, its transcript and translation must be seen as forming integral parts of the same item of evidence. It would therefore be incoherent to impose restrictions on one, but not the other”.⁹⁰
53. **Request for additional disclosure of new incriminating video evidence DRC-OTP-1042-0006.** The Court allowed the late disclosure of the passages of the video that overlap with the video that was already disclosed⁹¹ but did not admit the additional material contained in the video.⁹² It thus only partially reaffirmed the prosecution in ruling this way.
54. The Chamber examined video DRC-OTP-1042-0006 and agreed that it is of better audio-visual quality than video DRC-OTP-0155-0004.⁹³ It considered that it would “be to the benefit of all parties and the Chamber itself if the video material is of better quality.”⁹⁴
55. The Chamber pointed out that for the purpose of regulation 35 (2), in order to justify an extension after the lapse of a time limit the party requesting late submission must establish that it was “unable to file the application within the time for reasons outside [its] control”. This condition entails ‘exceptional circumstances. It does not suffice that common day-to-day working methods did not allow earlier compliance with the time limit.’⁹⁵
56. However, it did not admit the additional material contained in video DRC-OTP-1042-0006 as the fact that the Prosecution did not obtain video DRC-OTP-1042-0006 until 8 June 2009 “was mainly a consequence of the Prosecution's continuing investigation [...]”.⁹⁶

⁹⁰ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [18].

⁹¹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [20].

⁹² *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) 16.

⁹³ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [20].

⁹⁴ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [20].

⁹⁵ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [24].

⁹⁶ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [25].

57. Additionally, the Chamber recalls that the Prosecution said it was prepared to disclose all incriminating evidence by 30 January 2009. Thus, “the Chamber was entitled to infer from this that ... the Prosecution had all evidence it needed in order to present its case”.⁹⁷
58. If the Prosecution seeks to disclose newly discovered incriminating evidence after the applicable time, it is not enough to argue that the evidence is new.⁹⁸ It must be shown that “the new evidence is more compelling than evidence already disclosed to the Defence, or that it brings to light previously unknown facts which have a significant bearing upon the case”.⁹⁹
59. In the present case, the Prosecution did not provide a transcript and translation of video DRC-OTP-1041-0006.¹⁰⁰ Under such circumstances, “the Chamber is not in a position to evaluate whether the new evidence ... is either more compelling than previously disclosed evidence or brings to light a significant new fact”¹⁰¹ and thus rejects the submission.
60. **Request for late disclosure of evidence including videos (Request 1305, 1435, 1360 and 1401).** The Chamber rejected the application for extension of the time limit. The Chamber, using its authority under Articles 64(3)(c) and (6)(d) and Article 69(3), allowed for its late submission as it “deem[ed] this necessary for the determination of the truth and as long as this d[id] not jeopardise the Defence’s right to have adequate time in order to prepare.”¹⁰² By ruling this way, it reaffirmed the Prosecution.
61. The parties must, to the extent possible, keep the Chamber informed of ongoing or planned fact-finding missions, before the expiration of the deadline, when it is reasonable to think that they might lead to a request for additional disclosure after the set time limit, based on regulation 35 of the Regulations.¹⁰³

⁹⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [25].

⁹⁸ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [30].

⁹⁹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [30].

¹⁰⁰ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [31].

¹⁰¹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [32].

¹⁰² *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [26].

¹⁰³ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [27].

62. When a party knows that it will not be able to meet a set time limit, but still intends to obtain the material in order to present it at a later stage, it must, for the reasons outlined above, file a formal application under regulation 35(2) before the deadline.¹⁰⁴
63. Additionally, the Defence of Mr. Ngudjolo had questioned seven photos of human remains in Prosecution's Request 1305¹⁰⁴⁶ The Court did not respond to this query.

General comments on videos, films, photographs and audio recordings:

64. "Before video or audio material can be admitted, the Chamber will require evidence of originality and integrity. However, once this has been established, this type of exhibit may often be admitted as evidence "that speaks for itself and may be regarded, in this respect, as real evidence. Since the relevance of audio or video material depends on the date and/or location of recording, evidence must be provided in this regard."¹⁰⁵

Photographs

65. **Request for late disclosure of evidence including photographs (Request 1305, 1435, 1360 and 1401)** The Chamber rejected the application for extension of the time limit. The Chamber, using its authority under Articles 64(3)(c) and (6)(d) and Article 69(3), allowed for its late submission as it "deem[ed] this necessary for the determination of the truth and as long as this d[id] not jeopardise the Defence's right to have adequate time in order to prepare."¹⁰⁶ By ruling this way, it reaffirmed the Prosecution.
66. As with videos, the parties must, to the extent possible, keep the Chamber informed of ongoing or planned fact-finding missions, before the expiration of the deadline, when it is reasonable to think that they might lead to a request for additional disclosure after the set time limit, based on regulation 35 of the Regulations.¹⁰⁷
67. When a party knows that it will not be able to meet a set time limit, but still intends to obtain the material in order to present it at a later stage, it must, for the reasons outlined above, file a formal application under regulation 35(2) before the deadline.¹⁰⁸

¹⁰⁴ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [33].

¹⁰⁵ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the Prosecutor's Bar Table Motions) ICC-01/04-01/07 (17 December 2010) (TC II) [24].

¹⁰⁶ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [26].

¹⁰⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [27].

¹⁰⁸ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [33].

68. **Over 200 photographs, taken by the visual expert and by drone, which were used for the production of the visual presentation (Annex G to Request 1305)**
69. The Defences' right to have adequate time and facilities to prepare is not in any way jeopardised by the late submission of the photographs that formed the graphical material with which the visual representation was produced.¹⁰⁹
70. The Chamber authorised the late disclosure of the visual representation for which the photographs were used.¹¹⁰ By ruling this way, it reaffirmed the Prosecution.

Visual Aid

71. The Court allowed the late admission of the visual aid.¹¹¹ By ruling this way, it reaffirmed the Prosecution. It held that it may assist the Chamber and the parties in visualising the “Institut” and its surroundings. The material in itself is not incriminating and has very limited evidentiary value. It is simply a tool for orientation, just like a diagram or drawing.¹¹² The Defences' right to have adequate time and facilities to prepare is not in any way jeopardised by the late submission.¹¹³

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

72. Regulation 35(2) of the Court regulations: “The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.”
73. Regulation 39(1) of the Court regulations: “All documents and materials filed with the Registry shall be in English or French, unless otherwise provided in the Statute, Rules, these Regulations or authorised by the Chamber or the Presidency. If the original

¹⁰⁹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [40].

¹¹⁰ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) 38.

¹¹¹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [38].

¹¹² *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [39].

¹¹³ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [40].

document or material is not in one of these languages, a participant shall attach a translation thereof.”

74. Regulation 44 of the Court regulations:

“1. The Registrar shall create and maintain a list of experts accessible at all times to all organs of the Court and to all participants. Experts shall be included on such a list following an appropriate indication of expertise in the relevant field. A person may seek review by the Presidency of a negative decision of the Registrar.

2. The Chamber may direct the joint instruction of an expert by the participants.

3. On receipt of the report prepared by an expert jointly instructed, a participant may apply to the Chamber for leave to instruct a further expert.

4. The Chamber may proprio motu instruct an expert.

5. The Chamber may issue any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, the manner in which their evidence is to be presented and the time limits for the preparation and notification of their report.”

75. Article 64(3) Rome Statute: “Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

(a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;

(b) Determine the language or languages to be used at trial; and

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.”

76. Article 67(1)(b) Rome Statute: “In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence.”

V. EXTRAPOLATIONS

Videos

77. A video is only disclosed to the Defence from the moment it can fully understand what its precise content is.¹¹⁴

¹¹⁴ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) 5 [9].

78. A video, its transcript and translation must be seen as forming integral parts of the same item of evidence.¹¹⁵ Thus, in the case of restrictions, it would be incoherent to impose them on one but not the other.¹¹⁶
79. Until the transcript and the necessary translations into one of the working languages of the Court have been provided to the Defence, the Prosecution has not complied with its disclosure obligations and its obligations under regulation 39(1) of the Regulations.¹¹⁷
80. Labour-intensiveness of transcribing and translating video material is not an “exceptional circumstance” in the sense of regulation 35(2) (last sentence) but may constitute a “good cause” in the sense of regulation 35(2) (first sentence).¹¹⁸
81. The interest of the Chamber in receiving the transcripts and translations after the deadline in order to understand the original videos may outweigh their late submission.¹¹⁹
82. A video may be disclosed after the original deadline, to substitute passages that overlap with a previously disclosed video, if it is of superior quality. However, the Court may not admit the material that does not overlap if the party does not justify its late disclosure under Regulation 35(2) of the Court Regulations.¹²⁰
83. Evidence of “originality and integrity” must be provided before a video can be admitted into evidence.¹²¹

¹¹⁵ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) 9 [13].

¹¹⁶ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) 10 [18].

¹¹⁷ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) 9 [13].

¹¹⁸ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) 6-7 [7]-[8].

¹¹⁹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) 10 [15].

¹²⁰ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”) ICC-01/04-01/07-1336 (27 July 2009) (TC II) 11-12 [20], [25].

¹²¹ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the Prosecutor’s Bar Table Motions) ICC-01/04-01/07-2635 (17 December 2010) (TC II) 19 [24].

84. Evidence must be provided regarding the date and/or location of audio or video material, as their relevance depends on it.¹²²

Visual Aid

85. A digital 360° visual representation can assist the court in understanding the circumstances in which the crime occurred; however, as a piece of evidence it has almost no probative value¹²³¹²⁴

General

86. Generally speaking, material which is publicly available from an open source (e.g. internet or public libraries) will only require the tendering party to provide verifiable information about where the item can be obtained to be deemed admissible. If the item of evidence is no longer publicly available at the time it is tendered, the party should clearly indicate this and provide the date and location from which it was obtained.¹²⁵

VI. CITATIONS

Prosecutor v. Katanga and Ngudjolo Chui (Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions) ICC-01/04-01/07-1260 (30 June 2009) (TC II) https://www.icc-cpi.int/CourtRecords/CR2009_04877.PDF;

Prosecutor v Katanga and Ngudjolo Chui (Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, de modification de la liste des éléments à charge et de la liste des témoins à charge) ICC-01/04-01/07-1305, Tr. Ch. II (15 July 2009) (TC II) https://www.icc-cpi.int/CourtRecords/CR2009_05162.PDF;

Prosecutor v Katanga and Ngudjolo Chui (Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge et de modification de la liste des éléments à charge) ICC-01/04-01/07-1345 (30 July 2009) (TC II) https://www.icc-cpi.int/CourtRecords/CR2009_05397.PDF;

Prosecutor v Katanga and Ngudjolo Chui (Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, et de modification de la liste des

¹²² *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the Prosecutor's Bar Table Motions) ICC-01/04-01/07-2635 (17 December 2010) (TC II) 19 [24].

¹²⁴ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) [40]. For similar findings of the Court with regard to visual representations, see *Prosecutor v Ongwen* (Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016) ICC-02/04-01/15 (18 May 2016) (TC IX) [8].

¹²⁵ *Prosecutor v Katanga and Ngudjolo Chui* (Decision on the Prosecutor's Bar Table Motions) ICC-01/04-01/07 (17 December 2010) (TC II) [24].

éléments à charge et de la liste des témoins à charge) ICC-01/04-01/07-1401 (18 August 2009) (TC II) https://www.icc-cpi.int/CourtRecords/CR2009_05716.PDF;

Prosecutor v Katanga and Ngudjolo Chui (Addendum et corrigendum à certaines Requêtes de l'Accusation déposées en application de la norme 35 aux fins de dépôt d'expertises) ICC-01/04-01/07-1456 (4 September 2009) (TC II) https://www.icc-cpi.int/CourtRecords/CR2009_06349.PDF

Prosecutor v Katanga and Ngudjolo Chui (Prosecution's application for leave to appeal Trial Chamber II's "Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412, and 1456)) ICC-01/04-01/07-1527 (13 October 2009) (TC II) https://www.icc-cpi.int/CourtRecords/CR2009_07332.PDF;

Prosecutor v Katanga and Ngudjolo Chui (Defence Objections to the Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)) ICC-01/04-01/07-1284 (9 July 2009) (TC II) https://www.icc-cpi.int/CourtRecords/CR2009_05017.PDF.

Prosecutor v Katanga and Ngudjolo Chui (Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1305)) ICC-01/04-01/07-1317 (17 July 2009) https://www.icc-cpi.int/CourtRecords/CR2009_05237.PDF;

Prosecutor v Katanga and Ngudjolo Chui (Defence Response to the Prosecution Requests to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1305 and 1345)) ICC-01/04-01/07-1352 (5 August 2009) (TC II) https://www.icc-cpi.int/CourtRecords/CR2009_05444.PDF;

Prosecutor v Katanga and Ngudjolo Chui (Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1345) ICC-01/04-01/07-1355 (7 August 2009) (TC II) https://www.icc-cpi.int/CourtRecords/CR2009_05467.PDF.

Prosecutor v Katanga and Ngudjolo Chui (Defence Response to the Prosecution Requests to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1345 and 1360)) ICC-01/04-01/07-1406 (19 August 2009) (TC II) https://www.icc-cpi.int/CourtRecords/CR2009_05750.PDF

Prosecutor v Germain Katanga and Ngudjolo Chui (Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)") ICC-01/04-01/07-1336 (27 July 2009) (TC II) <https://www.legal-tools.org/doc/97c7e8/pdf/>.

Prosecutor v Katanga and Ngudjolo Chui (Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456)) ICC-01/04-01/07-1515 (7 October 2009) (TC II) https://www.icc-cpi.int/CourtRecords/CR2009_07212.PDF;

Prosecutor v Katanga and Ngudjolo Chui (Corrigendum, Decision on Request to admit prior recorded testimony of P-30 as well as related video excerpts) ICC-01/04-01/07-2233-Corr (15 July 2010) (TC II) https://www.icc-cpi.int/CourtRecords/CR2010_04907.PDF.

Prosecutor v Katanga and Ngudjolo Chui (Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts) ICC-01/04-01/07-2289-Corr-Red (27 August 2010) (TC II) https://www.icc-cpi.int/CourtRecords/CR2010_05766.PDF .

Prosecutor v Katanga and Ngudjolo Chui (Decision on the Prosecutor's Bar Table Motions) ICC-01/04-01/07-2635 (17 December 2010) (TC II) https://www.icc-cpi.int/CourtRecords/CR2010_11294.PDF.

Prosecutor v Katanga (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07-3436-tENG (7 March 2014) (TC II) https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF.

Prosecutor v Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera (ICTR-98-44)

I. CASE DETAILS

- **Case name:** *Prosecutor v Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera* (ICTR-98-44-T)
- **Tribunal/Court:** International Criminal Tribunal for Rwanda (“ICTR”)
- **Offence charged:**
Mr Karemera and Mr Ngirumpatse – guilty:
 - Count 1: of Conspiracy to Commit Genocide;
 - Count 2: of Direct and Public Incitement to Commit Genocide;
 - Count 3: of Genocide;
 - Count 4: of Complicity in Genocide;
 - Count 5: of Crimes Against Humanity (Rape);
 - Count 6: of Crimes Against Humanity (Extermination);
 - Count 7: of Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II (Killing and Causing Violence to Health & Well-Being)Proceedings against Joseph Nzirorera terminated, accused died during trial;
- **Stage of the proceedings:** Trial
- **Keywords:** Authenticity, Chain of Custody, Relevance, Probative value, Authentication

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. ANNEX A (documents that were originally part of the Prosecution’s exhibit bundle prepared at the beginning of the trial in September 2005):
 - a. **Tab 122** – a photograph on ONATRACOM bus;¹
 - b. **Tabs 234, 236** – videos (Tab 234 – a video, where, at one point, the prime minister appears with Joseph Nzirorera);²
 - c. **Tabs 129, 140, 143, 145 and 146** – photographs;³

¹ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [22].

² *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [22], [26].

³ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [23].

- d. **Tabs 151, 152, 153, 154, 157, 158, 160, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 175, 180, 181, 182, 184, 187, 191, 196 and 197** – *Radio Télévision Libre des Mille Collines* (“RTLTM”) and/or Radio Rwanda broadcasts;⁴
 - e. **Tabs 227, 238 and 239** – audio/video materials constituting contemporaneous recording of events;⁵
 - f. **Tab 276** - a transcript of a video by the RTLTM of a speech delivered by Édouard Karemera in October 1993;⁶
2. ANNEX B (additional documents from the Prosecution that were originally intended to form part of the proposed testimony of Investigator Baghel Upendra, whose testimony was excluded):
 3. **Tab 8** – RTLTM radio broadcast tapes.⁷
 4. All evidence was introduced by the Prosecutor.
 5. The following information is available with regard to certain Tabs:
 - a. **Tabs 122, 234** (photo and video) – the origin is not clear;⁸
 - b. **Tabs 227, 238 and 239** (audio/video materials) – obtained by the Prosecutor from BBC, Insight News Television Limited and France 3;⁹
 - c. **Tabs 140, 143, 145 and 146** (photographs) – were taken in 2005 by an Office of the Prosecutor (“OTP”) intern;¹⁰
 - d. **Tabs 151, 152, 153, 154, 157, 158, 160, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 175, 180, 181, 182, 184, 187, 191, 196 and 197** (radio broadcasts) – some of these materials were issued by the Rwandan Ministry of Information;¹¹

⁴ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [33].

⁵ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [35].

⁶ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [39].

⁷ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [43].

⁸ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [22].

⁹ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [35].

¹⁰ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [24].

¹¹ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [33].

- e. **Tab 8** (ANNEX B, RTLTM radio broadcast tapes) – originated from the OTP.¹²
6. With regard to the other Tabs, no information is available with regard to their origin (see also the Table below).

III. COURT ANALYSIS & LEGAL ARGUMENTS

7. The Prosecution based considerations on the admissibility under Rule 89C of the Rules of Procedure and Evidence.¹³ The Prosecution argued that this rule allowed a moving party to admit documents without the need to call a witness to testify to their origin and truth, as on their face value the documents can speak for themselves, subject to authenticity. It was because that rule existed that a decision had been taken on Monday 18 November 2007 in the presence of the Chamber, with agreement by the Defence and encouraged by the Chamber, that it would not be necessary to take up court time in calling Investigator Upendra Baghel to speak for the documents.¹⁴
8. On the authenticity of the particular materials, the Prosecution argued the following:
 - a. With regard to **Tabs 227, 234, 236, 238** (videos): This material originated from various TV production companies and was *prima facie* authentic on viewing. It arguably amounted to a species of real evidence recording events as they occurred: it provided a snapshot of how things looked on the ground. Insofar as there may be commentary by journalists, the judges of the Chamber were invited to disregard its content where necessary;¹⁵
 - b. With regard to **Tabs 151, 152, 153, 154, 157, 158, 160, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 175, 180, 181, 182, 184, 187, 191, 196, 197, 276** (radio broadcasts): There has never been any challenge to the authenticity of the radio broadcast material during the case of *Karemera et al.*: copious amounts of disclosed schedules exist to show the receipt of this material from various reliable sources and/or its use in other trials, and a glance at the transcripts suggests it is plainly *prima facie* authentic;¹⁶

¹² *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [43].

¹³ According to Rule 89(C), 'A Chamber may admit any relevant evidence which it deems to have probative value'. Rule 89(C), ICTY Rules of Procedure and Evidence.

¹⁴ *Prosecutor v Karemera et al* (Prosecutor's Motion for Admission of Certain Materials Under Rule 89(C) of the Rules of Procedure and Evidence) ICTR-98-44-T (26 November 2007) (TC III) [7].

¹⁵ *Prosecutor v Karemera et al* (Prosecutor's Motion for Admission of Certain Materials Under Rule 89(C) of the Rules of Procedure and Evidence) ICTR-98-44-T (26 November 2007) (TC III) [14].

¹⁶ *Prosecutor v Karemera et al* (Prosecutor's Motion for Admission of Certain Materials Under Rule 89(C) of the Rules of Procedure and Evidence) ICTR-98-44-T (26 November 2007) (TC III) [28].

- c. With regard to **Tabs 129, 140, 143, 145 and 146** (photos): This material was created by ICTR investigators and is *prima facie* authentic;¹⁷
 - d. With regard to **Tabs 122, 163 and Tab 8 (Annex B), A151, A152, A154, A157, A196, A197, A276** (photos and radio broadcasts): The admission of these materials in other trials suggests they are *prima facie* authentic.¹⁸
9. The relevance of each document was described in the Table attached to the Prosecutor's Motion for Admission of Certain Materials.¹⁹
10. The Defence of Ngirumpatse contested the interpretation of Rule 89(C) suggested by the Prosecutor. In particular, they stressed that since the Chamber would not go through a witness who could be examined or cross-examined (as per agreement between the parties), a particular caution should be exercised in the application of the Rule.²⁰ The Defence argued that the Prosecution presented an interpretation of the documents (which it sought to admit), which was far from being objective.²¹
11. In relation to particular documents, the Defence of Ngirumpatse argued the following:
- a. With regard to **Tabs 227, 234, 236, 238** (videos): The Prosecutor wanted to admit several videos and reports from various origins. Aware that journalists' comments could not be admitted into evidence, the Prosecutor requested the Chamber to disregard them. However, when it comes to videos, it is not just about ignoring the comments. It should also be observed that a report also supposes a choice of images and montages which can present information in a completely different way from reality. In these circumstances, the Chamber was asked to reject these videos;²²
 - b. With regard to **Tabs 151, 152, 153, 154, 157, 158, 160, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 175, 180, 181, 182, 184, 187, 191, 196, 197, 276** (radio broadcasts): in general the Defence did not contest the broadcasts. However, the Prosecutor's argument that the documents were self-authenticating could not be sustained as the defendants did not have an opportunity so far to present their views on these broadcasts;²³

¹⁷ *Prosecutor v Karemera et al* (Prosecutor's Motion for Admission of Certain Materials Under Rule 89(C) of the Rules of Procedure and Evidence) ICTR-98-44-T (26 November 2007) (TC III) [30].

¹⁸ *Prosecutor v Karemera et al* (Prosecutor's Motion for Admission of Certain Materials Under Rule 89(C) of the Rules of Procedure and Evidence) ICTR-98-44-T (26 November 2007) (TC III) [33].

¹⁹ Annexes to *Prosecutor v Karemera et al* (Prosecutor's Motion for Admission of Certain Materials Under Rule 89(C) of the Rules of Procedure and Evidence) ICTR-98-44-T (26 November 2007) (TC III); available at <https://jrad.irmct.org/view.htm?r=225172&s=>

²⁰ *Prosecutor v Karemera et al* (Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table) ICTR-98-44-T (3 December 2007) (TC III) [5].

²¹ *Prosecutor v Karemera et al* (Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table) ICTR-98-44-T (3 December 2007) (TC III) [6].

²² *Prosecutor v Karemera et al* (Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table) ICTR-98-44-T (3 December 2007) (TC III) [8].

²³ *Prosecutor v Karemera et al* (Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table) ICTR-98-44-T (3 December 2007) (TC III) [21].

- c. With regard to **Tabs 129, 140, 143, 145 and 146** (photos): the authenticity of the photos was not contested. However, their relevance to the Chamber was questioned. These photos were largely related to the period after 1994 and could be used to reconstruct the situation in question. No probative value could therefore be attributed to them in the absence of a witness able to put them in context;²⁴
 - d. With regard to **Tabs 122, 163 and Tab 8 (Annex B), A151, A152, A154, A157, A196, A197, A276** (photos and radio broadcasts): The admission of the same documents into other trials at the ICTR, if it is a relevant element in helping to conclude that it is authentic, does not, however, prejudge its probative value and even less its relevance for the present case.²⁵
12. The summary of the objections is presented in the Table in Annex to Ngirumpatse's Defence reply.²⁶
13. The Defence of Karemera based their objections on the authenticity of the documents (no source provided) or, where the source was provided, considered them unreliable.²⁷ The admissibility of documentary evidence presupposed the identification of its source to verify its authenticity and accuracy.²⁸ In particular:
- a. With regard to **Tab 122**: The source of the document was not indicated;²⁹
 - b. With regard to **Tab 140, 143, 145, 146**: Photos were taken 11 years after the events of April 1994. These photos cannot therefore present an objective picture of what happened back then;³⁰
 - c. With regard to **Tabs 151, 197**: The source of the document is not clear;³¹
 - d. With regard to **Tabs 227, 234, 236**: No source was indicated for this evidence;³²
 - e. With regard to **Tab 238**: No indication of the source;³³
 - f. With regard to **Tab 239**: No indication of the source. The documents were seized; however, the search and seizure reports were not produced;³⁴

²⁴ *Prosecutor v Karemera et al* (Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table) ICTR-98-44-T (3 December 2007) (TC III) [23].

²⁵ *Prosecutor v Karemera et al* (Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table) ICTR-98-44-T (3 December 2007) (TC III) [27].

²⁶ *Prosecutor v Karemera et al* (Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table) ICTR-98-44-T (3 December 2007) (TC III); available at <https://jrad.irmct.org/view.htm?r=225204&s=>

²⁷ *Prosecutor v Karemera et al* (Réponse à la Requête du Procureur tendant à faire admettre certains documents en preuve sous le régime de l'Article 89(C)) ICTR-98-44-T (4 December 2007) (TC III) 2.

²⁸ *Prosecutor v Karemera et al* (Réponse à la Requête du Procureur tendant à faire admettre certains documents en preuve sous le régime de l'Article 89(C)) ICTR-98-44-T (4 December 2007) (TC III) 5.

²⁹ *Prosecutor v Karemera et al* (Réponse à la Requête du Procureur tendant à faire admettre certains documents en preuve sous le régime de l'Article 89(C)) ICTR-98-44-T (4 December 2007) (TC III) 4.

³⁰ *Prosecutor v Karemera et al* (Réponse à la Requête du Procureur tendant à faire admettre certains documents en preuve sous le régime de l'Article 89(C)) ICTR-98-44-T (4 December 2007) (TC III) 4.

³¹ *Prosecutor v Karemera et al* (Réponse à la Requête du Procureur tendant à faire admettre certains documents en preuve sous le régime de l'Article 89(C)) ICTR-98-44-T (4 December 2007) (TC III) 4.

³² *Prosecutor v Karemera et al* (Réponse à la Requête du Procureur tendant à faire admettre certains documents en preuve sous le régime de l'Article 89(C)) ICTR-98-44-T (4 December 2007) (TC III) 4.

³³ *Prosecutor v Karemera et al* (Réponse à la Requête du Procureur tendant à faire admettre certains documents en preuve sous le régime de l'Article 89(C)) ICTR-98-44-T (4 December 2007) (TC III) 4.

³⁴ *Prosecutor v Karemera et al* (Réponse à la Requête du Procureur tendant à faire admettre certains documents en preuve sous le régime de l'Article 89(C)) ICTR-98-44-T (4 December 2007) (TC III) 4.

- g. With regard to **Tab 276**: The source of the document was not indicated. The French version was not communicated to the Defence.³⁵

Was the DDE admitted and/or relied upon?

14.

Tab. ³⁶	Ruling	Authenticity (reasoning)	Relevance/Probative value (reasoning)
122	Excluded	Lack of authenticity: no date, no corroborating evidence, no indication of the chain of custody or author of photographs	-
140	Excluded	Lack of authenticity: no corroborating evidence or information on the pictures, while nothing shows that the pictures are indeed what they purport to depict	Lack of relevance: insufficient showing of relevance Probative value: no witness testified
143	Excluded	Lack of authenticity: no supporting evidence or information on the pictures	Lack of relevance: insufficient showing of relevance
145	Excluded	Lack of authenticity: no supporting evidence or information on the pictures	Lack of relevance: insufficient showing of relevance
146	Excluded	Lack of authenticity: no supporting evidence or information on the pictures	Lack of relevance: insufficient showing of relevance

³⁵ *Prosecutor v Karemera et al* (Réponse à la Requête du Procureur tendant à faire admettre certains documents en preuve sous le régime de l'Article 89(C)) ICTR-98-44-T (4 December 2007) (TC III) 5.

³⁶ The Table is based on Annex to the Decision on the Prosecutor's Motion of 26 November 2007 for Admission of Certain Exhibits into Evidence (25 January 2008). See *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III).

151	Admitted	Source identified, authenticating, RTLM, self-	Collaboration between MRND and RTLM, count of conspiracy
152	Admitted	Source identified, authenticating, RTLM, self-	Speeches of the Accused and others at a rally. Counts of conspiracy and incitement
153	Admitted	Source identified, authenticating, RTLM, self-	Collaboration between MRND and RTLM, count of conspiracy
154	Admitted	Source identified, authenticating, RTLM, self-	Speeches of the Accused and others at a rally. Counts of conspiracy and incitement
157	Admitted	Source identified, authenticating, RTLM, self-	Collaboration between MRND and RTLM, count of conspiracy
158	Admitted	Source identified, authenticating, RTLM, self-	Historical background to commencement of genocide
160	Admitted	Source identified, authenticating, RTLM, self-	Count of genocide
163	Admitted	Source identified, authenticating, RTLM, self-	Count of genocide
164	Admitted	Source identified, authenticating, RTLM, self-	Count of genocide

165	Admitted	Source identified, authenticating	RTLTM, self-	General context of the events
166	Admitted	Source identified, authenticating	RTLTM, self-	Count of genocide
167	Admitted	Source identified, authenticating	RTLTM, self-	General context of the events
168	Admitted	Source identified, authenticating	RTLTM, self-	Count of genocide
169	Admitted	Source identified, authenticating	RTLTM, self-	Count of genocide
170	Admitted	Source identified, authenticating	RTLTM, self-	General context of the events
171	Admitted	Source identified, authenticating	RTLTM, self-	Incitement speeches. General context of the events
172	Admitted	Source identified, authenticating	RTLTM, self-	Government control. General context of the events
174	Admitted	Source identified, authenticating	RTLTM, self-	General context of the events
175	Admitted	Source identified, authenticating	RTLTM, self-	General context of the events
180	Admitted	Source identified, authenticating	RTLTM, self-	General context of the events

181	Admitted	Source identified, RTLTM, self-authenticating	Count of genocide
182	Admitted	Source identified, RTLTM, self-authenticating	Count of genocide
184	Admitted	Source identified, RTLTM, self-authenticating	General context of the events
187	Admitted	Source identified, RTLTM, self-authenticating	General context of the events
191	Admitted	Source identified, RTLTM, self-authenticating	General context of the events
196	Admitted	Source identified, RTLTM, self-authenticating	General context of the events
197	Admitted	Source identified, RTLTM, self-authenticating	General context of the events
227	Admitted	Source identified, BBC, self-authenticating	Recollection of what happened during the events
234	Excluded	Source unknown, no date or author	-
236	Excluded	Source identified, BBC, self-authenticating	Lack of relevance: this video depicting Nzirorera and the Prime Minister in Zaire in exile after the events is not relevant to the charges in the Indictment

238	Admitted	Source identified, Insight News Television Limited, self-authenticating	Recollection of what happened during the events. Count of genocide. Shows Mathieu Ngirumpatse at a rally in Kajuge
239	Admitted	Source identified, France 3, self-authenticating	Recollection of what happened during the events. Count of genocide
276	Admitted	Transcript of video from RTLM, self-authenticating	Shows speech delivered before the commission of the alleged crimes. Counts in the Indictment
Tab 8 Annex B	Excluded	Originates from OTP	Lack of relevance: list of radio broadcast tapes, no relevance to the Indictment

15. ANNEX A:

- a. **Tab 122** – Excluded;
- b. **Tabs 234, 236** – Excluded;
- c. **Tabs 129, 140, 143, 145 and 146** – Excluded;
- d. **Tabs 151, 152, 153, 154, 157, 158, 160, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 175, 180, 181, 182, 184, 187, 191, 196 and 197** – Admitted;
- e. **Tabs 227, 238 and 239** – Admitted;
- f. **Tab 276** – Admitted;

16. ANNEX B:

- a. **Tab 8** – Excluded.

17. The ICTR specifically elaborated on the admissibility of the following Tabs:
- a. **Tabs 122, 234:** documents did not have sufficient indicia of authenticity. The origin of these documents was doubtful, the author of the documents was unknown. They had no indications as to the chain of custody;³⁷
 - b. **Tab 234:** the ICTR Trial Chamber found that the Prosecutor had not made a *prima facie* showing of its authenticity. The Chamber noted that there was no mention of the date or author on the video footage itself nor in the Prosecutor's Motion. Furthermore, the Chamber found that there was no information about the source and the chain of custody. Finally, the Chamber noted that the video footage appeared to be an extract and the Prosecutor had not indicated whether the full footage was available, or who had extracted the parts under Tab 234.³⁸
 - c. **Tab 234 and 236:** Besides the objections regarding their authenticity, the Chamber was not satisfied that the Prosecutor had shown their *prima facie* relevance to charges alleged in the indictment. In addition, and specifically in relation to Tab 236, the Chamber noted that the showing of Joseph Nzirorera and the Prime Minister in exile in Zaire after the genocide was not pled in the indictment;³⁹
 - d. **Tabs 129, 140, 143, 145 and 146:** The Trial Chamber found that the description provided by the Prosecutor in relation to those pictures was not sufficient to establish their *prima facie* relevance with regards to the particular counts of the indictment. Moreover, the Prosecutor did not indicate in what way the contents of these photographs were supported by other evidence.⁴⁰ With regards to Tabs 140, 143, 145 and 146, the Chamber further noted "(i) that the indication by the Prosecutor that the photographs were taken in 2005 by the OTP, and (ii) that there is no further information on the face of these photographs or any supporting evidence in the Prosecutor's Motion to support the submission that these photographs were indeed of the locations they purport to depict." In addition, the Chamber was not satisfied that the Prosecutor made a *prima facie* showing of their reliability;⁴¹
 - e. **Tabs 151, 152, 153, 154, 157, 158, 160, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174, 175, 180, 181, 182, 184, 187, 191, 196 and 197:** Radio broadcasts were found to be self-authenticating. Moreover, the Chamber noted that some of these materials were issued by the Ministry of Information and as such provided

³⁷ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [22].

³⁸ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [22].

³⁹ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [26].

⁴⁰ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [23].

⁴¹ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [24].

sufficient indicia of their source and authenticity for the threshold of admissibility. These documents were relevant to the general context of the events, and the counts of genocide, conspiracy to commit genocide and direct and public incitement to commit genocide, as some of them showed speeches of the accused during rallies.⁴² Some items were partially admitted before in this case (Tabs 152, 154, 164, 166, 168, 169, 171, 172, 181, 182, and 184), the Chamber highlighted that it had already made the assessment of the admissibility requirements, and considered at the present stage to admit them in their entirety without any further consideration;⁴³

- f. **Tabs 227, 238 and 239:** The Chamber considered these documents relevant as they depicted violence and killings in Rwanda, which were related to the issue of whether there was knowledge of the killings on the part of the government, and/or whether the relevant authorities exercised control. However, the Chamber decided to disregard any accompanying comments made by the journalists;⁴⁴
- g. **Tab 276:** The Chamber noted that this item (transcript) was an extract of an exhibit previously admitted in the present case and it was therefore satisfied as to the *prima facie* showing of the authenticity of the document. The Chamber also considered that this item was relevant to counts of the indictment, as it showed a speech delivered by the Accused before the alleged commission of the crimes;⁴⁵
- h. **Tab 8 (Annex B):** The Trial Chamber found that it appeared *prima facie* authentic as it originated from OTP. However, in determining the admissibility of the said items, the Chamber also assessed their relevance and determined whether they had any probative value. The Chamber was of the view that the admission into evidence of some of these items in other trials did not infer any probative value or relevance in the instant case. Moreover, the Chamber was not bound by the assessment made by the other Trial Chambers.⁴⁶

General Legal Submissions on DDE

18. The ICTR considered DDE as purely documentary evidence. It stated the following:

⁴² *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [33].

⁴³ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [34].

⁴⁴ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [35].

⁴⁵ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [39].

⁴⁶ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [43]-[44].

“Documentary evidence has been defined in the jurisprudence of the ICTR as including ‘anything in which information of any kind has been recorded’. This includes maps, digital records, audio and video tapes, photographs and so forth.”⁴⁷

19. Nevertheless, there were several important remarks with regard to evidentiary considerations in general:
- a. In determining the admissibility of evidence, a Chamber must also guarantee the protection of the rights of the Accused as prescribed by Articles 19 and 20 of the ICTR Statute. Accordingly, the Chamber has an inherent power to exclude evidence if its probative value is substantially outweighed by its prejudicial effect or otherwise by the need to ensure a fair trial;⁴⁸
 - b. Indicia of reliability include: the authorship of the document; whether it is an original or a copy; the place from which the document was obtained in conjunction with its chain of custody; whether its contents are supported by other evidence; and the nature of the document itself, such as signatures, stamps, or the form of the handwriting.⁴⁹

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

20. The admissibility of evidence, including documentary evidence, is governed by Rule 89(C) of the Rules of Procedure and Evidence. This Rule allows the Chamber to admit any relevant evidence it deems to have probative value. The probative value of a document is determined by its authenticity, and it is sufficient for the moving party to establish the *prima facie* relevance and probative value of the evidence for admission under Rule 89(C).
21. The purpose of Rule 89(C) is to ensure that the Chamber is not burdened by evidence for which no reasonable showing of relevance or probative value has been made.⁵⁰

Application of Rules of Evidence

22. With regard to Rule 89(C): The Prosecutor argued that the admission of a document in another trial constitutes an indicium of reliability.⁵¹ The Chamber was of the view that such an argument could not succeed, since the decision of one Chamber could not bind another. The Chamber made its own assessment of the evidence.⁵²

⁴⁷ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [5].

⁴⁸ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [9].

⁴⁹ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [8].

⁵⁰ *Prosecutor v Karemera et al* (Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [6]-[7].

⁵¹ See above the arguments of the Prosecutor.

⁵² See above the arguments of the Court.

23. Therefore, where the Prosecutor relied only on this basis for their submission, and the Chamber was not able to find any additional indicia of reliability to establish the probative value of an item, and it therefore denied the application for admission.⁵³

V. EXTRAPOLATIONS

Videos

24. For the video extract to be admitted, the video should be provided in full, or the tendering party should indicate whether the full footage was available, or who had extracted the parts of the video. Video evidence should always contain information about the source, from which it originates. Prima facie authenticity of videos may be indicated via the date or author on the video footage, information about the source and the chain of custody.⁵⁴
25. Videos originating from the news reports can be admitted if any accompanying comments made by the journalists will be disregarded by the Chamber.⁵⁵

Photos

26. The fact that evidence originates from the OTP is not automatically suggestive of its authenticity. The photos should be clear, relate to the particular count of the indictment and be supported by other evidence.⁵⁶
27. The photographs may be excluded due to insufficient indicia of authenticity, if the photographs are undated and bear no official stamp, seals, signatures, and/or the author of the document is unknown,⁵⁷ or there is no corroborating evidence or indication of the chain of custody.⁵⁸
28. There should be evidence supporting that the photographs were of the locations they purport to depict, otherwise the photographs may be excluded due to lack of authenticity.⁵⁹
29. The photographs will be assigned low probative if no witness testifies on their content.⁶⁰

⁵³ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [10].

⁵⁴ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [22].

⁵⁵ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [35].

⁵⁶ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [24].

⁵⁷ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [22].

⁵⁸ *Prosecutor v Karemera et al* (Annex to the Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) 3.

⁵⁹ *Prosecutor v Karemera et al* (Annex to the Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) 4.

⁶⁰ *Prosecutor v Karemera et al* (Annex to the Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) 4.

Radio broadcasts

30. Radio broadcasts are self-authenticating when they bear sufficient indicia of their source.⁶¹
31. Where the exhibit is a transcript of a radio broadcast previously admitted in the same case, the *prima facie* showing of the authenticity of the transcript under consideration is satisfied;⁶²
32. The admission of pieces of evidence in another trial does not infer any probative value or relevance of such items in the case under consideration. The Chamber is not bound by the assessment made by the other Trial Chambers;⁶³
33. When extracts from radio broadcasts have already been presented earlier in the trial, and their admission implies the assessment of the admissibility requirements, the request to admit the broadcast tapes in full should be considered without any further consideration.⁶⁴

VI. CITATIONS

Prosecutor v Karemera et al (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/ICTR-98-44/MS25514R0000555544.PDF>;

Prosecutor v Karemera et al (Prosecutor's Motion for Admission of Certain Materials Under Rule 89(C) of the Rules of Procedure and Evidence) ICTR-98-44-T (26 November 2007) (TC III) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Submission/NotIndexable/ICTR-98-44/MS28169R0000555161.PDF>;

Prosecutor v Karemera et al (Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table) ICTR-98-44-T (3 December 2007) (TC III) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Motions/NotIndexable/ICTR-98-44/MS47619R0000555225.PDF>;

Prosecutor v Karemera et al (Mémoire en réponse pour M. Ngirumpatse sur la "Prosecutor's Motion for Admission of Certain Materials under the Rule 89(C) of the Rules of Procedure and Evidence") ICTR-98-44-T (4 December 2007) (TC III) <https://jrad.irmct.org/view.htm?r=225204&s=>;

Prosecutor v Karemera et al (Réponse à la Requête du Procureur tendant à faire admettre certains documents en preuve sous le régime de l'Article 89(C)) ICTR-98-44-T (4 December 2007) (TC III) <https://jrad.irmct.org/view.htm?r=225207&s=>.

⁶¹ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [33].

⁶² *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [39].

⁶³ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [43]-[44].

⁶⁴ *Prosecutor v Karemera et al* (Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence) ICTR-98-44-T (25 January 2008) (TC III) [34].

Prosecutor v Radislav Krstić (IT-98-33)

I. CASE DETAILS

- **Case name:** *Prosecutor v Radislav Krstić* (IT-98-33-T)
- **Tribunal/Court:** International Criminal Tribunal for the Former Yugoslavia (“ICTY”)
- **Offence charged:** genocide, crimes against humanity including extermination, murder, persecution and deportation and murder, as a violation of the laws of war.¹
- **Stage of the proceedings:** Pre-Trial, Trial, Judgement and Sentence
- **Keywords:** Corroboration, Voluminous data, Expert witness, Authenticity, Reliability

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. **Records of VRS radio communications** intercepted by Army of Bosnia Herzegovina (ABiH)² and State Security Services of Bosnia.³ The intercept material was obtained in the field through intercepted communications by members of the State Security Services of Bosnia and ABiH. They were then provided to the “OTP intercept project” for collation and fact-checking.⁴ “A former employee from the OTP who worked on compiling the intercept database, testified about the procedures established to test the accuracy of the intercept evidence received by the OTP from the Bosnian Government. The “intercept project”, as it became known, was handled by a team of analysts, investigators, translators and other with language skills, who collected, assembled, analysed and translated the material that had been provide to the OTP in its original Bosnian/Croatian/Serbian (hereafter “B/C/S”) form. Both the ABiH and State Security Services of Bosnia provided intercept material to the OTP.”⁵ The former employee who previously worked for the OTP on the intercept projects was Ms. Frease.⁶
2. **Aerial recognisance photographs** (i.e. Exhibit P12/4).⁷ The precise origin of the aerial photographs used at the Trial is not stated in the public court records.⁸ They were provided to the OTP by the United States government. “The aerial images were provided to the prosecution by the US Government, pursuant to Rule 70 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former

¹ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 1, [3].

² *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 1, [4].

³ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 34, [106].

⁴ *Prosecutor v Krstić* (Judgement) IT-98-33 (2 August 2001) 34, [106].

⁵ *Prosecutor v Krstić* (Judgement) IT-98-33 (2 August 2001) 34, [106].

⁶ *Prosecutor v Krstić* (Judgement) IT-98-33 (2 August 2001) 34, [106], fn 220.

⁷ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 1, [4].

⁸ London Institute of Space Policy and Law (LISPL), ‘Evidence from Space: Study for the European Space Agency on Use of Space Derived Earth Observation Information as Evidence in Judicial and Administrative Proceedings’ (London Institute of Space Policy and Law 2012) 197, [6.2.3].

Yugoslavia which allows the Prosecutor to receive confidential information on a limited basis and under certain conditions.”⁹ They were likely provided by both U-2 planes and photographs from satellites.¹⁰ “Aerial images were provided to the ICTY by United States authorities, which provided views of many of the mass graves at the time of, or shortly after, their creation. These images were also able to provide information as to the location and creation dates of the secondary graves.”¹¹

3. **Forensic analysis of grave sites incorporated the aerial images in order to determine creation/disturbance dates**¹² (i.e., Exhibit P12/2). The images were also used to assist experts in determining the dates of mass grave sites being created or moved.¹³ The forensic analysis was carried out by Professor Jose Barayba, Professor Helge Brunborg, Dr. John Clark, Professor William Haglund, Dr. Christopher Lawrence, Jean-Rene Ruez and Professor Richard Wright.¹⁴ The OTP requested its investigator D. Manning to summarise the forensic evidence for the trial due to its voluminous nature.¹⁵ D. Manning, therefore created a summary of the Forensic Evidence entitled Execution Points and Mass Graves, May 2000 and an additional report entitled Srebrenica Investigation: Summary of Forensic Evidence-Mass Graves Exhumed in 2000, February 2001.¹⁶ These reports were produced by the forensic analysts from the aerial images and other evidence. The aerial photographs were entered into evidence through the expert reports.
4. **Video taken by Serbian Journalist Zoran Petrovic**¹⁷ (Exhibit P145, still images from that video P490-498, slow motion version P145/2, video with subtitles P145bis, transcript from video P145a). Zoran Petrovi was in Srebrenica accompanying and filming the Bosnian Serb forces during the takeover. Video was taken on 13 July 1995 in the Potočari area¹⁸ and along the Bratunac-Konjevi Polje road.¹⁹ Mr Petrovi filmed the video himself during the events in Srebrenica in 1995. The video was obtained by the OTP investigator Mr. Ruez and accompanied his testimony.²⁰

⁹ International Bar Association, ‘Evidence matters in ICC trials’ (August 2016) 26.

¹⁰ Mark Tran, Spy pictures ‘show Bosnia massacre’ (*The Guardian*, 11 August 1995) <<https://www.theguardian.com/world/1995/aug/11/warcrimes.marktran>> accessed 20 March 2020.

¹¹ D Manning, *Srebrenica Investigation: Summary of Forensic Evidence-Execution Points and Mass Graves* (16 May 2000) 00950903.

¹² *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 79, [223].

¹³ D Manning, *Srebrenica Investigation: Summary of Forensic Evidence-Execution Points and Mass Graves* (16 May 2000) 00950903.

¹⁴ *Prosecutor v Krstić* (Judgement) IT-98-33 (2 August 2001) 22, [72], fn 139.

¹⁵ *Prosecutor v Krstić* (Transcript) IT-98-33-T (26 May 2000) (TC I) 3548.

¹⁶ *Prosecutor v Krstić* (Judgement) IT-98-33 (2 August 2001) 22, fn 136.

¹⁷ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 12, [36].

¹⁷ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 61, [173].

¹⁸ *Prosecutor v Krstić* (Judgement) IT-98-33 (2 August 2001) 61, [173], [174].

¹⁹ *Prosecutor v Krstić* (Judgement) IT-98-33 (2 August 2001) 50, [150].

²⁰ *Prosecutor v Krstić* (Transcript) IT-98-33-T (13 March 2000) (TC I) 517.

Evidentiary Considerations

5. The Court did not discuss the evidentiary considerations relating to the aerial images or the forensic analysis pertaining to the images. The Court also did not discuss the evidentiary considerations surrounding the video filmed by Zoran Petrovic.

6. Witness Frease²¹ had testified about the process used by the OTP to compile, authenticate and assess the reliability of the intercepts.²² The Defence objected to Frease's²³ evidence²⁴ and four radio intercept exhibits (many of which remained under seal²⁵).²⁶ In relation to the chain of custody of all intercepts the Court stated, "The Prosecution has tendered into evidence a number of exhibits aiming to authenticate all the intercepts used at trial."²⁷ Many of the exhibits tendered by the Prosecution were already submitted in rebuttal and the Court therefore declined to examine them again.²⁸ Two exhibits were not previously admitted and so the Court considered their admissibility.

7. The Defence argued that the exhibits were improper rebuttal evidence. The Defence specified that no objection was made to the authenticity of the intercepts before the accused was confronted with the intercepted conversation in which he presumably uttered "kill them all".²⁹ The Defence claimed there is no ground to admit evidence adduced under this category if the intercept itself was not admitted.³⁰

8. In response, the Prosecution claimed that the Defence, in contending the new intercept was a pure montage, challenged the authenticity of all intercepts already admitted, thereby allowing the Prosecution to additional evidence to authenticate all the intercepts.³¹ The Trial Chamber noted it had previously ruled the intercept where Krstic admittedly says "kill them all" was improper rebuttal evidence and therefore the Prosecution should not be granted the right to introduce any other evidence relating to that intercept and all other intercepts were admitted without challenge to their

²¹ *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [74].

²² *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [5].

²³ *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [4].

²⁴ *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [1].

²⁵ *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [4].

²⁶ *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [1].

²⁷ *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [73].

²⁸ *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [74].

²⁹ *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [75].

³⁰ *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [75].

³¹ *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [76].

authenticity.³² Accordingly, the exhibits tendered to authenticate the intercepts were excluded as evidence.

9. The Court went on to note that the Defence consistently challenged the reliability of the intercepts throughout the trial: “Witness DB indicated that the Muslim interceptors were not properly trained for transcribing radio intercepts; the expert witness Radinovic insisted that radio intercepts were highly unreliable sources of information; witness DC also indicated that intercepts were not always trustworthy and reliable. Likewise, the accused challenged the reliability of several intercepts during his testimony.”³³

10. Accordingly, the Court admitted the testimony of Ms. Frease, an ex-OTP member who previously worked on the “intercept project” as additional evidence in rebuttal to prove the intercepts were a reliable source of information. “Consequently, the Chamber finds that the Prosecution is entitled to adduce additional evidence in rebuttal in order to prove that the intercepts are a reliable source of information. The testimony of Witness Frease is thus admitted to the extent that it relates to the reliability of the intercepts generally and does not address the authentication of specific intercepts that have been ruled inadmissible by the Trial Chamber.”³⁴

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

11. The DDE consisting of the aerial photographs, the forensic report relating to the photographs and the intercept material was used, along with other pieces of evidence and testimony to corroborate the survivors’ testimonies.

“The accounts given by the survivors of the execution sites are corroborated by forensic evidence (such as shell casings and explosive and tissue residues) at some of the execution sites, expert analysis of the contents of mass graves and aerial reconnaissance photographs taken in 1995. The Trial Chamber has also considered the testimony of UN military personnel who were in Srebrenica, records of VRS radio communications that were intercepted by the Army of Bosnia Herzegovina (“ABiH”) in July and August 1995, records seized from the ABiH, records seized from the VRS, the analysis of military experts called by both the Prosecution and the Defence and the testimony of General Krstic himself, as well as other witnesses who testified for the Defence.”³⁵

12. **Video filmed by Zoran Petrovic:** The video was used by the Court to make findings of fact on how events transpired on the ground during the occupation of Srebrenica. For instance:

- a. “Late in the afternoon of 11 July 1995, General Mladic, accompanied by General Živanovic (then Commander of the Drina Corps), General Krstic (then Deputy

³² *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [77].

³³ *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [78].

³⁴ *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [79].

³⁵ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 2, [4].

Commander and Chief of Staff of the Drina Corps) and other VRS officers, took a triumphant walk through the empty streets of Srebrenica town. The moment was captured on film by Serbian journalist, Zoran Petrovi.³⁶

13. The Court used the video of the VRS victory walk through Srebrenica on 11 July 1995 showing the presence of soldiers of the Sabotage Detachment and the commander of the Unit in the centre of town. The Court noted that despite General Krstic denying awareness of the presence of that unit the video shows him walking past soldiers wearing the unit's uniform.³⁷
14. The footage was also used by the Prosecution's military expert Mr. Butler, along with military documents and statements of witnesses, to make findings regarding where the Bosnian Serb forces were, what actions they were taking, the scale of those actions and consequently the level of knowledge commanding officers would have had in the circumstances.
15. These findings were accepted by the Court, although in one instance rejected where Mr. Butler subsequently on cross-examination retreated from his original assertion. Mr. Butler initially presented circumstantial evidence that military equipment (flak jackets and an armoured vehicle) seen in the Petrovic video belonged to the Drina Corps but revealed later that further inquiries found these were police members and vehicles rather than military equipment.³⁸
16. **Records of VRS radio communications:** The intercept material was used by the Court in conjunction with the testimony of the Prosecution military expert witness Mr. Butler, to provide information about the scale of the executions.³⁹
17. The Court also used the intercepts to come to conclusions of fact regarding how events unfolded. "Radio intercepts indicate that the VRS first became aware of the formation of the column around 0300 hours on 12 July 1995...Over the course of 12 and 13 July 1995, a series of intercepted conversation track the developing knowledge of the Drina Corps."⁴⁰
18. For determining which soldiers were giving orders pertaining to certain events. For example, intercepts were used to determine that General Krstic's actions—speaking of the Bosnian Muslim women, children and elderly from Potočari, and several other intercepts connecting him with organisation of transport for Potočari—were consistent with the organisational role expected of the Chief of Staff of a Corps engaged in an operation to transport tens of thousands of people.⁴¹ "The intercepts are further corroborated by the evidence of Witness II, who testified

³⁶ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 12, [36].

³⁷ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 101, [278].

³⁸ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 61, [173].

³⁹ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 26, [83].

⁴⁰ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 56, [162].

⁴¹ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 128, [344].

that, on 12 July 1995, General Krstic ordered the requisition of buses and trucks from local companies for use in transporting the Bosnian Muslim civilians out of Potočari.”⁴²

19. The Court used the testimony of the Prosecution’s military expert Mr. Butler including his view as to the reliability of the intercept material and the process of its corroboration to assist in determining the Court’s own view of the intercept material. “The testimony of Mr. Butler provided corroboration of the careful consideration given to the intercept evidence during the course of the OTP’s investigation. Initially in the course of preparing his expert military report, Mr. Butler viewed the intercepts with some skepticism. However, after detailed examination of the complete body of intercept evidence, he was convinced that they were reliable and, to the extent that he was able to draw firm conclusions from the conversations, he incorporated them into his military analysis”.⁴³
20. **Aerial images and forensic analysis of aerial images of creation/disturbance dates:** Aerial images and the accompanying analysis of the photos was used to corroborate other evidence such as forensic analysis of the gravesites or witness testimony and for the Trial Chamber to come to factual conclusions:

“Aerial reconnaissance photos tendered into evidence by the Prosecution confirm the presence of masses of people in these locations on 13 July 1995”.⁴⁴

“Aerial photos show that the earth in this spot was disturbed between 5 July and 27 July 1995”.⁴⁵

“Other evidence corroborates the survivors’ testimony. An aerial reconnaissance photo, taken on 13 July 1995 at 14.00 hours, shows two buses outside the Warehouse, just as Witness K remembered.”⁴⁶

“The forensic evidence supports crucial aspects of the survivors’ testimony. Aerial photos show that the ground in Orahovac was disturbed between 5 and 27 July 1995 and again between 7 and 27 September 1995.”⁴⁷

“Forensic analysis of ... and aerial images of creation/disturbance dates, further revealed that bodies from Lazete 1 and Lazete 2 graves were removed and reburied at secondary graves named Hodzici Road 3, 5 and 5. Aerial images show that these secondary gravesites were created between 7 September and 2 October 1995....”⁴⁸

“The accounts given by the survivors are supported by forensic and other evidence. Aerial images show that earth around the Petkovci Sam site was first disturbed between 5 and

⁴² *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 129, [345].

⁴³ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 38, [115].

⁴⁴ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 19, [64].

⁴⁵ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 71, [202].

⁴⁶ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 73, [208].

⁴⁷ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 78, [222].

⁴⁸ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 79, [223].

27 July 1995 and then again between 7 and 27 September 1995”.⁴⁹ Aerial images and their analysis was used to corroborate evidence supplied by witnesses during the trial.

“Aerial images reveal that Liplje 2 was created between 7 September and 2 October 1995.”⁵⁰

“The testimony of the survivors has other support in the Trial Record. Aerial photographs taken on 17 July 1995, of an area around the Branjevo Military Farm, show a large number of bodies lying in the field near the farm, as well as traces of the excavator that collected the bodies from the field”.⁵¹

“Aerial photographs show an excavator digging a hole at Brenjevo on 17 July 1995”.⁵²

“Aerial photographs show the Cancari Road 3 gravesite was first excavated after 27 September 1995, and back filled prior to 2 October 1995”.⁵³

“Aerial images show that the Kozluk mass gravesite was created between 5 and 17 July 1995 and that it was disturbed again between 7 and 27 September 1995.”⁵⁴

“The execution in Kozluk must have occurred between 14 July and 17 July 1995, given that aerial images show the mass grave in the Kozluk area was created prior to 17 July 1995 and the prisoners were not transported to the zone of responsibility of the Zvornik Brigade until 14 July 1995”.⁵⁵

21. The Court determined the Cancari Road 12 a secondary grave site associated with the primary site Branjevo Military Farms, date of creation and date of back filling using aerial images. “Aerial images show this secondary grave was created between 7 and 27 September 1995 and back filled prior to 2 October 1995”.⁵⁶

22. To support a witness’s inference that fuel was being used for something associated with criminal activity. “Given that aerial images confirm the reburial activity was ongoing at this time and the fact that there is no information establishing that any legitimate engineer work was being carried out by the Zvornik Bridge, Mr. Butler concluded that the fuel must have been used for reburial activity.”⁵⁷

23. The reasoning in respect of the aerial images is not contained in the public court record.

24. As the Petrovic video was unchallenged by the Defence, the Court did not discuss its reasoning to accepting the video as evidence.

25. The forensic analysis included DDE by incorporating the aerial imagery and

⁴⁹ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 82, [229].

⁵⁰ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 82, [230].

⁵¹ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 84, [237].

⁵² *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 86, [241].

⁵³ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 90, [251].

⁵⁴ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 89, [250].

⁵⁵ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 90, [253].

⁵⁶ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 84, [238].

⁵⁷ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 92, [258].

describing what could be viewed.⁵⁸ The Trial Chamber accepted the evidence surrounding what could be viewed in the aerial images but did not specifically comment on their value separately from the forensic analysis as they were combined within the reports. The Trial Chamber found “that the forensic evidence presented by the Prosecution provides corroboration of survivor testimony that, following the take-over of Srebrenica in July 1995, thousands of Bosnian Muslim men from Srebrenica were killed in careful and methodical mass executions.”⁵⁹

26. The Trial Chamber accepted the OTP did diligently check and cross-reference the intercept material through the “intercept project”.

“In order to determine whether the material was reliable and genuine, the OTP looked at internal consistency between the notebooks and the printouts of each conversation. Transcripts of a single conversation, which was recorded by two or more interceptors, were also compared. The OTP also embarked on a process of corroborating the intercepts with information obtained from other sources, such as documents acquired from the VRS, the RS Ministry of Defence and UNPROFOR, as well as aerial images.”⁶⁰

27. The Court found:

“Although at times the OTP was unable to determine the significance of some aspects of the conversation, there was no information in the intercepted conversation that was completely at odds with other evidence uncovered by the OTP.⁶¹ Meticulous procedures were used by the OTP for tracking dates of intercepts and the former OTP employee testified before the court with “absolute certainty”: the dates ascribed to the individual conversations were accurate.”⁶²

Records of VRS Radio Intercepts

28. The Prosecution used the intercept material as a piece of evidence to prove key elements of the case such as the command structure of Serb forces and knowledge of atrocities being committed. “The Prosecution relied upon intercept evidence as proof of key elements of its case. The reliability of these intercepted conversations, however, was the subject of strenuous debate between the parties.”⁶³

29. To convince the Court of the accuracy of the intercept material the Prosecution called some of the witnesses who intercepted and transcribed the material and allowed the Court to gain an understanding of the process of transcription and to view some of the original notebooks in which the transcription was made. “Additionally, a number of Bosnian Muslim witnesses, who were involved in intercepting and transcribing the VRS conversation, testified before the Trial Chamber about the methods employed... The

⁵⁸ D Manning, *Srebrenica Investigation: Summary of Forensic Evidence-Execution Points and Mass Graves* (16 May 2000) 00950901-00951041, 00950928, 00950931, 00950936, 00950939, 00950942, 00950946, 00950950, 00950954, 00950958, 00950961, 00950965, 00950969, 00950972, 00950975, 00950979, 00950983, 00950987, 00950991.

⁵⁹ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 25, [79].

⁶⁰ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 37, [114].

⁶¹ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 37, [114].

⁶² *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 37, [114].

⁶³ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 34, [105].

Trial Chamber viewed several of the original notebooks in which intercepted conversations were transcribed.”⁶⁴

30. Through the oral evidence provided by the military personnel who carried out the intercepts the Court was able to gain an appreciation for how the intercepting military members were able to identify those on the calls and how the material was at times authenticated by being carried out by more than one operator simultaneously.
“Very often the participants in the conversations identified themselves by name, or their identities could be ascertained from the context of the conversation. In addition, the Bosnian Muslim interceptors became familiar with the voice of the VRS participants in the conversations over the course of time.... On some occasions a single conversation was monitored by different intercept operators working in different locations, which, in the Trial Chamber’s view, is a factor supporting the authenticity of these communications.”⁶⁵
31. The Defence argued that the Bosnian Muslim interceptors were inadequately trained and did not have the proper equipment for their task. This argument went directly to the reliability of what was transcribed by the interceptors. “The Defence objected that the Bosnian Muslim interceptors were not properly trained for the work they were doing and had inadequate technology at their disposal. As a result, it was argued, the intercepts were filled with assumptions as to what had been said during the course of the conversation. Prosecution Witness Y conceded that some of the soldiers intercepting conversation for the ABiH were better trained than others.”⁶⁶
32. General Radinovic was the Defence military expert called during the trial.⁶⁷ General Radinovic, “...argued that in order to be considered a reliable source of information the intercepts need to be collated, cross-checks made between the tapes and the notebooks, and military experts, linguists and so on called in to assess them.”⁶⁸
33. A former OTP employee previously assigned to the “intercept project” testified that through the corroboration process he became convinced the intercepts were absolutely reliable.⁶⁹
34. The Trial Chamber devoted paragraph 105 to 116 to a discussion regarding the reliability of the intercept material.⁷⁰
35. The Court ultimately did not accept the argument of the Defence or of their witness General Radinovic. The Court found that there was evidence that the intercept material was deemed reliable by the forces and the Court ultimately accepted its reliability. “General Radinovic testified that, although the VRS used intercepted radio communications in their intelligence work, he did not consider them to have a high degree of reliability. There was, however, evidence to the contrary. A VRS document dating back to 1993 indicates that radio reconnaissance platoons, or intercepting groups, had provided the VRS command structure with about 70 percent of all intelligence data gathered, which

⁶⁴ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 35, [107].

⁶⁵ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 35, [108].

⁶⁶ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 36, [111].

⁶⁷ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 1, [12].

⁶⁸ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 37, [114].

⁶⁹ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 37, [114].

⁷⁰ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 34, [105].

shows how heavily they relied upon the interception procedure. Indeed, the Trial Chamber heard evidence that the VRS was relying on information obtained from intercepted ABiH communications during the events in Srebrenica.”⁷¹

General Legal Submissions on DDE

36. The Trial Chamber noted that overall it found the intercepted communications to be reliable but the weight and meaning of each intercepted conversation was to be considered on a case-by-case basis and in light of the wider context in which the conversation occurred. “On the whole, the Trial Chamber considers the intercepted communications to be a reliable source of evidence. All possible measures were taken by the Bosnian Muslim interceptors to ensure the accuracy of the recorded conversations, as would be expected in any prudent army. This fact was reinforced by the measures taken by the OTP to verify the reliability of the intercepted evidence as part of the “intercept project”.
37. The Trial Chamber accepts that, often, aspects of the intercepted conversations can be corroborated by other evidence of events occurring at the time and it is impossible for the Chamber to imagine that this level of documentable detail could have been completely manufactured by the Bosnian Muslim interceptors...The Trial Chamber is satisfied that the intercept evidence is a reliable source of information. The weight and meaning attributable to each intercepted conversation will be considered on a case-by-case basis and in light of the wider context in which the conversation took place. Certainly, several of the intercepts tendered by the Prosecution were extremely fragmented, with numerous gaps where transcribers were unable to determine what was being said with precision. In those specific cases, the Trial Chamber has obviously not been able to draw any firm conclusions from the intercepts”.⁷²

Was the DDE admitted and/or relied upon?

38. The aerial imagery and the forensic analysis pertaining to those images was admitted by the Court and relied upon in its findings. Numerous examples are provided above. The Defence forensic expert did not challenge the aerial images in any respect within their own report.⁷³
39. The video footage was unchallenged by the Defence and accepted by the Court.⁷⁴

⁷¹ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 36, [112].

⁷² *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 38, [116].

⁷³ D 172 (*Forensic Opinion* dated 17 October 2000 by Doc Dr sc Med Zoran Stankovi}, Specialist in Forensic Medicine, permanent Expert for the area of Forensic Medicine pursuant to Ruling No. 740/0373/98 of the Ministry of Justice of Serbia, Institute of Forensic Medicine-VMA and D 172 (*Forensic Opinion* dated 18 April 2001 by Doc Dr sc Med Zoran Stankovi}, Specialist in Forensic Medicine, permanent Expert for the area of Forensic Medicine pursuant to Ruling No. 740/0373/98 of the Ministry of Justice of Serbia, Institute of Forensic Medicine-VMA.

⁷⁴ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 12, [36]; 101, [278].

40. The intercept evidence was admitted and relied upon, although the exact weight and meaning attributed to each intercept conversation was to be determined on a case-by-case basis and in its wider context of which it took place.⁷⁵ Where the intercepts tendered by the OTP were extremely fragmented with numerous gaps in the transcription due to the interceptors being unable to determine the content of what was said, no firm conclusion could be drawn from the intercept.⁷⁶

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

41. Rule 92 *bis* of the Rules of Procedure and Evidence of the ICTY authorises a Trial Chamber to admit evidence of a witness in the forms of a written statement in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of an accused as charged in the indictment. A number of favours are listed for admitting such evidence including where the evidence in question is of a cumulative nature in that other witnesses will give or have given oral testimony of similar facts.⁷⁷ This allows the presentation of summary reports by investigators. These are compilations, derived from multiple sources, which aim to give background evidence of the forensic examinations, thereby contextualising and reducing the complexity of the findings.

42. Rule 94 *bis* of the Rules of Procedure and Evidence of the ICTY requires that the full statement of any expert witness called by a party is disclosed to the opposing party as early as possible and is not filed later than twenty-one days prior to the date on which the expert is expected to testify. Within fourteen days of the statement being filed the opposing party must file notice indicating whether they accept the expert witness statement or wish to cross examine the expert witness. If they opposing party accepts the statement of the expert witness the statement can be admitted into evidence by the Trial Chamber without calling the witness to testify in person.⁷⁸

43. Rule 70(B) of the Rules of Procedure and Evidence of the ICTY applies to the Prosecutor when in possession of information on a confidential basis and where it has only been used for the purpose of generating new evidence. The initial information and its origin are not to be disclosed by the Prosecutor without consent of the entity who provided the initial information and, in any event, are not to be given in evidence without prior disclosure to the accused.⁷⁹

⁷⁵ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 38, [116].

⁷⁶ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 38, [116].

⁷⁷ Rule 92 *bis*, ICTY Rules of Procedure and Evidence (26 July 2001).

⁷⁸ Rule 94 *bis*, ICTY Rules of Procedure and Evidence (26 July 2001).

⁷⁹ Rule 70, ICTY Rules of Procedure and Evidence (26 July 2001).

Application of Rules of Evidence

44. Rule 92 *bis* could have been applied in respect of allowing the summary of evidence in Mr. Manning's and Mr. Butler's reports as admitted evidence. Mr. Manning was summarising a range of reports made by other experts into one document for the ease of the Court including the aerial images and the expert's comments on them.⁸⁰ Mr. Butler used the intercept material, military documents and witness's statements to create his report.⁸¹ In practice, both experts provided testimony allowing their evidence to be admitted as expert witness testimony.

45. Rule 94 *bis* was applied in allowing Mr. Butler and Mr. Manning to be called as expert witnesses (each had incorporated DDE in the forms of intercepts of conversations and aerial images into their respective reports). Both Mr. Butler⁸² and Mr. Manning⁸³ were subject to cross examination.

46. Rule 70(B) allowed the Prosecution to utilise the aerial images as evidence in expert reports and did not require they disclose the means or method by which the aerial images themselves were produced; this is likely because they were classified by the United States.⁸⁴

V. EXTRAPOLATIONS

47. Evidence that is collected by way of intercepts of VRS radio communications is more likely to be considered authentic and therefore accepted if a practitioner can explain to the court the process and methodology surrounding the intercepts,⁸⁵ including clarifying the process of their recording and transcription by calling witnesses who carried out the intercepts or took part in their collation.⁸⁶

48. Intercept evidence is more likely to be deemed reliable by a Court when it can be authenticated, cross checked and corroborated through internal means such as multiple operators intercepting the same message⁸⁷ and a comparison taking place and/or where surrounding events or unrelated witness evidence corroborates the intercepted material.⁸⁸ It is more likely the intercept evidence will be accepted as reliable where corroborating evidence is of a high level of documentable detail that could not have been completely manufactured.⁸⁹

49. Where the reliability of intercept evidence is disputed, additional evidence may come from witnesses who took part in the collection or collation of that evidence, such

⁸⁰ D Manning, *Srebrenica Investigation: Summary of Forensic Evidence-Execution Points and Mass Graves* (16 May 2000) 00950901-00951041.

⁸¹ R Butler, *Srebrenica Military Narrative-Operation "Krivaja 95"* (15 May 2000) iv, exhibit P403.

⁸² *Prosecutor v Krstić* (Transcript) IT-98-33-T (19 July 2000) (TC I).

⁸³ *Prosecutor v Krstić* (Transcript) IT-98-33-T (1 June 2000) (TC I).

⁸⁴ As the images' authenticity was accepted this was not discussed in the present case. However, the argument was made in *Prosecutor v Tolimir* (Judgment) IT-05-88/2 (12 December 2012) (TC) [68].

⁸⁵ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 35, [107]; 2, [4].

⁸⁶ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 38, [116].

⁸⁷ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 35, [108].

⁸⁸ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 129, [345]; 73, [208].

⁸⁹ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 38, [116].

as from those who helped assemble it (e.g., Ms. Frease, the ex-OTP member who previously took part in the “intercept project”).⁹⁰

50. Where the reliability of intercept evidence is challenged, witness testimony as to the evidence’s reliability and authenticity may be given weight by the court (e.g., Mr. Butler, who used it in his report⁹¹ and Ms. Frease who compiled the evidence including ensuring its accuracy⁹²).

51. Where forensic evidence, including aerial images, is voluminous it may be entered into evidence via expert reports summarizing the forensic evidence.⁹³

VI. CITATIONS

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<https://www.icty.org/x/cases/krstic/tdec/en/10504AE116170.htm>;

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D Manning, *Srebrenica Investigation: Summary of Forensic Evidence-Execution Points and Mass Graves* (16 May 2000) 00950901-00951041

⁹⁰ *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [79].

⁹¹ *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 38, [115].

⁹² *Prosecutor v Krstić* (Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance) IT-98-33-T (4 May 2001) (TC I) [79]; *Prosecutor v Krstić* (Judgment) IT-98-33-T (2 August 2001) (TC I) 38, [116].

⁹³ *Prosecutor v Krstić* (Transcript) IT-98-33-T (26 May 2000) (TC) 3548, lines 16-25 and 3549, lines 1-10; *Prosecutor v Krstić* (Judgement) IT-98-33-T (2 August 2001) (TC) [71], fn 136.

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ICTY Rules of Procedure and Evidence (26 July 2001)
https://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev21_en.pdf

Prosecutor v Thomas Lubanga Dyilo (ICC-01/04-01/06)

I. CASE DETAILS

- **Case name:** *Prosecutor v Thomas Lubanga Dyilo* (ICC-01/04-01/06)
- **Tribunal/Court:** International Criminal Court (“ICC”)
- **Offence charged:** conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a)¹ – guilty. This was upheld in the Appeals Chamber.²
- **Stage of the proceedings:** Conviction confirmed by the Appeals Chamber
- **Keywords:** Translation, Disclosure of videos, Content, Corroboration, Inference, Reliability

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. Videos

- a. DRC-OTP-0035-0074 (pacification meeting between armed groups);³ was introduced by the Legal Representatives of victims a/0001/06 to a/0003/06⁴ and obtained from publicly available video ‘Guerre et Paix en Ituri’ produced by United Nations Organization Mission in the Democratic Republic of the Congo (MONUC).⁵
- b. DRC-OTP-0102-0003 (speech by the accused indicating knowledge of the armed conflict)⁶ was- introduced by the Legal Representatives of victims a/0001/06 to a/0003/06⁷ and obtained from a search conducted by the DRC national authorities in the Bunia Tribunal.⁸
- c. DRC-OTP-0148-0302 (documentary on the accused)⁹ was introduced by the Legal Representatives of victims a/0001/06 to a/0003/06¹⁰ and obtained

¹ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1358].

² *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [529].

³ *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) (PTC I) 83, lines 4-13.

⁴ *Prosecutor v Lubanga Dyilo* (Registration in the Record of Material Presented During the Hearing Held in Open Session on 02 October 2007) ICC-01/04-01/06 (08 October 2007) (TC I) 8.

⁵ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) (PTC I) 82.

⁶ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) (PTC I) 86, line 25; 89, lines 16-24; 92, lines 1-6.

⁷ *Prosecutor v Lubanga Dyilo* (Registration in the Record of Material Presented During the Hearing Held in Open Session on 02 October 2007) ICC-01/04-01/06 (08 October 2007) (TC I) 8.

⁸ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) (PTC I) 86, lines 13-16; 88, lines 9-5; 89 lines 1-5.

⁹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) (PTC I) 35, lines 17, 24; 36, lines 8-17.

¹⁰ *Prosecutor v Lubanga Dyilo* (Registration in the Record of Material Presented During the Hearing Held in Open Session on 02 October 2007) ICC-01/04-01/06 (08 October 2007) (TC I) 9.

from documentary ‘The Killing Fields’ produced by UK broadcasting company Channel 4.¹¹

- d. DRC-OTP-0082-0016 (private video on the Deputy Minister)¹² was introduced by the Legal Representatives of victims a/0001/06 to a/0003/06¹³ and is a private video taken by a witness (witness number: #DRC-OTP-WWWW-0002#).¹⁴
- e. DRC-OTP-0120-0293 (speech by accused with children in the crowd)¹⁵ was introduced by the Legal Representatives of victims a/0001/06 to a/0003/06¹⁶ and obtained from a ‘private source’.¹⁷
- f. DRC-OTP-0127-0058 (commanders being escorted by children)¹⁸ was introduced by Prosecution¹⁹ and the origin is redacted.²⁰
- g. DRC-OTP-0120-0294 (accused being escorted by children);²¹
- h. EVD-OTP-00574 (accused being escorted by children)²² was introduced by defence²³ and only states that the ‘video was filmed at the Appellant’s home’²⁴ when a MONUC delegation visited.²⁵

¹¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) (PTC I) 35, 38-39.

¹² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) (PTC I) 36, lines 8-17.

¹³ *Prosecutor v Lubanga Dyilo* (Registration in the Record of Material Presented During the Hearing Held in Open Session on 02 October 2007) ICC-01/04-01/06 (08 October 2007) (TC I) 9.

¹⁴ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) (PTC I) 43.

¹⁵ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006) (TC I) 38, lines 19-20; 41, lines 12 – 19; *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [792].

¹⁶ *Prosecutor v Lubanga Dyilo* (Registration in the Record of Material Presented During the Hearing Held in Open Session on 02 October 2007) ICC-01/04-01/06 (08 October 2007) (TC I) 10.

¹⁷ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) (PTC I) 72.

¹⁸ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [716]; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006) (TC I) 63, lines 4-14; 66, lines 2-4.

¹⁹ *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) (AC) [190]; *Prosecutor v Lubanga Dyilo* (Prosecution's Submission on the presentation of Video Evidence and Requests for Admission of Evidence and in relation to the Translations of the Videos) ICC-01/04-01/06 (03 March 2009) (TC I) [1].

²⁰ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [854]; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2009) (TC I) 4, lines 20, 23; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-02/11-01/15-T-129-Red2-ENG (06 March 2017) (TC I) 14, lines 6-13.

²¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006) (TC I) 51, lines 17-18; 53, lines 11-16; *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [915], [1249].

²² *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [862]; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-02/11-01/15-T-129-Red2-ENG (06 March 2017) (TC I) 27, lines 22 – 25.

²³ *Prosecutor v Lubanga Dyilo* (Defence application for leave to present additional evidence at sentencing hearing scheduled for 13 June 2012) ICC-01/04-01/06-2892-tENG (03 June 2012) (TC I) [8].

²⁴ *Prosecutor v Lubanga Dyilo* (Mr Thomas Lubanga’s appellate brief against the 14 March 2012 Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2948-Red-tENG (17 October 2014) (AC) [160]; *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [858], [862], [1252], [1254].

²⁵ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [858].

- i. DRC-OTP-1001-0010 (the presidential guard²⁶ and speech by accused with children in the crowd)²⁷ was – introduced by Prosecution²⁸ but origin is unknown.²⁹
- j. DRC-OTP-0127-0064 (speech at military training camp addressed to children);³⁰
- k. DRC-OTP-0102-0009 (speech by accused with children in crowd)³¹ was introduced by Prosecution³² but its origin is unknown.³³
- l. DRC-OTP-1001-0008 (interview of the accused)³⁴ was introduced by Prosecution³⁵ and is obtained from an interview at the accused's residence.³⁶
- m. DRC-OTP-0081-0007 (speech by accused with children in crowd)³⁷ was introduced by Prosecution³⁸ yet origin is unknown.³⁹
- n. EVD-OTP-00578 (accused and alleged co-perpetrators)⁴⁰ was introduced by Legal Representative of victims a/0001/06 to a/0003/06⁴¹ and is obtained

²⁶ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 68 lines 2-4; *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1255].

²⁷ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1256]; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 70, lines 20-21.

²⁸ *Prosecutor v Lubanga Dyilo* (Prosecution's Submission on the presentation of Video Evidence and Requests for Admission of Evidence and in relation to the Translations of the Videos) ICC-01/04-01/06 (03 March 2009) (TC I) 3.

²⁹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 66.

³⁰ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 11, line 9; 12, lines 12-18; 14, lines 3-18; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006) (TC I) 38, lines 19-20.

³¹ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1257], [1266]; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 72, lines 2-5.

³² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 66.

³³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 11, 89.

³⁴ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 29, line 5; 32, line 25; 33, line 1.

³⁵ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 4, lines 6 -9; 27, lines 23-25.

³⁶ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 33 line 1; *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1106].

³⁷ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [779]; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-162-Red2-ENG (02 April 2011) (TC I) 43, line 3; 48, lines 16-25; 49, lines 1-5.

³⁸ *Prosecutor v Lubanga Dyilo* (Prosecution's communication of originals of incriminatory evidence disclosed to the Defence on 17 December 2007) ICC-01/04-01/06-1096 (18 December 2007) (TC I) [4]; *Prosecutor v Lubanga Dyilo* (Prosecution's Information pursuant to the 28 September 2006 Decision on the Prosecution Information in respect of the Second Decision on Rule 81 Motions) ICC-01/04-01/06-611 (25 October 2006) (PTC I) [11].

³⁹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-162-Red2-ENG (02 April 2011) (TC I) 15, lines 16-20.

⁴⁰ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1210]; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-02/11-01/15-T-129-Red2-ENG (06 March 2017) (TC I) 61 line 23 - 78, line 16.

⁴¹ *Prosecutor v Lubanga Dyilo* (Registration in the Record of Material Presented During the Hearing Held in Open Session on 02 October 2007) ICC-01/04-01/06 (08 October 2007) (TC I) 2.

from a publicly displayed documentary produced by Canada and ARTE France.⁴²

- o. EVD-OTP-00573 (accused and alleged co-perpetrators);⁴³
- p. EVD-OTP-00579 (accused and alleged co-perpetrators);⁴⁴
- q. DRC-OTP-1001-0010 (speech by accused with children in crowd);⁴⁵

Unable to find introducing party and origin:

- II. (DRC-OTP-0120-0294);⁴⁶
 - III. (DRC-OTP-0127-0064);⁴⁷
 - IV. (DRC-OTP-0102-0009);⁴⁸
 - V. (EVD-OTP-00578);⁴⁹
 - VI. (EVD-OTP-00573);⁵⁰
 - VII. (EVD-OTP-00579);⁵¹
1. (DRC-OTP-0035-0074) (DRC-OTP-0148-0302) (DRC-OTP-0082-0016) (DRC-OTP-0127-0064) (EVD-OTP-00578) (EVD-OTP-00573) (EVD-OTP-00579) (DRC-OTP-0137-0711) – illustrate the Accused’s relations with co-perpetrators.⁵²
 2. (DRC-OTP-0120-0293) (DRC-OTP-1001-0010) (DRC-OTP-0127-0064) (DRC-OTP-0102-0009) – demonstrates the Accused’s awareness of child soldiers by addressing them,⁵³

⁴² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) (PTC I) 33; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-43-EN (23 November 2006) (PTC I) 79.

⁴³ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1218]; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-02/11-01/15-T-129-Red2-ENG (06 March 2017) (TC I) 17, lines 3 – 4.

⁴⁴ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1218].

⁴⁵ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1256]; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 70, lines 19-20.

⁴⁶ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006) (PTC I) 49, lines 15-24.

⁴⁷ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 11, 89.

⁴⁸ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 11, 89.

⁴⁹ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1210].

⁵⁰ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1210].

⁵¹ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) 519 [1210].

⁵² *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1210], [1218], [1042], [1044]; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) (PTC I) 36-39, 41; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) (PTC I) 83, lines 4-13.

⁵³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) (PTC I) 88; *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [713], [1256].

and his involvement in recruiting and encouraging them;⁵⁴ therefore, indicating individual criminal responsibility.⁵⁵

3. DRC-OTP-0102-0003 – illustrates the Accused having knowledge of the armed conflict.⁵⁶
4. (DRC-OTP-0127-0058) (DRC-OTP-0120-0294) (EVD-OTP-00574) – illustrates commanders being escorted by children ‘clearly’ below the age of 15.⁵⁷
5. (DRC-OTP-0081-0007) (EVD-OTP-00585)⁵⁸ – shows accused making a speech with children in the crowd; indicating his awareness of them.⁵⁹
6. DRC-OTP-1001-0008 – demonstrates the accused’s authority as President and political leader of army.⁶⁰

7. Photographs

- a. DRC-OTP-0013-8014 (soldier)⁶¹ was introduced by Defence⁶² but origin is unknown.⁶³
- b. DRC-OTP-0216-0288 (soldier)⁶⁴ was introduced by Prosecution⁶⁵ but origin is unknown.⁶⁶
- c. DRC-OTP-0214-0360 (intermediary)⁶⁷ was introduced by Defence⁶⁸ but origin is unknown.⁶⁹

⁵⁴ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [729], [1343], [1347].

⁵⁵ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) (PTC I) 51, 72, 86-87, 118; *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [729], [1348].

⁵⁶ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) (PTC I) 86, line 25; 89, lines 16-24, 92 lines 1-6.

⁵⁷ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [854], [861-862], [915], [1249], [1252].

⁵⁸ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [713].

⁵⁹ *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) [779]; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-162-Red2-ENG (02 April 2011) (TC I) 43, line 3; 48, lines 16-25; 49, lines 1-5.

⁶⁰ *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) [1149-1150], [1213].

⁶¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-261-Red3-ENG (15 March 2010) (TC I) 17, lines 5-24.

⁶² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-254-Red3-ENG (05 March 2010) (TC I) 48, line 4.

⁶³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-254-Red3-ENG (05 March 2010) (TC I) 48, line 4.

⁶⁴ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-329-Red2-ENG (09 November 2010) (TC I) 17, lines 11-24; 19 lines 2-6.

⁶⁵ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-329-Red2-ENG (09 November 2010) (TC I) 18, line 3.

⁶⁶ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-329-Red2-ENG (09 November 2010) (TC I) 18, line 3.

⁶⁷ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) 6, lines 1-17.

⁶⁸ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-257-Red2-ENG (09 March 2010) (TC I) 6, line 17.

⁶⁹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-257-Red2-ENG (09 March 2010) (TC I) 6, line 17.

- d. DRC-OTP-0150-0146 (witness)⁷⁰ was introduced by Defence⁷¹ yet origin is unknown.⁷²
- e. DRC-OTP-0184-0055 (soldier)⁷³ was introduced by Prosecution⁷⁴ yet origin is unknown.⁷⁵
- f. DRC-OTP-0138-0049 (the questioned witness)⁷⁶ was introduced by Prosecution⁷⁷ yet origin is unknown.⁷⁸
- g. DRC-OTP-0137-0711 (accused with alleged co-perpetrators)⁷⁹ was introduced by Defence⁸⁰ yet origin is unknown.⁸¹
- h. DRC-OTP-0227-0397 (accused)⁸² was introduced by Prosecution⁸³ yet origin is unknown.⁸⁴
- i. DRC-OTP-0227-0396 (accused)⁸⁵ was introduced by Prosecution⁸⁶ yet origin is unknown.⁸⁷
- j. DRC-0011-4030 (the questioned witness)⁸⁸ was – introduced by Defence⁸⁹ yet origin is unknown.⁹⁰

⁷⁰ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-259-Red2-ENG (11 March 2010) (TC I) 12, lines 13-24.

⁷¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-259-Red2-ENG (11 March 2010) (TC I) 11, line 17; 12, lines 7 – 21; 15 lines 11-13.

⁷² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-259-Red2-ENG (11 March 2010) (TC I) 15, lines 11-13.

⁷³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-117-Red3-FRA (04 February 2010) (TC I) 29, line 21; 30, lines 1-9.

⁷⁴ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-117-Red3-FRA (04 February 2010) (TC I) 29, lines 21-23; *Prosecutor v Lubanga Dyilo* (Prosecution's provision of electronic versions of incriminatory evidence disclosed to the Defence after the confirmation hearing) ICC-01/04-01/06-997 (23 October 2007) (TC I) 2 [1]; *Prosecutor v Lubanga Dyilo* (Prosecution's provision of electronic versions of incriminatory evidence disclosed to the Defence on 31 October 2007) ICC-01/04-01/06-1013 (02 November 2007) (TC I) 2 [3].

⁷⁵ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-117-Red3-FRA (04 February 2010) (TC I) 29, lines 21-23.

⁷⁶ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011) (TC I) 32, lines 8-11; 33 lines 7-9.

⁷⁷ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011) (TC I) 32, lines 6-7.

⁷⁸ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011) (TC I) 32, lines 8-9, 33 lines 7-10.

⁷⁹ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1042]; *Prosecutor v Thomas Lubanga Dyilo* (Closing submissions of the Defence) ICC-01/04-01/06 (15 July 2011) (TC I) [792].

⁸⁰ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) (TC I) 40, line 9

⁸¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) (TC I) 31, lines 6-16.

⁸² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) (TC I) 23, lines 14-17.

⁸³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) (TC I) 23, lines 14-17; 24, lines 5-6.

⁸⁴ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) (TC I) 23, lines 14-17; 24, lines 5-6.

⁸⁵ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) (TC I) 24, lines 5-6.

⁸⁶ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) (TC I) 23, lines 14-17; 24, lines 5-6.

⁸⁷ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) (TC I) 23, lines 14-17; 24, lines 5-6.

⁸⁸ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) (TC I) 60, lines 21-24.

⁸⁹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) (TC I) 60, lines 6-8.

⁹⁰ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) (TC I) 60, lines 6-8.

- k. DRC-0011-4031 (the questioned witness)⁹¹ was introduced by Defence⁹² yet origin is unknown.⁹³
- l. DRC- 0185-0810 (alleged co-perpetrators)⁹⁴ was introduced by Prosecution⁹⁵ yet origin is unknown.⁹⁶
- m. DRC-D01-0003-2012 (witness' family members)⁹⁷ was introduced by Defence⁹⁸ yet origin is unknown.⁹⁹
- n. DRC-D01-0003-2594 (witness' family members)¹⁰⁰ was introduced by Defence¹⁰¹ yet origin is unknown.¹⁰²
- o. DRC-D01-0003-2518 (witness' family members)¹⁰³ was introduced by Defence¹⁰⁴ yet origin is unknown.¹⁰⁵
- p. DRC-D01-003-2509 (witness' family members)¹⁰⁶ was introduced by Defence¹⁰⁷ yet origin is unknown.¹⁰⁸
- q. DRC-D01-0003-25137 (witness' family members)¹⁰⁹ was introduced by Defence¹¹⁰ yet origin is unknown.¹¹¹
- r. EVD-D01-00097 (witness' family members);¹¹²

⁹¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) (TC I) 61, lines 10-12.

⁹² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) (TC I) 60, line 25; 61, line 1.

⁹³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) (TC I) 60, line 25; 61, line 1.

⁹⁴ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) (TC I) 53, lines 12-20.

⁹⁵ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) (TC I) 52, lines 24-25; 53, lines 1-6.

⁹⁶ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) (TC I) 52, lines 24-25; 53, lines 1-6.

⁹⁷ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) (TC I) 24, lines 24-25; 25, lines 1-15.

⁹⁸ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) (TC I) 31, lines 5-10.

⁹⁹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) (TC I) 31, line 10.

¹⁰⁰ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) (TC I) 34, lines 1-8.

¹⁰¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) (TC I) 33, lines 18-20.

¹⁰² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) (TC I) 33, lines 17-20.

¹⁰³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 13, lines 3-9.

¹⁰⁴ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 13, lines 3-6.

¹⁰⁵ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 13, lines 3-6.

¹⁰⁶ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 46, lines 17-24.

¹⁰⁷ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 15 lines, 13-22.

¹⁰⁸ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 15, lines 13-22.

¹⁰⁹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 21, lines 2-4; *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [497].

¹¹⁰ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 20, line 25; 21, lines 1-4.

¹¹¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 20, line 25; 21, lines 1-4.

¹¹² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 3, lines 1-15.

- s. DRC-D01-0003-2593 (witness' family members)¹¹³ was introduced by Defence¹¹⁴ yet origin is unknown.¹¹⁵
8. (DRC-OTP-0013-8014) (DRC-OTP-0216-0288) (DRC-OTP-0184-0055) – witness identifying soldiers.¹¹⁶
9. DRC-OTP-0214-0360 – witness asserting the identity of an intermediary.¹¹⁷
10. DRC-OTP-0150-0146 – witness asserting the identity of another witness.¹¹⁸
11. (DRC-OTP-0227-0397) (DRC-OTP-0227-0396) – identification of the accused in location where he gave a speech in the presence of child soldiers.¹¹⁹
12. (DRC-OTP-0138-0049) (DRC-0011-4030) (DRC-0011-4031) – identification of questioned witness to assert their identity and reliability.¹²⁰
13. DRC- 0185-0810 – identification of co-perpetrators.¹²¹
14. (DRC-D01-0003-2012) (DRC-D01-0003-2594) (DRC-D01-0003-2593) – witness required to identify family members to ascertain their identity and reliability.¹²²
15. (DRC-D01-0003-2518) (DRC-D01-003-2509) (DRC-D01-0003-25137) (EVD-D01-00097) – inability of witness to identify relatives in a picture; therefore, impacting their reliability.¹²³

¹¹³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) (TC I) 24, lines 24-25; 25, lines 1-15.

¹¹⁴ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-290-Red2-ENG (19 May 2010) (TC I) 24, lines 5, 23.

¹¹⁵ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-290-Red2-ENG (19 May 2010) (TC I) 24, lines 23.

¹¹⁶ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-261-Red3-ENG (15 March 2010) (TC I) 19, line 18; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-329-Red2-ENG (09 November 2010) (TC I) 20, lines 3-8; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-117-Red3-FRA (04 February 2010) (TC I) 30, lines 1-3.

¹¹⁷ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [155]; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-257-Red2-ENG (09 March 2010) (TC I) 6, lines 1-17.

¹¹⁸ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-259-Red2-ENG (11 March 2010) (TC I) 11, line 17; 12, lines 7 – 21; 15, lines 11-13.

¹¹⁹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) (TC I) 23, lines 14-17; 24, lines 5-6.

¹²⁰ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011) (TC I) 32, lines 8-11; 33, lines 7-9; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) (TC I) 60, lines 21-24; 61, lines 10-12; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011) (TC I) 32, lines 8-9.

¹²¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) (TC I) 53, lines 12-20.

¹²² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) (TC I) 34, lines 1-8; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-290-Red2-ENG (19 May 2010) (TC I) 24, lines 24-25; 25, lines 1-15; *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) (TC I) 31, lines 11-25; 32, lines 1-25; 33, lines 1-15.

¹²³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 46, lines 17-20; 21-24.

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

Videos: Pre-Trial

16. (DRC-OTP-0102-0003) (DRC-OTP-0082-0016) – Defence asserts that videos disclosed in languages other than English or French should be excluded if translation is not provided before the deadline.¹²⁴ Prosecution states that Regulation 39(1) of the Regulations of the Court, which provides that ‘all documents and materials filed with the Registry shall be in English or French, unless otherwise provided in the Statute [...]’¹²⁵ does not apply to the disclosure obligation in Art. 61(3)(b) of the Rome Statute, which stipulates the accused’s right to ‘be informed of the evidence on which the Prosecutor intends to rely at the hearing’; therefore, the request should be denied.¹²⁶
17. (DRC-OTP-0102-0003) (DRC-OTP-0082-0016) – the Chamber, pursuant to article 69 (4), decided to declare inadmissible video excerpts which are not translated into one of the working languages of the Court by a certain time and date, and whose translation into one of the working languages is not made available to the Chamber and the Defence by the same time limit.¹²⁷ The Court said that pursuant to article 67 (1) of the Statute the defendant is entitled to know ‘in detail the nature, cause and content of the charge, in a language which he fully understands’.¹²⁸ It added that, ‘[U]nder no circumstances may evidence not translated into one of the working languages of the Court at the time of commencement of the confirmation hearing be admitted into evidence insofar as the Chamber must be in a position to fully understand the evidence’.¹²⁹ Finally, it also established that ‘In order for the Court to conduct its business effectively, the Prosecution must be prepared to provide the evidence on which it intends to rely on at the confirmation hearing in one of the working languages of the Court’.¹³⁰

Videos: Trial

¹²⁴ *Prosecutor v Lubanga Dyilo* (Corrigendum to Request to exclude video evidence which has not been disclosed on one of the working languages) ICC-01/04-01/06-642-Corr (02 November 2006) (PTC I) 4.

¹²⁵ *Prosecutor v Lubanga Dyilo* (Response to the Defence "Request to exclude video evidence which has not been disclosed in one of the working languages") ICC-01/04-01/06-642-Corr ICC-01/04-01/06-662 (06 November 2006) (PTC I) 4 [11].

¹²⁶ *Prosecutor v Lubanga Dyilo* (Response to the Defence "Request to exclude video evidence which has not been disclosed in one of the working languages") ICC-01/04-01/06-642-Corr ICC-01/04-01/06-662 (06 November 2006) (PTC I) 3, 5, 10.

¹²⁷ *Prosecutor v Lubanga Dyilo* (Decision on the Defence Request to exclude video evidence which has not been disclosed in one of the working languages) ICC-01/04-01/06-676 (7 November 2006) (PTC I) 4.

¹²⁸ *Prosecutor v Lubanga Dyilo* (Decision on the Defence Request to exclude video evidence which has not been disclosed in one of the working languages) ICC-01/04-01/06-676 (7 November 2006) (PTC I) 3.

¹²⁹ *Prosecutor v Lubanga Dyilo* (Decision on the Defence Request to exclude video evidence which has not been disclosed in one of the working languages) ICC-01/04-01/06-676 (7 November 2006) (PTC I) 3.

¹³⁰ *Prosecutor v Lubanga Dyilo* (Decision on the Defence Request to exclude video evidence which has not been disclosed in one of the working languages) ICC-01/04-01/06-676 (7 November 2006) (PTC I) 3, 4.

18. (DRC-OTP-0120-0293) (DRC-OTP-0127-0058) – Prosecution asserts that the video material ‘speaks for itself’ since the children are ‘visibly’ under the age of 15.¹³¹ The Defence rejects this by stating the impossibility of reliably distinguishing between a 12- or 13-year-old and a 15- or 16-year-old based on a photograph or video extract alone.¹³²
19. DRC-OTP-0120-0293) (DRC-OTP-0127-0058) (DRC-OTP-0081-0007) (EVD-OTP-00574) (DRC-OTP-0127-0058) (DRC-OTP-0120-0294) - Chamber only relies on video evidence that depicts children who are ‘clearly’ or ‘plainly’ under the age of 15.¹³³ Regarding one video, the Court compares the ‘size and general appearance’ of certain individuals with other children and men in their vicinity; establishing that they are visibly below this age.¹³⁴ However, in another video, a person is deemed ‘obviously younger than the other males’ in the frame, yet the Chamber is unable to determine whether he is younger than 15.¹³⁵ However, it was ‘unpersuaded’ by the Defence’s assertion that there was a lack of video evidence demonstrating underage.¹³⁶
20. The Court asserts that it is ‘generally possible to identify children who are clearly below 15 years of age’ without specifying the factors that indicate this.¹³⁷
21. (DRC-OTP-1001-0010) (DRC-OTP-0102-0009) (DRC-OTP-0120-0294) – Chamber does not rely on video evidence where age could not be fully ascertained.¹³⁸
22. EVD-OTP-00574 – the ‘size and general appearance’ of the individuals, compared to those in their surroundings, concludes their age as below 15.¹³⁹
23. (DRC-OTP-0120-0293) (DRC-OTP-0120-0294) (DRC-OTP-1001-0008) – video evidence corroborated with documentary evidence establishes the crimes of the accused.¹⁴⁰

¹³¹ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [257], [644].

¹³² *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [644]; *Prosecutor v Lubanga Dyilo* (Closing submissions of the Defence) ICC-01/04-01/06 (15 July 2011) [704].

¹³³ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [644], [779], [854], [858], [860].

¹³⁴ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [862].

¹³⁵ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1250].

¹³⁶ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1244].

¹³⁷ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [837].

¹³⁸ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1250], [1255], [1257].

¹³⁹ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [862].

¹⁴⁰ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [912], [1112], [1169], [1218].

Videos: Appeal

24. DRC-OTP-0081-0007 – the Defence states in the Appeal phase that the video did not ‘allow discernment of the individual’s facial features’ and therefore does not show soldiers clearly under the age of fifteen; undermining its reliability.¹⁴¹ The Prosecution states that the Trial Chamber ‘was fully entitled to evaluate the videos and reach reasonable conclusions as the age of the persons depicted on them’, keeping in mind that the video images are usually admitted in international tribunals because “the video footage contained therein will usually speak for itself”.¹⁴²
25. The Appeals Chamber argued that video evidence is not reliable in asserting the age of individuals beyond reasonable doubt. However, jurisprudence from national courts and the Special Court for Sierra Leone demonstrate that video evidence may be relied on for establishing the element of age.¹⁴³
26. Additionally, the reasonableness of the Trial Chamber’s finding depends on whether it exercised caution in determining the age of individuals through video images, which is common practice in domestic jurisprudence. Since the Court did not rely on videos where children were not depicted as below 15 years of age, the Appeal Chamber found the Trial Chamber to be reasonable.¹⁴⁴
27. The Appeals Chamber comments on the Trial Chamber’s reasoning regarding the age element, where they consider that it could have been ‘more extensive’ in explaining their analysis.¹⁴⁵

Photographs: Trial

28. (DRC-OTP-0013-8014) (DRC-OTP-0216-0288) (DRC-OTP-0214-0360) (DRC-OTP-0150-0146) (DRC-OTP-0184-0055) – Defence asserts that it is impossible to reliably distinguish between a 12- or 13 year old and a 15- or 16 year old based solely on a photograph. It is increasingly difficult for growing adolescents; whose physical appearance depends on numerous factors such as diet and community-specific aspects. This difficulty is ‘insurmountable’ when the observer is unacquainted with the community from which the child originates.¹⁴⁶

¹⁴¹ *Prosecutor v Lubanga Dyilo* (Mr Lubanga’s appellate brief against the 14 March 2012 Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06-2948-Red-tENG (17 October 2014) [184] – [185].

¹⁴² *Prosecutor v Lubanga Dyilo* (Prosecution’s Response to Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74) ICC-01/04-01/06-2969-Red (18 February 2013) (AC) [162].

¹⁴³ *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2014) (AC) [219-221].

¹⁴⁴ *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) (AC) [221-222].

¹⁴⁵ *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) (AC) [222].

¹⁴⁶ *Prosecutor v Lubanga Dyilo* (Closing submissions of the Defence) ICC-01/04-01/06 (15 July 2011) (TC I) [704].

29. There was no argument proffered for the following evidence: (no information provided):

a. Videos

- i. DRC-OTP-0035-0074;¹⁴⁷
- ii. DRC-OTP-0148-0302;¹⁴⁸
- iii. DRC-OTP-0120-0294;¹⁴⁹
- iv. EVD-OTP-00574;¹⁵⁰
- v. DRC-OTP-1001-0010;¹⁵¹
- vi. DRC-OTP-0127-0064;¹⁵²
- vii. DRC-OTP-0102-0009;¹⁵³
- viii. DRC-OTP-1001-0008;¹⁵⁴
- ix. EVD-OTP-00578;¹⁵⁵
- x. EVD-OTP-00573;¹⁵⁶
- xi. EVD-OTP-00579;¹⁵⁷

b. Photographs

- i. DRC-OTP-0137-0711;¹⁵⁸
- ii. DRC-OTP-0227-0396;¹⁵⁹
- iii. DRC-OTP-0227-0397;¹⁶⁰

¹⁴⁷ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) (PTC I).

¹⁴⁸ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) (PTC I).

¹⁴⁹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006) (PTC I).

¹⁵⁰ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) (PTC I) 33.

¹⁵¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I).

¹⁵² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 11, 89.

¹⁵³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 72.

¹⁵⁴ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) (TC I) 29, lines 4-6.

¹⁵⁵ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1210].

¹⁵⁶ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1210].

¹⁵⁷ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1210].

¹⁵⁸ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) (TC I) (TC I) 31, lines 6-16.

¹⁵⁹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) (TC I) (TC I) 23, lines 14-17; 24 lines 5-6.

¹⁶⁰ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) (TC I) 23, lines 14-17; 24, lines 5-6.

- iv. DRC-OTP-0138-0049;¹⁶¹
- v. DRC-OTP-0138-0049;¹⁶²
- vi. DRC-0011-4030;¹⁶³
- vii. DRC-0011-4031;¹⁶⁴
- viii. DRC- 0185-0810;¹⁶⁵
- ix. DRC-D01-0003-2012;¹⁶⁶
- x. DRC-D01-0003-2594;¹⁶⁷
- xi. DRC-D01-0003-2518;¹⁶⁸
- xii. DRC-D01-003-2509;¹⁶⁹
- xiii. DRC-D01-0003-25137;¹⁷⁰
- xiv. EVD-D01-00097;¹⁷¹
- xv. DRC-D01-0003-2593;¹⁷²

Was the DDE admitted and/or relied upon?

30. Status of admission: admitted/not admitted

a) Videos

- i. DRC-OTP-0127-0064 – admitted¹⁷³ and relied upon.¹⁷⁴

¹⁶¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) (TC I) 23, lines 14-17; 24, lines 5-6.

¹⁶² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011) (TC I) 32, lines 8-9; 33, lines 7-10.

¹⁶³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) (TC I) 60, lines 6-8.

¹⁶⁴ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) (TC I) 60, line 25; 61 line 1.

¹⁶⁵ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) (TC I) 52, lines 24-25; 53, lines 1-6.

¹⁶⁶ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) (TC I) 31, line 10.

¹⁶⁷ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) (TC I) 33, lines 17-20.

¹⁶⁸ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 13, lines 3-6.

¹⁶⁹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 15, lines 13-22.

¹⁷⁰ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 20, line 25; 21, lines 1-4.

¹⁷¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 2, lines 24-25.

¹⁷² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-290-Red2-ENG (19 May 2010) (TC I) 24, lines 23.

¹⁷³ *Prosecutor v Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007) (PTC I) 17, fn 48; 155.

¹⁷⁴ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [774], [1344].

- ii. DRC-OTP-0081-0007 – relied upon¹⁷⁵ [no information on admission in the available sources].
- iii. DRC-OTP-0120-0293 – admitted¹⁷⁶ and relied upon.¹⁷⁷
- iv. EVD-OTP-00574 – relied upon¹⁷⁸ [no information on admission in the available sources].
- v. DRC-OTP-0127-0058 - admitted¹⁷⁹ and relied upon.¹⁸⁰
- vi. DRC-OTP-0120-0294 – 6 out of 7 excerpts relied upon¹⁸¹ [no information on admission in the available sources].
- vii. DRC-OTP-0102-0009 – 1 out of 2 excerpts relied upon¹⁸² [no information on admission in the available sources].
- viii. DRC-OTP-1001-0008 – 2 out of 3 excerpts relied upon¹⁸³ [no information on admission in the available sources].
- ix. EVD-OTP-00578 – relied upon¹⁸⁴ [no information on admission in the available sources].
- x. EVD-OTP-00573 – relied upon¹⁸⁵ [no information on admission in the available sources].
- xi. EVD-OTP-00579 – relied upon¹⁸⁶ [no information on admission in the available sources].
- xii. DRC-OTP-0120-0294 – 1 out of 7 excerpts not relied upon¹⁸⁷ [no information on admission in the available sources].
- xiii. DRC-OTP-1001-0010 – 1 of 3 excerpts not relied upon¹⁸⁸ [no information on admission in the available sources].

¹⁷⁵ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [911]; *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) [190], [277], [359]

¹⁷⁶ *Prosecutor v Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007) 17, fn 48; 155.

¹⁷⁷ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [793].

¹⁷⁸ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [915], [858], [862].

¹⁷⁹ *Prosecutor v Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007) 17, fn 48; 155.

¹⁸⁰ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [375], [376], [854], [857].

¹⁸¹ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [523], [860], [861], [869], [1218], [1219], [1249] – [1260].

¹⁸² *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1266].

¹⁸³ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1112], [1169], [1213].

¹⁸⁴ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1209].

¹⁸⁵ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1210], [1218].

¹⁸⁶ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1210].

¹⁸⁷ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1250].

¹⁸⁸ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1253].

- xiv. DRC-OTP-0102-0009 – 1 out of 2 excerpts not relied upon¹⁸⁹ [no information on admission in the available sources].
 - xv. DRC-OTP-0082-0016 – admitted¹⁹⁰ [no information on reliability in the available sources¹⁹¹].
- b) No information provided on admissibility or reliability:
- i. DRC-OTP-0035-0074;¹⁹²
 - ii. DRC-OTP-0102-0003;¹⁹³
 - iii. DRC-OTP-0148-0302;¹⁹⁴
31. Photographs were not demonstrated for determining the guilt of the accused but rather the reliability of the witnesses.¹⁹⁵
- a. Only one photograph is mentioned (DRC-OTP-0137-0711), where the Chamber establishes it as 'inconclusive' evidence, where it cannot demonstrate the nature of the relationship between the accused and co-perpetrators.¹⁹⁶
32. No information provided on admissibility or reliability:
- i. DRC-OTP-0013-8014;¹⁹⁷
 - ii. DRC-OTP-0216-0288;¹⁹⁸
 - iii. DRC-OTP-0214-0360;¹⁹⁹
 - iv. DRC-OTP-0150-0146;²⁰⁰
 - v. DRC-OTP-0184-0055;²⁰¹
 - vi. DRC-OTP-0138-0049;²⁰²

¹⁸⁹ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1257].

¹⁹⁰ *Prosecutor v Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007) 17, fn 48; 155.

¹⁹¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) (PTC I).

¹⁹² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) (PTC I).

¹⁹³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) (PTC I).

¹⁹⁴ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) (PTC I).

¹⁹⁵ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [189].

¹⁹⁶ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) 448-449 [1042] – [1044].

¹⁹⁷ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [124].

¹⁹⁸ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [152].

¹⁹⁹ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [152].

²⁰⁰ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [152].

²⁰¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-117-Red3-FRA (04 February 2010) (TC I) 30, lines 1-13.

²⁰² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-FRA (03 March 2009) (TC I) 34, lines 1-24.

- vii. DRC-OTP-0227-0397;²⁰³
- viii. DRC-OTP-0227-0396;²⁰⁴
- ix. DRC-0011-4030;²⁰⁵
- x. DRC-0011-4031;²⁰⁶
- xi. DRC- 0185-0810;²⁰⁷
- xii. DRC-D01-0003-2012;²⁰⁸
- xiii. DRC-D01-0003-2594;²⁰⁹
- xiv. DRC-D01-0003-2518;²¹⁰
- xv. DRC-D01-003-2509;²¹¹
- xvi. DRC-D01-0003-25137;²¹²
- xvii. DRC-D01-0003-2593;²¹³

General Legal Submissions on DDE

33. The Trial Chamber states that it relies solely on its own assessment²¹⁴ and makes its own determination regarding the individuals depicted in the video excerpts, where it finds specific persons to be ‘evidently,’²¹⁵ ‘clearly’²¹⁶ or ‘significantly’²¹⁷ under the age of fifteen. The Trial Chamber believes that it is ‘fully entitled to evaluate the videos and reach reasonable conclusions as to the age of the persons depicted on them’ and exercises caution when considering this evidence.²¹⁸
34. The Trial Chamber found individuals to be under 15 years old without knowledge of their names or any other identifying information. The Appeals Chamber found that it is not ‘per se’ impermissible to make a finding on the age element in circumstances where the victim’s identity is unknown.²¹⁹

²⁰³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) (TC I) (TC I) 23, lines 14-17; 24, lines 5-6.

²⁰⁴ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) (TC I) (TC I) 23, lines 14-17; 24, lines 5-6.

²⁰⁵ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) (TC I) 60, line 8.

²⁰⁶ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) (TC I) 61, line 1.

²⁰⁷ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) (TC I) 53, line 6.

²⁰⁸ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) (TC I) 31, line 10.

²⁰⁹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) (TC I) 33, line 18-20.

²¹⁰ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 13, line 4.

²¹¹ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 15, lines 20-21.

²¹² *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) (TC I) 21, line 1.

²¹³ *Prosecutor v Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-290-Red2-ENG (19 May 2010) (TC I) 24, line 23.

²¹⁴ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [718].

²¹⁵ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [861], [1254].

²¹⁶ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [713], [792], [854], [858], [862], [869], [912], [915], [1348].

²¹⁷ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [1249], [1251], [1252].

²¹⁸ *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) (AC) [216].

²¹⁹ *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) (AC) [197].

35. The Appeals Chamber established that Arts. 66(3) and 74(2) of the Rome Statute, as well as Rule 63(4) of the Rules of Procedure and Evidence, does not have a strict requirement for video excerpts to be corroborated with other evidence. Depending on the circumstances, a single piece of evidence ‘may suffice to establish a specific fact.’²²⁰ However, this does not mean that any piece of evidence is a sufficient evidentiary basis for a factual finding.²²¹
36. The Appeals Chamber found that jurisprudence from domestic courts and the Special Court for Sierra Leone establishes video evidence as reliable for establishing the element of age.²²²

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

37. Article 74(2) of the Rome Statute - the Chamber must ‘base its decision only on evidence submitted and discussed before it at the trial’²²³ and the decision ‘shall be based on its evaluation of the evidence and the entire proceedings.’²²⁴
38. Article 69(2) of the Rome Statute - the ‘Court may rule on the relevance or admissibility of any evidence, taking into account [...] the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation’ of witness testimony.²²⁵
39. Article 66(3) of the Rome Statute - ‘the Trial Chamber must be convinced beyond reasonable doubt of the facts that constitute the legal elements of the crime.’²²⁶

²²⁰ *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) (AC) [218].

²²¹ *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) (AC) [218]; *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [110].

²²² *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) (AC) [219], [220].

²²³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 74(2); *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) 52 [98].

²²⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 74(2); *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [218].

²²⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 69(2); *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [99].

²²⁶ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 66(3); *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) (AC) [218].

40. Article 63(4) of the Rules of Procedure and Evidence – ‘a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court’.²²⁷

V. EXTRAPOLATIONS

Videos

41. Videos should be translated into one of the working languages of the Court at the time of commencement of the confirmation hearing and should be made available to the Chamber and the Defence, otherwise the videos will be inadmissible.²²⁸
42. There is no strict legal requirement that the video had to be corroborated by other evidence for the Court to be able to rely on them and establish a specific fact.²²⁹ Although a single video image may suffice to establish a certain fact, it does not mean that ‘any piece of evidence provides a sufficient evidentiary basis for a factual finding.’²³⁰ Subsequently, the Court will independently assess the reliability of the material.²³¹
43. The lack of identifying information on the depicted person in the video does not make the evidence unreliable.²³² As the Court relies on its own assessment of the depicted persons, the facial or physical features may be enough to establish the age element.²³³
44. The Court can make an inference from the content of the video [or photograph] to the extent the video allows to make a definite finding.²³⁴ A reliable distinction can be drawn between different age ranges, based solely on appearance in photographs and videos.²³⁵ Thus, video images may be relied upon to establish the age of the depicted beyond reasonable doubt.²³⁶

²²⁷ Rules of Procedure and Evidence (adopted and entered into force 9 September 2002) UN Doc PCNICC/2000/1/Add.1 (2000) art 63(4); *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) (AC) [218].

²²⁸ *Prosecutor v. Thomas Lubanga Dyilo* (Decision on the Defence “Request to exclude video evidence which has not been disclosed in one of the working languages”) ICC-01/04-01/06-676 (7 November 2006) (PTC I) 3.

²²⁹ *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) (AC) [218].

²³⁰ *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) 81 [218]; *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [110].

²³¹ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [718].

²³² *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) (AC) [197].

²³³ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [644], [779], [854], [858], [860], [862].

²³⁴ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) fn 2432.

²³⁵ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [718].

²³⁶ *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) (AC) [222].

45. Regulation 39(1) of the Regulations of the Court, which provides that documents have to be filed in English or French, do not apply to the disclosure obligation in Art. 61(3) of the Rome Statute, which stipulates the right of the accused to be informed of Prosecution's evidence.²³⁷
46. To determine the age of persons in videos, there is an emphasis whether they are 'visibly' below a certain age.²³⁸
47. Videos disclosed in languages other than English or French should be excluded if translation is not provided before the deadline [please note this is case specific].²³⁹
48. NB: As stated above in the summary, photographs had no information regarding evidentiary value. This applies for videos as well, where ICC documents relating to videos mainly refers to:
 - Admission of video transcripts
 - Video numbering
 - In one document there is reference to the rejection of a video admission due to its incriminatory nature, yet the original document is confidential (https://www.icc-cpi.int/CourtRecords/CR2010_02925.PDF para 5)
 - The Defence asserts that using videos which requires the accused to demonstrate the age of depicted persons 'reverses the burden of proof' (https://www.icc-cpi.int/CourtRecords/CR2014_08860.PDF para 149) but here too it is focused on age element and not the probative value of video
 - The Prosecution's response to the Appeal request (https://www.icc-cpi.int/CourtRecords/CR2013_01504.PDF) has extensive information on videos, yet only focuses on the age element

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²³⁷ *Prosecutor v Lubanga Dyilo* (Response to the Defence "Request to exclude video evidence which has not been disclosed in one of the working languages") ICC-01/04-01/06-642-Corr ICC-01/04-01/06-662 (06 November 2006) (PTC I) 3, 5, 10.

²³⁸ *Prosecutor v Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (TC I) [257], [644].

²³⁹ *Prosecutor v Lubanga Dyilo* (Corrigendum to Request to exclude video evidence which has not been disclosed on one of the working languages) ICC-01/04-01/06-642-Corr (02 November 2006) (PTC I) 4.

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Prosecutor v Bosco Ntaganda (ICC-01/04-02/06)

I. CASE DETAILS

- **Case name:** *Prosecutor v Bosco Ntaganda* (ICC-01/04-02/06)
- **Tribunal/Court:** International Criminal Court (“ICC”)
- **Offence charged:** 13 counts of war crimes and 5 counts of crimes against humanity allegedly committed in 2002-2003 in the Ituri district of the DRC. Found guilty by Trial Chamber VI on 8 July 2019.²⁴⁰ The case is currently on appeal.
- **Stage of the proceedings:** Trial
- **Keywords:** Authenticity, Provenance, Relevance, Probative value, Excerpt, Transcript, Translation

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. **Excerpts of a video,**²⁴¹ not mentioned where obtained in the available transcripts.
2. **Videos and photographs** (DRC-OTP-0151-0665, DRC-OTP-0127-0065, DRC-OTP-0128-0043, DRC-OTP-0128-0046; DRC-OTP-0128-0047)²⁴² – these contained information in an annex of a confidential Prosecution application [ICC-01/04-02/06-1488-Conf].²⁴³
3. **Four excerpts of video** (DRC-OTP-0127-0064)²⁴⁴ – not discussed where the DDE was obtained as there is no information in the available transcripts.
4. **Three excerpts of video** (DRC-OTP-0159-0477)²⁴⁵ - not discussed where the DDE was obtained as there is no information in the available transcripts.

²⁴⁰ *Prosecutor v Ntaganda* (<https://www.icc-cpi.int/drc/ntaganda>).

²⁴¹ *Prosecutor v Ntaganda* (Public redacted version of “Submissions on behalf of Mr Ntaganda concerning the admission into evidence of transcriptions and/or translations of audio and video material”) ICC-01/04-02/06-907-Red (19 October 2015) (TC VI) [4].

²⁴² *Prosecutor v Ntaganda* (Public redacted version of “Response on behalf of Mr Ntaganda to ‘Prosecution application under rule 68(3) to admit Witness P-0030’s prior recorded testimony and associated material’”, 14 September 2016, ICC-01/04-02/06-1503-Conf) ICC-01/04-02/06-1503-Red (14 September 2016) (TC VI) [29]-[30].

²⁴³ *Prosecutor v Ntaganda* (Public redacted version of “Response on behalf of Mr Ntaganda to ‘Prosecution application under rule 68(3) to admit Witness P-0030’s prior recorded testimony and associated material’”, 14 September 2016, ICC-01/04-02/06-1503-Conf) ICC-01/04-02/06-1503-Red (14 September 2016) (TC VI) [4], fn 9; [10], fn 18.

²⁴⁴ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [14]; *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [9].

²⁴⁵ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [16].

5. **Two excerpts of video** (DRC-D18-0001-0425)²⁴⁶ not discussed where the DDE was obtained as this evidence was not admitted.
6. **Four excerpts of video** (DRC-D18-0001-0436) **and five excerpts of video** (DRC-OTP-0118-0002);²⁴⁷ - where this DDE was obtained is not discussed as they were not admitted.
7. **NOTE 1** - the following DDE mentioned in the footnotes of the judgment could not be traced since they refer to the Defence Closing Brief whose annexes are confidential. [https://www.icc-cpi.int/CourtRecords/CR2018_03432.PDF]
- i. **Photograph** (DRC-OTP-2058-0667-R02) - footnotes 406-407
 - ii. **Photographs** (see DRC-OTP-0104-0050, DRC-OTP-0104-0051, DRC-OTP-0104-0052, DRC-OTP-0104-0043, DRC-OTP-0104-0044, DRC-OTP-0104-0045, DRC-OTP-0104-0046, DRC-OTP-0104-0047, DRC-OTP-0104-0048, and DRC-OTP-0104-0049) - footnote 1637
 - iii. **Photographs** (DRC-OTP-2059-0173; DRC-OTP-2059-0174; DRC-OTP-2059-0175) - footnote 1866
 - iv. **Photographs** (DRC-OTP-0096-0133 to DRC-OTP-0096-0136, DRC-OTP-0096-0138 to DRC-OTP-0096-0142, DRC-OTP-0096-0144, DRC-OTP-0096-0145, DRC-OTP-2052-0207, DRC-OTP-2059-0231-R01) - footnote 1867 **Video** (DRC-OTP-0120-0293) – footnotes 241 / 256 / 1020 / 1025 / 1037 / 1047 / 1098 / 1099 / 1100 / 1101 / 1264.
 - v. **Video** (DRC-OTP-2058-0251) - footnotes 264 / 398 / 405 / 407 / 856 / 1000 / 1099 / 1109 / 1129 / 1135 / 1141 / 1143 / 1250 / 1353 / 1414 / 1415 / 1434 / 1447 / 1522 / 1570 / 1574 / 1581 / 1583 / 1584 / 1586
 - vi. **Video** (DRC-OTP-0103-0008) - footnotes 500 / 502 / 1102 / 1216 / 1344 / 2090.
 - vii. **Video** (DRC-OTP-1033-0221) – footnotes 1748 / 1921.
 - viii. **Video** (DRC-OTP-0164-0910) – footnotes 2088 / 2090 / 2097.
8. **NOTE 2** – The Trial Chamber in its judgment refers to the so-called ‘Motorola intercepts’. Motorola was a device that ‘had been lost by the UPC/FPLC during the failed assault on Lipri’ and was subsequently ‘set up in the Gutsi primary school by Lendu people’ prior to the ‘pacification meeting’.²⁴⁸ With this device, the Lendu people ‘managed to intercept UPC/FPLC communications in which UPC/FPLC commanders exchanged details indicating that the ‘pacification meeting’ was meant to be a trap aimed at capturing the Lendu’.²⁴⁹
9. No information in the judgment as to the evidence code of these intercepts – unable to trace them in the judgment. However, the Prosecution’s Closing Brief - https://www.icc-cpi.int/RelatedRecords/CR2018_05218.PDF - at pages 182-183, para. 506 refers to an audio intercept which ‘provides strong evidence of the coordinated attack that followed the Pacification

²⁴⁶ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [20].

²⁴⁷ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [22].

²⁴⁸ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [593]-[594].

²⁴⁹ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [593]-[594].

Meeting'. The footnote to this statement refers to the evidence code **DRC-OTP-0162-0115**, which has already been included in this case summary (DDE **Letter L**).

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

10. **Excerpts of video** - Prosecution intended to show excerpts of a video as part of the examination-in-chief of a witness and had provided the Defence 'with the references to the transcriptions and translations of these extracts'.²⁵⁰

11. **Excerpts of video** – reference is made to a previous 'Decision on the conduct of proceedings' issued by Trial Chamber VI on 2 June 2015, where the Chamber held that '[i]f a party wishes to present audio-visual material to a witness, it must establish that the witness has personal knowledge of the making of the recording or its contents. This may be achieved by playing a brief excerpt of the audio-visual material only to the extent strictly necessary for the witness to confirm his/her personal knowledge of it. Once this has occurred, the party may play the excerpt(s) of the recording it intended to present to the witness. Regardless of whether the party is allowed to present such recordings to a witness, the audio-visual material itself will not be considered for the truth of its contents unless it is admitted into evidence.'²⁵¹

12. **Videos and photographs** (DRC-OTP-0151-0665, DRC-OTP-0127-0065, DRC-OTP-0128-0043, DRC-OTP-0128-0046; DRC-OTP-0128-0047) - Prosecution wanted to admit these items that 'were shown to and explained by Witness P-0030' in his witness statement and annexes.²⁵²

13. **Four excerpts of video** (DRC-OTP-0127-0064) - Tendered into evidence by the Defence to illustrate 'Ntaganda's efforts to reach out to the Lendu community and to promote reconciliation'.²⁵³ It depicts 'a ceremony he attended in Katoto in 2004 during which Mr Ntaganda delivered a speech'.²⁵⁴

14. The Chamber found that they were '*prima facie* relevant to the Chamber's assessment of Mr. Ntaganda's conduct after the events forming part of the charges' and considered that 'their

²⁵⁰ *Prosecutor v Ntaganda* (Public redacted version of "Submissions on behalf of Mr Ntaganda concerning the admission into evidence of transcriptions and/or translations of audio and video material") ICC-01/04-02/06-907-Red (19 October 2015) (TC VI) [4]-[5].

²⁵¹ *Prosecutor v Ntaganda* (Decision on the conduct of proceedings) ICC-01/04-02/06-619 (2 June 2015) (TC VI) [56].

²⁵² *Prosecutor v Ntaganda* (Public redacted version of "Response on behalf of Mr Ntaganda to 'Prosecution application under rule 68(3) to admit Witness P-0030's prior recorded testimony and associated material'", 14 September 2016, ICC-01/04-02/06-1503-Conf) ICC-01/04-02/06-1503-Red (14 September 2016) (TC VI) [29].

²⁵³ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [14].

²⁵⁴ *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [9].

probative value [had] been sufficiently established'.²⁵⁵ It held that 'no undue prejudice would arise from their admission'²⁵⁶ and that 'it was not necessary for the accused to explain the meaning of his speech'²⁵⁷.

15. **Three excerpts of video** (DRC-OTP-0159-0477) - Tendered into evidence by the Defence in order to 'show Mr Ntaganda's family relationships as well as his views about women and his disposition towards the civilian population in 2004'.²⁵⁸

16. The Chamber found that two of the excerpts 'may be relevant in determining the existence of mitigating circumstances, Mr Ntaganda's character *vis-à-vis* others, and Mr Ntaganda's personal relationships', and that their probative value had been 'sufficiently established' since their 'authenticity' was not disputed.²⁵⁹

17. **Two excerpts of video** (DRC-D18-0001-0425) - Tendered into evidence by the Defence to demonstrate the 'UPC/FPLC's efforts towards peace and reconciliation with all communities'.²⁶⁰

18. The Chamber held that 'the Defence has not sufficiently demonstrated that the aforementioned proposed evidence is unique and goes beyond other evidence on the record'.²⁶¹

19. **Four excerpts of video** (DRC-D18-0001-0436) and **five excerpts of video** (DRC-OTP-0118-0002) - Tendered into evidence by the Defence to demonstrate 'Mr Ntaganda's successful efforts to reach out to the Lendu community and the FNI and to promote reconciliation'.²⁶²

20. **Four excerpts of video** (DRC -D18-001-0436) and **five excerpts of video** (DRC-OTP-0118-0002) – The Chamber rejected the admission of the tendered excerpts from the bar table because it considered it more appropriate 'that the excerpts be tendered during the examination-in-chief of Witnesses D-0305 and D-0306 since they 'appear on the videos the extracts of which the Defence intends to tender into evidence'.²⁶³

²⁵⁵ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [15].

²⁵⁶ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [15].

²⁵⁷ *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [9].

²⁵⁸ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [16].

²⁵⁹ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [18].

²⁶⁰ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [20].

²⁶¹ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [21].

²⁶² *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [22].

²⁶³ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [23].

21. **Seven excerpts of video** (DRC-OTP-1002-0014) – tendered into evidence by the Defence to ‘provide context to the security situation in and around Bunia following the arrival of the Artémis forces’.²⁶⁴

22. The Chamber held that ‘it would be more appropriate to admit the video in its entirety, notably to assist in contextualizing those portions initially identified by the Defence as being most relevant’.²⁶⁵ It found that the video was ‘*prima facie* relevant’, had ‘probative value’ and that ‘no undue prejudice’ would arise from its ‘admission in full’.²⁶⁶

23. **Video** (DRC-D18-0001-0463) – Depicts ‘Mr Ntaganda’s visit to the Rwampara and Ndro mo training camps’.²⁶⁷ Defence argued that its admission, in full, ‘is necessary in order to understand [Witness D-0080’s] testimony and the images he refers to therein’.²⁶⁸

24. The Chamber held that it was ‘more appropriate to consider the requested admission of this item in its decision on the Defence’s Rule 68(2)(c) request in relation to Witness D-0080’, given the Prosecution’s argument that ‘D-0080’s witness statement fails to adequately explain crucial details related to his viewing of DRC-D18-0001-0463 that affect the reliability and probative value of his statement’.²⁶⁹ [please, note: there was no evidentiary consideration on the video itself by the Court in the available transcripts].

25. **Video** (DRC-OTP-0082-0016) – information contained in confidential annex. The Chamber noted that the ‘specific portions of the Videos were both used with the Witness and commented upon by him’ and thus they bared ‘sufficient indicia of reliability for the purposes of Rule 68(2)(c) of the Rules’.²⁷⁰

26. **Groups of photographs taken in Kobu** – not discussed but presumably to ‘depict the aftermath of the ‘Kobu massacre’’.²⁷¹

27. The Chamber was satisfied that ‘the Kobu Photographs depict the aftermath of the ‘Kobu massacre’’.²⁷² It noted that ‘[d]espite the poor quality of some of the photographs and noting that the evidence on the record as to who took the photographs and how they were developed is

²⁶⁴ *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [10].

²⁶⁵ *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [10].

²⁶⁶ *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [10].

²⁶⁷ *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [11].

²⁶⁸ *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [11].

²⁶⁹ *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [11].

²⁷⁰ *Prosecutor v Ntaganda* (Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016) ICC-01/04-02/06-1802-Red (24 February 2017) (TC VI) [24]-[25].

²⁷¹ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [282].

²⁷² *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [282].

indeed unclear, the Chamber notes the consistent evidence that photographs were taken at the site from witnesses whom it considers credible as to their presence at the scene in the days after the alleged killings.²⁷³ It notes ‘the consistent testimony from witnesses who said they recognized victims in certain photos, and considers the Defence assertion that such identifications were implausible and indicative of contamination to be similarly unsubstantiated’.²⁷⁴ Furthermore, it noted the ‘consistency between the images depicted in the photographs and the scene described by eyewitnesses, and that a pair of blue trousers found on one of the skeletal remains exhumed in Kobu looks similar to the trousers in one of the Kobu Photographs’.²⁷⁵

28. **Satellite image(s)** (DRC-OTP-2099-0166) - ‘relied upon by the Defence to undermine the witness’s statement that ‘[e]verything was torched’ in Buli’.²⁷⁶ It was argued that ‘[w]hile P-0810 provided credible expert testimony, the Chamber notes the extensive time period between the photos, the ongoing fighting in Ituri at the relevant time, and P-0810’s acknowledgment that changes could have happened any time during the relevant time frame.’²⁷⁷ As a result, the Chamber was ‘not in a position to establish beyond reasonable doubt that the destruction of property within this time frame as shown on the 22 May 2003 satellite image occurred during this specific assault’.²⁷⁸

29. Furthermore, the Chamber observed that the satellite image was ‘taken more than a month after the Lipri attack’ and was ‘therefore of limited use to establish whether, and if so how, any destruction took place during the events that are subject to the charges’.²⁷⁹ As such, the Chamber considered ‘it appropriate to rely on the most contemporaneous evidence, namely the witnesses’ accounts and observations, including eye-witnesses, who were present during the attack on 18 February 2003 or came to Lipri immediately after to witness the destruction’.²⁸⁰

30. **Intercepted radio communication** (DRC-OTP-0162-0115) - Sought to be admitted by the Prosecution because it ‘allegedly relates to FPLC operations in the Walendu-Djatsi area at times relevant to the charges’.²⁸¹

31. The Chamber had, on a previous occasion, admitted ‘portions of the audio which were played in the courtroom, noting, *inter alia*, that while the witness was able to recognize some of the persons who could be heard on the recording, and was able to comment on the places and events that were mentioned on it, he was not in a position to explain the circumstances in which the recording was made or to attest to its chain of custody’.²⁸² The Chamber, in this instance,

²⁷³ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [282].

²⁷⁴ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [282].

²⁷⁵ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [282].

²⁷⁶ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [248], fn 624.

²⁷⁷ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [454], fn 1293.

²⁷⁸ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [454], fn 1293.

²⁷⁹ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [569], fn 1748.

²⁸⁰ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [569], fn 1748.

²⁸¹ *Prosecutor v Ntaganda* (Decision on Prosecution’s request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [65].

²⁸² *Prosecutor v Ntaganda* (Decision on Prosecution’s request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [65].

found that the Prosecution had not provided ‘any supplementary information on the relevance and probative value of the remaining parts of the items’ and thus the Chamber did not find ‘any reasons that would [then] justify admission of these items in full’.²⁸³

32. **Ten photographs** (DRC-OTP-0094-0032; DRC-OTP-0094-0040; DRC-OTP-0094-0056; DRC-OTP-0094-0057; DRC-OTP-0094-0089; DRC-OTP-0113-0214; DRC-OTP-0128-0011; DRC-OTP-0128-0013; DRC-OTP-0128-0026; DRC-OTP-0137-0680) – The Prosecution argued that they ‘serve to establish the ‘presence of co-perpetrators of the common plan’, and provide context and further establish the availability of communications devices and the UPC/FPLC leadership’s ability to communicate over electronic devices’.²⁸⁴

33. The Chamber held that since six of these photographs were not dated, ‘their relevance to issues of the case and probative value [could not] be determined’.²⁸⁵ With regard to the other four, the Chamber noted that ‘apart from one photo, the Prosecution has not provided any information on the basis of which the Chamber can conclude that the dates are correct’ and that one of them fell ‘outside the temporal scope of the charges’.²⁸⁶ With regard to the remaining three, the Chamber held that ‘while these photos could have some relevance, in the absence of any substantiation or reliable information as to the date and location and events depicted, the probative value of these items is so low that they cannot be admitted into evidence’.²⁸⁷

34. **Video reportage** (DRC-OTP-0159-0441). The Chamber held that its probative value was very low since ‘the Prosecution [had] failed to provide any substantiation of the time when the video is supposed to have been shot (except for noting that the video was broadcast on 13 June 2003) and armed groups concerned’.²⁸⁸ ‘The limited probative value’ was outweighed ‘by the prejudice that admission of the video would cause’.²⁸⁹

Was the DDE admitted and/or relied upon?

35. **Excerpts of video** – not discussed [since mentioned in Defence filing].

²⁸³ *Prosecutor v Ntaganda* (Decision on Prosecution’s request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [66].

²⁸⁴ *Prosecutor v Ntaganda* (Decision on Prosecution’s request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [67].

²⁸⁵ *Prosecutor v Ntaganda* (Decision on Prosecution’s request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [68].

²⁸⁶ *Prosecutor v Ntaganda* (Decision on Prosecution’s request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [68].

²⁸⁷ *Prosecutor v Ntaganda* (Decision on Prosecution’s request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [68].

²⁸⁸ *Prosecutor v Ntaganda* (Decision on Prosecution’s request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [63].

²⁸⁹ *Prosecutor v Ntaganda* (Decision on Prosecution’s request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [63].

36. **Videos and photographs** (DRC-OTP-0151-0665, DRC-OTP-0127-0065, DRC-OTP-0128-0043, DRC-OTP-0128-0046; DRC-OTP-0128-0047) – not discussed [since mentioned in Defence filing].
37. **Four excerpts of video** (DRC-OTP-0127-0064) – admitted / no information as to reliance.²⁹⁰
38. **Three excerpts of video** (DRC-OTP-0159-0477) - Two of the excerpts were admitted / no information as to reliance.²⁹¹
39. **Two excerpts of video** (DRC-D18-0001-0425) - not admitted.²⁹²
40. **Four excerpts of video** (DRC -D18-001-0436) **and five excerpts of video** (DRC-OTP-0118-0002) – not admitted (see above).
41. **Seven excerpts of video** (DRC-OTP-1002-0014) – entire video was admitted.²⁹³
42. **Video** (DRC-D18-0001-0463) – admitted.²⁹⁴
43. **Video** (DRC-OTP-0082-0016) – admitted.²⁹⁵
44. **Groups of photographs taken in Kobu** – admitted.²⁹⁶
45. **Satellite image(s)** (DRC-OTP-2099-0166) - admitted but not relied upon.²⁹⁷
46. **Intercepted radio communication** (DRC-OTP-0162-0115) - not admitted.²⁹⁸
47. **Ten photographs** (DRC-OTP-0094-0032; DRC-OTP-0094-0040; DRC-OTP-0094-0056; DRC-OTP-0094-0057; DRC-OTP-0094-0089; DRC-OTP-0113-0214; DRC-OTP-0128-0011; DRC-OTP-0128-0013; DRC-OTP-0128-0026; DRC-OTP-0137-0680) – not admitted.²⁹⁹

²⁹⁰ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [15].

²⁹¹ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [19].

²⁹² *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [21].

²⁹³ *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [10].

²⁹⁴ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [104], fn 251.

²⁹⁵ *Prosecutor v Ntaganda* (Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016) ICC-01/04-02/06-1802-Red (24 February 2017) (TC VI) [32].

²⁹⁶ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [281], fn 701.

²⁹⁷ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [609], fn 1892.

²⁹⁸ *Prosecutor v Ntaganda* (Decision on Prosecution's request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [66].

²⁹⁹ *Prosecutor v Ntaganda* (Decision on Prosecution's request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [68].

48. **Video reportage** (DRC-OTP-0159-0441) - not admitted.³⁰⁰

General Legal Submissions on DDE

49. **Excerpts of video** - the **Defence** informed the Prosecution ‘that in the absence of the necessary resources / qualified personnel to verify the accuracy of the transcripts / translations prepared by the Prosecution’, it opposed to the ‘admission into evidence of the excerpts of audio-visual exhibits’.³⁰¹ The Defence argued that the accuracy of ‘any transcription and/or translation of audio-visual material used with a witness or admitted through a witness’ should be ‘verified and certified by a neutral and independent entity such as the Registry’.³⁰² The Prosecution did not discuss evidentiary considerations.

50. **Videos and photographs** (DRC-OTP-0151-0665, DRC-OTP-0127-0065, DRC-OTP-0128-0043, DRC-OTP-0128-0046; DRC-OTP-0128-0047) - Since the Chamber had granted ‘the Defence objection to the admissibility’ of the witness’ statement and annexes, the Defence opposed ‘the admission of these five items unless they [were] admitted following the procedure set out by the Chamber during the Prosecution’s supplementary examination’.³⁰³

51. **Four excerpts of video** (DRC-OTP-0127-0064) – The Prosecution did not oppose but requested ‘the admission of two extensions of two of the excerpts, so that the Chamber [could] properly evaluate the nature of the event depicted therein and the related Defence submissions’.³⁰⁴ The Defence did not discuss evidentiary considerations.

52. **Three excerpts of video** (DRC-OTP-0159-0477) – The Prosecution argued that they were ‘irrelevant to any mitigating circumstances’ and lacked probative value since it portrayed something different than the Defence’s submissions.³⁰⁵ The Defence did not discuss evidentiary considerations.

³⁰⁰ *Prosecutor v Ntaganda* (Decision on Prosecution’s request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [63].

³⁰¹ *Prosecutor v Ntaganda* (Public redacted version of “Submissions on behalf of Mr Ntaganda concerning the admission into evidence of transcriptions and/or translations of audio and video material”) ICC-01/04-02/06-907-Red (19 October 2015) (TC VI) [6].

³⁰² *Prosecutor v Ntaganda* (Public redacted version of “Submissions on behalf of Mr Ntaganda concerning the admission into evidence of transcriptions and/or translations of audio and video material”) ICC-01/04-02/06-907-Red (19 October 2015) (TC VI) [11].

³⁰³ *Prosecutor v Ntaganda* (Public redacted version of “Response on behalf of Mr Ntaganda to ‘Prosecution application under rule 68(3) to admit Witness P-0030’s prior recorded testimony and associated material’”, 14 September 2016, ICC-01/04-02/06-1503-Conf) ICC-01/04-02/06-1503-Red (14 September 2016) (TC VI) [30].

³⁰⁴ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [14].

³⁰⁵ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [16].

53. **Two excerpts of video** (DRC-D18-0001-0425) – The Prosecution argued that ‘the event depicted in the video has already been extensively dealt with during Mr Ntaganda’s testimony’.³⁰⁶ The Defence did not discuss evidentiary considerations.

54. **Four excerpts of video** (DRC-D18-0001-0436) **and five excerpts of video** (DRC-OTP-0118-0002) – The Prosecution opposed to their admission ‘for lack of relevance and/or probative value, as the mere presence of FNI and Lendu leaders at the event depicted in the video is not probative of Mr Ntaganda’s efforts towards ethnic reconciliation’.³⁰⁷ The Defence did not discuss evidentiary considerations.

55. **Seven excerpts of video** (DRC-OTP-1002-0014) – The Prosecution argued that ‘the excerpts tendered by the Defence are too selective and that it would be more appropriate for the entire video to be admitted, a proposal not opposed by the Defence’.³⁰⁸ The Defence did not discuss evidentiary considerations.

56. **Video** (DRC-D18-0001-0463) – The Prosecution argued that ‘D-0080’s witness statement fails to adequately explain crucial details related to his viewing of DRC-D18-0001-0463 that affect the reliability and probative value of his statement’.³⁰⁹ The Defence argued that its admission, in full, ‘is necessary in order to understand [Witness D-0080’s] testimony and the images he refers to therein’.³¹⁰

57. **Video** (DRC-OTP-0082-0016) – The Prosecution argued that the video was relevant, reliable and had probative value.³¹¹ It argued that the video was ‘sufficiently reliable for admission in the *Ntaganda* case as the Witness ‘authenticated and provided information about’ it.³¹² The Defence argued that the video lacked ‘sufficient indicia of reliability and as such, ought not to be admitted under Rule 68(2)(c) of the Rules’.³¹³

58. **Groups of photographs taken in Kobu** – The Defence challenged their authenticity asserting that ‘there are serious grounds to believe that witnesses extensively discussed them, shared them amongst themselves, and coordinated their testimony to falsely claim that these depict the aftermath of the ‘Kobu massacre’’.³¹⁴ The Prosecution argued that ‘many witnesses

³⁰⁶ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [20].

³⁰⁷ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [22].

³⁰⁸ *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [10].

³⁰⁹ *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [11].

³¹⁰ *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [11].

³¹¹ *Prosecutor v Ntaganda* (Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016) ICC-01/04-02/06-1802-Red (24 February 2017) (TC VI) [9].

³¹² *Prosecutor v Ntaganda* (Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016) ICC-01/04-02/06-1802-Red (24 February 2017) (TC VI) [19].

³¹³ *Prosecutor v Ntaganda* (Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016) ICC-01/04-02/06-1802-Red (24 February 2017) (TC VI) [21].

³¹⁴ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [281].

who identified individuals in the photographs were present in Kobu and saw the photographed bodies in person shortly after the bodies were discovered'.³¹⁵ It also argued that it 'is not necessary to call a photographer to authenticate a photograph; another witness can testify that a photograph is a fair and accurate representation of that which it purports to be'.³¹⁶

59. **Satellite image(s)** (DRC-OTP-2099-0166) – not discussed in judgment [could not trace the evidence in other transcripts].

60. **Intercepted radio communication** (DRC-OTP-0162-0115) – The Prosecution noted that 'the items in question are submitted in their entirety' for 'completeness and context'.³¹⁷ No discussion as to The Defence evidentiary considerations.

61. **Ten photographs** (DRC-OTP-0094-0032; DRC-OTP-0094-0040; DRC-OTP-0094-0056; DRC-OTP-0094-0057; DRC-OTP-0094-0089; DRC-OTP-0113-0214; DRC-OTP-0128-0011; DRC-OTP-0128-0013; DRC-OTP-0128-0026; DRC-OTP-0137-0680) – The Defence argued that 'they are inadmissible mainly on the basis that the Prosecution should have tendered them through witnesses capable of identifying the subjects pictured, they refer to events outside the temporal scope of the charges, and/or that the probative value that can be attributed to them is exceeded by the prejudice against the accused'.³¹⁸

62. **N. Video reportage** (DRC-OTP-0159-0441) – not discussed as it was not admitted.

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

63. Rule 68(3) of the Rules of Procedure and Evidence.

V. EXTRAPOLATIONS

64. Decisive factors are relevance, probative value, and no undue prejudice to a fair trial, or to the evaluation of the testimony of a witness.³¹⁹

65. For evidence not presented *viva voce*, the Court assesses factors such as 'provenance, source or author, as well as the author's role in the relevant events' and takes into account 'the

³¹⁵ *Prosecutor v Ntaganda* (Public redacted version of "Prosecution's Response to the Defence Closing Brief", 17 July 2018, ICC-01/04-02/06-2306-Conf) ICC-01/04-02/06-2306-Red (7 November 2018) (TC VI) [151].

³¹⁶ *Prosecutor v Ntaganda* (Public redacted version of "Prosecution's Response to the Defence Closing Brief", 17 July 2018, ICC-01/04-02/06-2306-Conf) ICC-01/04-02/06-2306-Red (7 November 2018) (TC VI) [152].

³¹⁷ *Prosecutor v Ntaganda* (Decision on Prosecution's request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [65]-[66].

³¹⁸ *Prosecutor v Ntaganda* (Decision on Prosecution's request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [67].

³¹⁹ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [49].

reported chain of custody from the time of the item's creation until its submission to the Chamber, and any other relevant information'.³²⁰

Videos

66. Each video should be unique and should not overlap with other evidence already admitted³²¹ (**NB:** this is a case-specific consideration which needs to be looked at within the context).

67. Videos should be submitted in their entirety to help the Court to contextualise the portions identified by the party seeking admission as being most relevant.³²²

68. Having a witness comment on videos can lead to the conclusion that they bear sufficient indicia of reliability.³²³

69. The party seeking admission should provide 'substantiation of the time when the video is supposed to have been shot'.³²⁴

70. Before a video can be presented to a witness, the party must first establish that the witness has 'personal knowledge of the making of the recording or its contents'.³²⁵ This can be done by 'playing a brief excerpt of the audio-visual material on to the extent strictly necessary for the witness to confirm his/her personal knowledge of it'.³²⁶

71. Audio-visual material 'will not be considered for the truth of its contents unless it is admitted into evidence'.³²⁷

72. Videos should be admitted in their entirety.³²⁸

73. Videos should be sufficiently reliable if authenticated by a witness who also provides information on them.³²⁹

³²⁰ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [57].

³²¹ *Prosecutor v Ntaganda* (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [21].

³²² *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [10].

³²³ *Prosecutor v Ntaganda* (Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016) ICC-01/04-02/06-1802-Red (24 February 2017) (TC VI) [24]-[25].

³²⁴ *Prosecutor v Ntaganda* (Decision on Prosecution's request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [63].

³²⁵ *Prosecutor v Ntaganda* (Decision on the conduct of proceedings) ICC-01/04-02/06-619 (2 June 2015) (TC VI) [56].

³²⁶ *Prosecutor v Ntaganda* (Decision on the conduct of proceedings) ICC-01/04-02/06-619 (2 June 2015) (TC VI) [56].

³²⁷ *Prosecutor v Ntaganda* (Decision on the conduct of proceedings) ICC-01/04-02/06-619 (2 June 2015) (TC VI) [56].

³²⁸ *Prosecutor v Ntaganda* (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) [10].

³²⁹ *Prosecutor v Ntaganda* (Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016) ICC-01/04-02/06-1802-Red (24 February 2017) (TC VI) [19].

74. The transcription and/or translation of videos should be verified and certified by a neutral and independent entity, e.g., the Registry of the Court.³³⁰

Intercepted radio communications

75. Witnesses who comment on intercepted radio communications should also be able to explain the circumstances in which the recording was made or be able to attest to the recording's³³¹

Photographs

76. Photographs should include reliable information as to the date, location and events depicted.³³²

77. A Party seeking admission should provide information on the basis of which the Court can conclude that the dates are correct and fall within the temporal scope of the charges.³³³

78. There should be consistency between the 'images depicted in the photographs and the scene described by eyewitnesses.³³⁴

79. Photographs should be tendered through witnesses capable of identifying the subjects pictured.³³⁵

80. Photographs should refer to events within the temporal scope of the charges.³³⁶

81. It 'is not necessary to call a photographer to authenticate a photograph; another witness can testify that a photograph is a fair and accurate representation of that which it purports to be'.³³⁷

³³⁰ *Prosecutor v Ntaganda* (Public redacted version of "Submissions on behalf of Mr Ntaganda concerning the admission into evidence of transcriptions and/or translations of audio and video material") ICC-01/04-02/06-907-Red (19 October 2015) (TC VI) [11].

³³¹ *Prosecutor v Ntaganda* (Decision on Prosecution's request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [65].

³³² *Prosecutor v Ntaganda* (Decision on Prosecution's request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [68].

³³³ *Prosecutor v Ntaganda* (Decision on Prosecution's request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [68].

³³⁴ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [282].

³³⁵ *Prosecutor v Ntaganda* (Decision on Prosecution's request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [67].

³³⁶ *Prosecutor v Ntaganda* (Decision on Prosecution's request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [67].

³³⁷ *Prosecutor v Ntaganda* (Public redacted version of "Prosecution's Response to the Defence Closing Brief", 17 July 2018, ICC-01/04-02/06-2306-Conf) ICC-01/04-02/06-2306-Red (7 November 2018) (TC VI) [152].

Satellite images:

82. Aerial and satellite imagery should be taken contemporaneously to the events they purport to be showing.³³⁸

VI. CITATIONS

Prosecutor v Ntaganda (Decision on requests for admission of evidence related to sentencing from the bar table) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) <https://www.legal-tools.org/doc/1a72bc/>;

Prosecutor v Ntaganda (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) <https://www.legal-tools.org/doc/80578a/>;

Prosecutor v Ntaganda (Decision on second Defence request for admission of evidence from the bar table) ICC-01/04-02/06-2240 (21 February 2018) (TC VI) <https://www.legal-tools.org/doc/639f7c/>;

Prosecutor v Ntaganda (Decision on Prosecution's request for admission of documentary evidence) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) <https://www.legal-tools.org/doc/b558d5/>;

Prosecutor v Ntaganda (Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016) ICC-01/04-02/06-1802-Red (24 February 2017) (TC VI) <https://www.legal-tools.org/doc/eac1fe/>;

Prosecutor v Ntaganda (Decision on the conduct of proceedings) ICC-01/04-02/06-619 (2 June 2015) (TC VI) <https://www.legal-tools.org/doc/03357c/>;

Prosecutor v Ntaganda (Public redacted version of "Prosecution's Response to the Defence Closing Brief", 17 July 2018, ICC-01/04-02/06-2306-Conf) ICC-01/04-02/06-2306-Red (7 November 2018) (TC VI) <https://www.legal-tools.org/doc/ab71b4/>;

Prosecutor v Ntaganda (Public redacted version of "Response on behalf of Mr Ntaganda to 'Prosecution application under rule 68(3) to admit Witness P-0030's prior recorded testimony and associated material'", 14 September 2016, ICC-01/04-02/06-1503-Conf) ICC-01/04-02/06-1503-Red (14 September 2016) (TC VI) <https://www.legal-tools.org/doc/309656/>;

Prosecutor v Ntaganda (Public redacted version of "Submissions on behalf of Mr Ntaganda concerning the admission into evidence of transcriptions and/or translations of audio and video material") ICC-01/04-02/06-907-Red (19 October 2015) (TC VI) <https://www.legal-tools.org/doc/a42533/>

³³⁸ *Prosecutor v Ntaganda* (Judgment) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [454], fn 1293; [569], fn 1748.

Prosecutor v Dominic Ongwen (ICC-02/04-01/15) – Pre-Trial Phase

I. CASE DETAILS

- **Case name:** *Prosecutor v Dominic Ongwen* (ICC-02/04-01/15)
- **Tribunal/Court:** International Criminal Court (“ICC”)
- **Offence charged:** Initially charged with three counts of Crimes Against Humanity, and four counts of War Crimes. Later, in 2015, additionally charged with a total of 70 counts.¹
- **Stage of the proceedings:** Pre-Trial
- **Keywords:** Provenance, Chain of custody, Reliability

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. **Intercepted radio communications [in Confidential Annex A]**² This also includes digitally enhanced sound recordings of LRA radio communications prepared by the Prosecution. **[Items 266-357 and 360-375 in Annex A]**.³
2. The intercepts were introduced by the Prosecution and obtained from the Ugandan Government.⁴ Digitally enhanced sound recordings of LRA radio communications were also submitted and prepared by the Prosecution.⁵
3. **Photographs [in Confidential Annex A]**.⁶
4. The photographs were generated by the Ugandan authorities in the course of investigating attacks attributed to the LRA and introduced by the Prosecution.⁷

¹ *Prosecutor v Ongwen* (Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016) (PTC II).

² *Prosecutor v Ongwen* (Prosecution’s Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses) ICC-02/04-01/15-577 (24 October 2016) (TC IX) [37].

³ *Prosecutor v Ongwen* (Prosecution’s Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses) ICC-02/04-01/15-577 (24 October 2016) (TC IX) [38].

⁴ *Prosecutor v Ongwen* (Prosecution’s Pre-Trial Brief) ICC-02/04-01/15-533 (6 September 2016) (TC IX).

⁵ *Prosecutor v Ongwen* (Prosecution’s Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses) ICC-02/04-01/15-577 (24 October 2016) (TC IX) [38].

⁶ *Prosecutor v Ongwen* (Prosecution’s Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses) ICC-02/04-01/15-577 (24 October 2016) (TC IX) [28].

⁷ *Prosecutor v Ongwen* (Public Redacted Version of “Prosecution Closing Brief”) ICC-02/04-01/15-1719-Red (24 February 2020) (TC IX) [38].

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

Intercepted radio communications

5. Radio communications between LRA commanders were intercepted and recorded contemporaneously by several Ugandan military and security organisations during the charged period. These intercepted communications were submitted as evidence by the Prosecution in this case.⁸ In this regard, the Prosecution submitted six categories of items related to the interception of LRA radio communications indicating the relevance and probative value of each individual item. It comprised of records compiled and maintained by authorities in the regular course of their duty to protect the Ugandan State, and to maintain law and order.
6. The Prosecution gave a detailed analysis of the history and the working of these radio recording to the Chambers. It submitted that the evidence was unaffected by human memory's fallibility, and free of the bias or motivations that could taint witness testimony. As such, any gaps in the collection in no way affected the reliability of those records that were obtained.⁹
7. The Prosecution also explained the shortcomings in the interception process; however, in its opinion, it did not affect the integrity of this evidence. These shortcomings related to: the recording equipment of the intercepts (which was rudimentary in nature); record-keeping, which was not always meticulous; corroboration between the different sources of intercept evidence, which was not always consistent, etc. Nevertheless, the Prosecution submitted that the shortcomings proved that the material they produced was distinct and independently compiled.¹⁰
8. In the words of the Prosecution, the intercepted LRA radio communications represented a unique opportunity for the Court to step inside the mind of Dominic Ongwen and the other LRA commanders at a time before the prospect of prosecution might have influenced their thoughts or actions.¹¹
9. Finally, the Prosecution emphasised that the Defence had not challenged the reliability of this evidence but had instead itself relied on it.¹²
10. Noting that the Prosecutor had provided a detailed explanation of the process of interception and analysis of the LRA radio communications by the Ugandan government,

⁸ *Prosecutor v Ongwen* (Transcript) ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (PTC II) 33.

⁹ *Prosecutor v Ongwen* (Prosecution's Pre-Trial Brief) ICC-02/04-01/15-533 (6 September 2016) (TC IX) [88].

¹⁰ *Prosecutor v Ongwen* (Transcript) ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (PTC II) 44.

¹¹ *Prosecutor v Ongwen* (Transcript) ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (PTC II) 44.

¹² *Prosecutor v Ongwen* (Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016) (PTC II) [51].

the Chamber held the intercepted evidence to be reliable.¹³ Considering the intercept evidence to be “particularly instructive” to its findings regarding the nature and structure of the LRA and Dominic Ongwen’s status in the organization, the Pre-Trial chamber found the evidence material to be reliable for the purposes of its decision on the confirmation of charges.¹⁴

11. As a result, the Chamber relied on records of intercepted LRA radio communications in confirming the charges against Mr Ongwen.¹⁵ The DDE was submitted and relied upon for the confirmation of charges¹⁶

Photograph

12. In its Pre-Trial Brief, the Prosecution stressed that images “speak for themselves” and were consistent with the Prosecution’s case.¹⁷ In addition, it contended that the photographic evidence was relevant because it provided a contemporaneous image of the nature and effect of LRA attacks against the civilian population.

IV. RULES OF EVIDENCE

Not Applicable

V. EXTRAPOLATIONS

Intercepted radio communications

13. A detailed explanation of the process of interception and analysis can overcome shortcomings in the interception process¹⁸

VI. CITATIONS

Prosecutor v Ongwen (Transcript) ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (PTC II) <https://www.legal-tools.org/doc/592d06/>

¹³ *Prosecutor v Ongwen* (Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016) (PTC II) [51].

¹⁴ *Prosecutor v Ongwen* (Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016) (PTC II) [54]-[55].

¹⁵ *Prosecutor v Ongwen* (Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016) (PTC II) [46].

¹⁶ *Prosecutor v Ongwen* (Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016) (PTC II) [46].

¹⁷ *Prosecutor v Ongwen* (Defence Response to “Prosecution’s formal submission of intercept evidence via the ‘bar table’” (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [40].

¹⁸ *Prosecutor v Ongwen* (Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016) (PTC II) [51].

Prosecutor v Ongwen (Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016) (PTC II) <https://www.legal-tools.org/doc/74fc6e/>;

Prosecutor v Ongwen (Decision on Disclosure Issues Arising Out of First Status Conference) ICC-02/04-01/15-457 (7 June 2016) (TC IX) <https://www.legal-tools.org/doc/bc0de4/>;

Prosecutor v Ongwen (Prosecution's Pre-Trial Brief) ICC-02/04-01/15-533 (6 September 2016) (TC IX) <https://www.legal-tools.org/doc/6ecd6a/>;

Prosecutor v Ongwen (Prosecution's Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses) ICC-02/04-01/15-577 (24 October 2016) (TC IX) <https://www.legal-tools.org/doc/3175af/>;

Prosecutor v Ongwen (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) <https://www.legal-tools.org/doc/ccc5e3/>;

Prosecutor v Ongwen (Public Redacted Version of "Prosecution Closing Brief") ICC-02/04-01/15-1719-Red (24 February 2020) (TC IX) <https://www.legal-tools.org/doc/msix71/>.

Prosecutor v Dominic Ongwen (ICC-02/04-01/15) – Trial Phase

I. CASE DETAILS

- **Case name:** *Prosecutor v Dominic Ongwen* (ICC-02/04-01/15)
- **Tribunal/Court:** International Criminal Court (“ICC”)
- **Offence charged:** Initially charged with three counts of Crimes Against Humanity, and four counts of War Crimes. Later, in 2015, additionally charged with a total of 70 counts.¹⁹
- **Stage of the proceedings:** Trial
- **Keywords:** Translation, Evidential value, Corroboration, News report, Journalism, Relevance, Probative value, Evidence

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. **Electronic visual representations** of four attack locations.
 - a. A Technical Officer of the Forensic Science Section of the Office of the Prosecutor²⁰ created the evidence using drone photography and three-dimensional laser scanning.²¹
2. **Intercepted radio communications** [in Confidential Annex A]²² This also includes digitally enhanced sound recordings of LRA radio communications prepared by the Prosecution. [Items 266-357 and 360-375 in Annex A].²³
 - a. The intercepts were introduced by the Prosecution and obtained from the Ugandan Government.²⁴ Digitally enhanced sound recordings of Lord’s Resistance Army (“LRA”) radio communications were also submitted and prepared by the Prosecution.²⁵

¹⁹ *Prosecutor v Ongwen* (Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016) (PTC II).

²⁰ *Prosecutor v Ongwen* (Transcript) ICC-02/04-01/15-T-119-Red-ENG (5 October 2017) (TC IX).

²¹ *Prosecutor v Ongwen* (Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016) ICC-02/04-01/15-438 (18 May 2016) (TC IX) [8].

²² *Prosecutor v Ongwen* (Prosecution’s Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses) ICC-02/04-01/15-577 (24 October 2016) (TC IX) [37].

²³ *Prosecutor v Ongwen* (Prosecution’s Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses) ICC-02/04-01/15-577 (24 October 2016) (TC IX) [38].

²⁴ *Prosecutor v Ongwen* (Prosecution’s Pre-Trial Brief) ICC-02/04-01/15-533 (6 September 2016) (TC IX).

²⁵ *Prosecutor v Ongwen* (Prosecution’s Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses) ICC-02/04-01/15-577 (24 October 2016) (TC IX) [38].

3. **Photographs** [in Confidential Annex A].²⁶
 - a. The photographs were generated by the Ugandan authorities in the course of investigating attacks attributed to the LRA and introduced by the Prosecution.²⁷

4. **Video** UGA-OTP-0021-0006 and UGA-OTP-0021-0012, UGA-OTP-0023-0008.
 - a. Video footage of locations in Northern Uganda, following attacks perpetrated by the LRA, was introduced by the OTP, which obtained it from the Ugandan and international media organisations.²⁸

²⁶ *Prosecutor v Ongwen* (Prosecution's Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses) ICC-02/04-01/15-577 (24 October 2016) (TC IX) [28].

²⁷ *Prosecutor v Ongwen* (Public Redacted Version of "Prosecution Closing Brief") ICC-02/04-01/15-1719-Red (24 February 2020) (TC IX) [38].

²⁸ *Prosecutor v Ongwen* (Prosecution's request to submit 1006 items of evidence from the 'bar table') ICC-02/04-01/15-654 (16 January 2017) (TC IX) [22].

III. COURT ANALYSIS & LEGAL ARGUMENTS

Electronic visual representations

5. The Prosecution argued that the material was not of primary evidentiary value and was to be used as an aid. However, it had to be submitted as evidence so that it could be shown to the witnesses, assisting them in describing the particulars of the event in question, such as the location of the attack, etc. As the evidence did not go to the acts and conduct of the accused or any other material aspect of the matters at issue in the trial, the Prosecution argued that its disclosure would not generate any additional investigative burden on the Defence.²⁹ Therefore, it requested the Chamber to permit service of the evidence no later than 10 working days before the commencement of the trial.³⁰
6. The Defence requested the Court to order the disclosure of the electronic visual representations, in accordance with the general rules.³¹ It argued for the disclosure so as to prepare a challenge to the reliability of the impugned evidence and to the veracity of witness testimonies.³² The Defence pointed out that there is a difference in the evidential burden when the visual aid is used to assist witnesses as opposed to its admission as evidence itself. It argued that if the visual aids are to be submitted as evidence, they must be disclosed in accordance with rules of evidence and procedure. In this case, although they were not considered separately as evidence, they were to be submitted as evidence so as to be used as an aid by the witnesses.³³
7. Later, in a joint statement by the Prosecution and the Defence, it was agreed upon that any audio-visual aids that the parties and participants intended to use should be notified and disclosed at least eight days before the start of the trial. Any objections to the use of this material should be filed five days before the start of trial.³⁴
8. The Chamber, comprising of a single judge, pronounced that it would not make any ruling on the Prosecution's use of 'electronic visual representations' until the OTP was in possession of the evidence.³⁵ At the time of the Court's decision, the Prosecution was yet to complete the process. As mentioned, both the Prosecution and Defence agreed on the timeline for disclosure and so the Court did not pronounce on the evidentiary

²⁹ *Prosecutor v Ongwen* (Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016) ICC-02/04-01/15-438 (18 May 2016) (TC IX) [8].

³⁰ *Prosecutor v Ongwen* (Transcript) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX).

³¹ *Prosecutor v Ongwen* (Transcript) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX).

³² *Prosecutor v Ongwen* (Public Redacted Version of "Defence Request for a Rule 77 Disclosure Order Concerning the Requests for Assistance and Other Related Items", filed on 16 January 2018) ICC-02/04-01/15-1137-Red (16 January 2018) (TC IX) [3], [33]-[41].

³³ *Prosecutor v Ongwen* (Transcript) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX).

³⁴ *Prosecutor v Ongwen* (Joint Prosecution and Defence submissions on the conduct of proceedings) ICC-02/04-01/15-486 (30 June 2016) (TC IX) [7].

³⁵ *Prosecutor v Ongwen* (Decision on Disclosure Issues Arising Out of First Status Conference) ICC-02/04-01/15-457 (7 June 2016) (TC IX) [17].

value of the evidence, but merely noted the nature of the electronic visual presentation, and the position of the parties to it.³⁶

Intercepted radio communications

9. Radio communications between LRA commanders were intercepted and recorded contemporaneously by several Ugandan military and security organisations during the charged period. These intercepted communications were submitted as evidence by the Prosecution in this case.³⁷ In this regard, the Prosecution submitted six categories of items related to the interception of LRA radio communications indicating the relevance and probative value of each individual item. It comprised of records compiled and maintained by authorities in the regular course of their duty to protect the Ugandan State, and to maintain law and order. The Prosecution argued that since the purpose of these organizations required such records to be regular and accurate, the intercept evidence was implicitly imbued with indicia of reliability.³⁸ Hence, the chain of custody of the intercept evidence was also secure.³⁹
10. Further, the Prosecution formally submitted the intercept evidence in its entirety, arguing that this would allow the Chamber to assess: (i) the original form in which the records were provided; (ii) their integrity and reliability; and (iii) the context in which the highly probative material is framed, to determine the weight to attach to it.⁴⁰ The Prosecution highlighted that the intercept evidence was voluminous with diverse sources, making it genuine, contemporaneous and highly probative.⁴¹ More so, the consistency across the breadth of the intercept evidence demonstrated its accuracy and reliability.⁴² Thus, the intercepted evidence was genuine and highly probative.⁴³
11. The Prosecution additionally argued that the evidence was relevant to material issues at trial, provided valuable context to,⁴⁴ and was mutually corroborative of other Prosecution

³⁶ *Prosecutor v Ongwen* (Decision on Disclosure Issues Arising Out of First Status Conference) ICC-02/04-01/15-457 (7 June 2016) (TC IX) [18].

³⁷ *Prosecutor v Ongwen* (Transcript) ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (PTC II) 33.

³⁸ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [28].

³⁹ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [29].

⁴⁰ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [17].

⁴¹ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [34].

⁴² *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [30].

⁴³ *Prosecutor v Ongwen* (Prosecution's Pre-Trial Brief) ICC-02/04-01/15-533 (6 September 2016) (TC IX).

⁴⁴ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [15].

evidence, such as the intercept operators,⁴⁵ and so bore sufficient indicia of reliability.⁴⁶ This was so as former LRA fighters also confirmed independently the accuracy of the content of sound recordings of LRA radio communications.⁴⁷ According to the Prosecution, the probative nature of the intercept evidence, including its reliability and authenticity, was demonstrated by the sheer number and consistency of the Prosecution witnesses' statements, and by the intercept evidence itself.⁴⁸

12. On Defence's request for disclosure of the speakers on the intercepted radio communications, the Prosecution responded that this was not a disclosure issue, and that it endeavoured to establish the speaker with certainty.⁴⁹
13. In sum, the Prosecution argued that the intercept evidence was highly probative and reliable because it was voluminous, contemporaneous, internally corroborative, and corroborative of other Prosecution evidence. Further, the intercept-related evidence was also corroborated by other documentary evidence and the testimony of over 30 Prosecution and Defence witnesses.⁵⁰
14. The Defence made the following general objections regarding the nature of the intercept evidence: that several technical and/or human factors could have introduced major gaps and errors into the intercept collection process and that radio transmissions were not the only form of communications used, meaning that these materials are not a complete record of LRA communications. Further, the Defence challenged the sound recordings of LRA radio communications on grounds that: (i) these sound recordings did not reflect entire communications, making them impossible to contextualise; (ii) the recordings submitted were incomplete, with gaps being created through 'operational limitations of the [Uganda People's Defence Force] or political decisions' or 'systemic issues' of a technical nature.
15. It argued that the Prosecution's 'assertion that there is a secure chain of custody' was misleading and inadequate.

⁴⁵ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [26].

⁴⁶ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [3].

⁴⁷ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [32].

⁴⁸ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [25].

⁴⁹ *Prosecutor v Ongwen* (Decision on Disclosure Issues Arising Out of First Status Conference) ICC-02/04-01/15-457 (7 June 2016) (TC IX) [15].

⁵⁰ *Prosecutor v Ongwen* (Public Redacted Version of "Prosecution Closing Brief") ICC-02/04-01/15-1719-Red (24 February 2020) (TC IX) [117].

16. The Defence requested the Trial Chamber to act with caution in admitting the disputed intercept material, bearing in mind its volume and significance to the issues at hand, which Defence claimed could greatly impact Mr Ongwen's fair trial rights.⁵¹
17. In its closing brief, the Defence challenged the reliability of the intercept evidence and submitted that most of the intercept material was irrelevant and the failure to translate, transcribe it, or attempt to attribute other speakers has deprived the Trial Chamber of context; that the Prosecution had not authenticated the recordings which should bar their admission; that the original intercept recordings were unreliable evidence; that particularly due to the failure to conduct an authentication procedure, the body of recordings were plausibly tampered with prior to being provided to the Prosecution by one party to the LRA conflict, and therefore the prejudice of admission outweighed their probative value; that the 'enhancement' of recordings might have further contributed to the unreliability of the evidence; that the testimonial process of attribution processes were flawed as a result; and that the in-court attribution witnesses themselves were not credible or reliable.⁵²
18. *Disclosure*: The Single Judge accepted the Prosecution's submission that it will indicate who is speaking on radio intercepts when it could be confirmed and agreed with the Prosecution that this was not a disclosure issue.⁵³
19. *Assessment of evidence*: The Chamber declared that it would not apply the jurisprudential requirements set out for prima facie assessments of documentary materials prior to their admission.⁵⁴ It stated that the ultimate prejudice which the Defence might suffer depends on the nature of the material, how the material is discussed during trial, whether and how the Chamber relies on it in its judgment. The Chamber nevertheless remarked that, though each item would be considered when deliberating its judgment, the Chamber might not necessarily discuss every item in the judgment itself.⁵⁵ Therefore, the Chamber emphasised that deferring considerations of the standard evidentiary criteria does not deprive the Defence of the opportunity to challenge them.⁵⁶

⁵¹ *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [12].

⁵² *Prosecutor v Ongwen* (Public Redacted Version of 'Corrected Version of "Defence Closing Brief", filed on 24 February 2020') ICC-02/04-01/15-1722-Corr-Red (13 March 2020) (TC IX).

⁵³ *Prosecutor v Ongwen* (Decision on Disclosure Issues Arising Out of First Status Conference) ICC-02/04-01/15-457 (7 June 2016) (TC IX) [16].

⁵⁴ *Prosecutor v Ongwen* (Decision on Prosecution Request to Submit Interception Related Evidence) ICC-02/04-01/15-615 (1 December 2016) (TC IX) [8].

⁵⁵ *Prosecutor v Ongwen* (Decision on Prosecution Request to Submit Interception Related Evidence) ICC-02/04-01/15-615 (1 December 2016) (TC IX) [13].

⁵⁶ *Prosecutor v Ongwen* (Decision on Prosecution Request to Submit Interception Related Evidence) ICC-02/04-01/15-615 (1 December 2016) (TC IX) [23].

Photographs

20. The Prosecution argued that the evidence was corroborative of other evidence presented to the Chamber by witnesses who provided oral testimony at trial.⁵⁷ Thus, the photographs were probative and had sufficient indicia of reliability.⁵⁸
21. The Defence argued that: (i) certain photographs were ‘outside the jurisdiction’ of the case and thus irrelevant and lacked probative value; (ii) certain photographs were of an unknown location and thus their prejudicial effect outweighed their probative value and relevance; (iii) without further information, photographs of monuments in Uganda (Lukodi and Odek) which listed persons who died during attacks had no probative value, little-to-no relevance, and amounted to hearsay evidence which is highly prejudicial; and (iv) photographs of Pagak IDP Camp were irrelevant and the prejudicial effect of these items far outweighed their relevance and probative value.⁵⁹

Video

22. The Prosecution submitted that the video evidence was relevant as it contained information on the background, existence, and nature of the armed conflict. It also corroborated evidence presented by oral witness testimony at trial.⁶⁰ Thus, the evidence was probative and had sufficient indicia of reliability.⁶¹
23. The Defence claimed that the Prosecution’s descriptions of some of the contents of the videos and audios did not match the actual content. Thus, the Defence argued that it could not properly respond to the relevance and probative value of the material when it does not reflect what is proposed, and that this prejudiced the Defence. Further, the Defence submitted that news reports should be approached with caution as the standard of proof for journalism are not on the same as for criminal trials and that the reports were created in the context of a conflict, by Uganda news sources, which affects the probative value of the materials.⁶²
24. As in the case of intercepted evidence, the Chamber stated that the items of evidence will be recognised as formally submitted during the trial and consideration of their

⁵⁷ *Prosecutor v Ongwen* (Prosecution’s request to submit 1006 items of evidence from the ‘bar table’) ICC-02/04-01/15-654 (16 January 2017) (TC IX) [38].

⁵⁸ *Prosecutor v Ongwen* (Defence Response to “Prosecution’s formal submission of intercept evidence via the ‘bar table’” (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [40].

⁵⁹ *Prosecutor v Ongwen* (Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” (ICC-02/04-01/15-654)) ICC-02/04-01/15-701 (7 February 2017) (TC IX).

⁶⁰ *Prosecutor v Ongwen* (Prosecution’s request to submit 1006 items of evidence from the ‘bar table’) ICC-02/04-01/15-654 (16 January 2017) (TC IX) [22].

⁶¹ *Prosecutor v Ongwen* (Prosecution’s request to submit 1006 items of evidence from the ‘bar table’) ICC-02/04-01/15-654 (16 January 2017) (TC IX) [23].

⁶² *Prosecutor v Ongwen* (Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” (ICC-02/04-01/15-654)) ICC-02/04-01/15-701 (7 February 2017) (TC IX) [13].

relevance, probative value, and potential prejudice would be deferred until the judgment.⁶³

25. The Chamber remarked that it saw no reason why the Defence could not adequately prepare to examine the relevant witnesses in the absence of any such determination by the Chamber. In its opinion, knowing that an item is recognised as submitted prior to the testimony of a witness adequately aided the Defence's preparation and allowed the Defence to prepare to question the witness in relation to the document, if it wishes.⁶⁴
26. Moreover, the Chamber was not convinced by the Defence's argument as to the contents of the materials, which according to the Chamber were in themselves comments on the relevance and probative value of the materials. The Chamber pointed out that Defence had access to the documents and was able to comment on their relevance and probative value in relation to what the Prosecution purported to utilize them for. Thus, the Prosecution's Pre-Trial Brief and the factual details of the confirmed charges provided the Defence with ample detail to make the relevant arguments.⁶⁵

Was the DDE admitted and/or relied upon?

Electronic visual representations

27. The electronic visual representations of attack locations derived from the use of drone photography and three-dimensional laser scanning, were used as a visual aid to help the witnesses identify the location of events under consideration.⁶⁶
28. The Court did not rule on admissibility as the electronic visual representation was not of primary evidentiary value⁶⁷ and only used as an aid and it was relied upon by the Prosecution to corroborate witness testimonies.⁶⁸

Intercepted radio communications

29. The intercept evidence documented the LRA's goals, policies, tactics, and movements over the charged period, its interaction with persons and institutions outside the LRA, its system of discipline, its command and leadership structure, and the system of communication between commanders. Therefore, according to the Prosecution, firstly, it provided with the contextual elements of the war crimes and crimes against humanity

⁶³ *Prosecutor v Ongwen* (Decision on Defence Request regarding the Evidentiary Regime) ICC-02/04-01/15-1546 (19 June 2019) (TC IX) [1].

⁶⁴ *Prosecutor v Ongwen* (Decision on Prosecution's Request to Submit 1006 Items of Evidence) ICC-02/04-01/15-795 (28 March 2017) (TC IX) [47].

⁶⁵ *Prosecutor v Ongwen* (Decision on Prosecution's Request to Submit 1006 Items of Evidence) ICC-02/04-01/15-795 (28 March 2017) (TC IX) [48].

⁶⁶ *Prosecutor v Ongwen* (Transcript) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX).

⁶⁷ *Prosecutor v Ongwen* (Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016) ICC-02/04-01/15-438 (18 May 2016) (TC IX) [8].

⁶⁸ *Prosecutor v Ongwen* (Transcript) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX).

charges.⁶⁹ Secondly, it was used to establish the elements of the modes of liability charged in the case.⁷⁰ Thirdly, it helped to establish the LRA's persecutory campaign against the civilian population in northern Uganda.⁷¹ Fourthly, the intercept evidence was directly relevant to the four charged attacks. Fifthly, the intercept evidence was to be used to demonstrate the systematic nature of the sexual and gender-based violence perpetrated by the LRA. And lastly, the intercept evidence supported the charges of conscription and use of child soldiers.⁷²

30. This evidence was submitted.⁷³

Photographs

31. The photographs were used to build the Prosecution case's regarding the attack at Pajule IDP camp.⁷⁴

32. Submitted.⁷⁵

Video

33. This evidence was used to identify the LRA as an armed group involved in the conflict in Northern Uganda and contained information on crimes perpetrated by the LRA against civilians.⁷⁶

General Legal Submissions on DDE

34. **Testimony:** The Prosecution argued that in accordance with the Court's practice, the reception of evidence other than testimony required consideration of three key factors: (i)

⁶⁹ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [16].

⁷⁰ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [19].

⁷¹ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [20].

⁷² *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [20].

⁷³ *Prosecutor v Ongwen* (Decision on Prosecution Request to Submit Interception Related Evidence) ICC-02/04-01/15-615 (1 December 2016) (TC IX) [26].

⁷⁴ *Prosecutor v Ongwen* (Public Redacted Version of "Prosecution Closing Brief") ICC-02/04-01/15-1719-Red (24 February 2020) (TC IX) [203].

⁷⁵ *Prosecutor v Ongwen* (Public Redacted Version of "Prosecution Closing Brief") ICC-02/04-01/15-1719-Red (24 February 2020) (TC IX) [67].

⁷⁶ *Prosecutor v Ongwen* (Public Redacted Version of "Prosecution Closing Brief") ICC-02/04-01/15-1719-Red (24 February 2020) (TC IX) [329].

its prima facie relevance to the issues at trial; (ii) its prima facie probative value, including its reliability and authenticity; and (iii) any prejudicial effect to a fair trial as weighed against its probative value.⁷⁷

35. **Relevance:** The Defence argued that a tendering party must demonstrate that the proffered evidence is prima facie relevant to trial and that it relates to the issues before the chamber. In this case, the Trial Chamber need not evaluate probative value if the moving party has not made a prima facie showing of relevance. As an example, a moving party must prove the originality and integrity of audio recordings, films, and photographs before they can be admitted by a chamber via the bar table, including the date and/or location of the recording.⁷⁸
36. **Fair trial:** The Defence argued that the Chamber had an obligation to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the Accused. This right to a fair trial must be understood to involve a right to elicit exculpatory oral evidence where there is a reasonable expectation that a witness can do so.⁷⁹
37. **Probative value:** The Defence argued that in determining probative value, the Trial Chamber must examine reliability and authenticity of the submitted evidence. In the instant case, the Prosecution had not demonstrated that the intercept evidence passed the necessary requirements.⁸⁰ Further, there were several human factors which introduced major gaps, and potentially errors, into the collection process undermined the probative nature of radio recordings and associated rough notes and faxes.⁸¹ Thus, the Defence argued that technical limitations systematically impact upon the completeness of the record and thus its probative value.⁸²
38. **Experts:** The Defence stressed the decision in *Katanga*, wherein the Trial chamber stated that documents emanating from persons or entities involved in the events that contain non-expert opinion evidence should be admitted with caution.⁸³
39. **Cross-examination:** With regard to intercept evidence, the Defence highlighted that as State organs of a belligerent party, the institutions which provided the evidence couldn't be considered as a neutral independent source, especially since much of the evidence was

⁷⁷ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [9].

⁷⁸ *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [14].

⁷⁹ *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [46].

⁸⁰ *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [16].

⁸¹ *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [20].

⁸² *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [41].

⁸³ *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [26].

provided or generated after the referral of the case to the Prosecutor. As such, the need for cross examination of the witnesses involved in the intercept operation was important.⁸⁴

40. According to the Chamber, the phrase ‘material to the preparation of the defence’ must be interpreted broadly and ‘understood as referring to all objects that are relevant for the preparation of the defence. Further, if the information is material to the preparation of the defence, the Chamber must consider whether any restrictions on disclosure are justified under the Statute and/or Rules.’⁸⁵

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

41. Article 67(2) of the Rome statute and Rules 76 and 77 of the Rules of Procedure and Evidence pertaining to disclosure obligations.⁸⁶ This relates to live testimony by means of audio or video-link technology, Pre-Trial disclosure relating to prosecution witnesses, Inspection of material in possession or control of the Prosecutor, etc.
42. The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the Defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.
43. Article 69(4) of the Statute, which gives the Chamber discretion on whether to rule on the admissibility of each piece of evidence upon its submission, and Article 74(2) of the Statute.⁸⁷
44. Rule 68(2)(b) relating to proof of a matter other than the acts and conduct of the accused.⁸⁸

⁸⁴ *Prosecutor v Ongwen* (Defence Response to “Prosecution’s formal submission of intercept evidence via the ‘bar table’” (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [28].

⁸⁵ *Prosecutor v Ongwen* (Decision on Disclosure Issues Arising Out of First Status Conference) ICC-02/04-01/15-457 (7 June 2016) (TC IX) [4].

⁸⁶ *Prosecutor v Ongwen* (Initial Directions on the Conduct of the Proceedings) ICC-02/04-01/15-497 (13 July 2016) (TC IX) [24].

⁸⁷ *Prosecutor v Ongwen* (Initial Directions on the Conduct of the Proceedings) ICC-02/04-01/15-497 (13 July 2016) (TC IX) [24].

⁸⁸ *Prosecutor v Ongwen* (Defence Response to “Prosecution’s formal submission of intercept evidence via the ‘bar table’” (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [7].

45. Article 67 of the Rome Statute providing for the rights of the accused.⁸⁹
46. Article 64(2) of the Rome Statute, under which the Chamber has an obligation to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the Accused.

Application of Rules of Evidence

47. Article 67(2) of the Rome statute and Rules 76 and 77 of the Rules of Procedure and Evidence: On Defence's arguments for disclosure of evidence, the Chamber held that an inquiry pursuant to Rule 77 of the Rules had two stages. First, it must be determined, on a prima facie basis, whether the objects in question are 'material to the preparation of the defence'. The phrase 'material to the preparation of the defence' must be interpreted broadly and 'understood as referring to all objects that are relevant for the preparation of the defence'. Second, if the information is material to the preparation of the defence, the Chamber must consider whether any restrictions on disclosure are justified under the Statute and/or Rules.⁹⁰
48. Article 69(4): The Chamber stated that this article gave the Chamber discretion on whether to rule on the admissibility of each piece of evidence upon its submission. The Chamber held that, as a general rule, it would defer its assessment of the admissibility of the evidence until deliberating its judgment pursuant to Article 74(2) of the Statute.
49. The Chamber remarked that at the time when the participants formally submit evidence during trial, all the Chamber was generally required to do is to recognise their formal submission. It would consider the relevance, probative value and potential prejudice of each item of evidence submitted when deliberating the judgment.⁹¹
50. In this respect, the Defence argued that the Article 69(4) evaluation of an item is in principle supposed to consider the item in isolation, meaning the items should be evaluated individually, yet the Prosecution's approach sought to establish the admissibility of the items through mutual self-reference and reference to Rule 68(2)(b) statements.
51. The Defence argued that if the Trial Chamber accepted this approach, which is a departure from prior practice, then the Prosecution could establish major elements of its case effectively on paper through an unorthodox legal process without a single witness appearing. This would significantly diminish the idea of a public trial premised

⁸⁹ *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [46].

⁹⁰ *Prosecutor v Ongwen* (Decision on Disclosure Issues Arising Out of First Status Conference) ICC-02/04-01/15-457 (7 June 2016) (TC IX) [4].

⁹¹ *Prosecutor v Ongwen* (Initial Directions on the Conduct of the Proceedings) ICC-02/04-01/15-497 (13 July 2016) (TC IX) [24].

on the principle of orality, firstly because of the absence of live testimony and, secondly, because rarely in international trials is the evidence made available for the public to inspect and scrutinize.⁹²

52. Article 67(1): The Defence also pointed out that the Prosecution had not addressed the prejudice that would be caused by the admission of this evidence to the rights of Mr. Ongwen enshrined in Article 67(1); in particular, the right to challenge the evidence proffered against him. Such prejudice would stand even if the intercept evidence was significant to the case.⁹³
53. Article 64(2): The Defence stressed that the right to a fair trial must be understood to involve a right to elicit exculpatory oral evidence where there is a reasonable expectation that a witness can do so. It stated that a failure to afford such an opportunity would be a denial of the Accused's right under Article 67(1)(e) to examine witnesses against him. As such, the Trial Chamber should refrain from denying this opportunity to Mr Ongwen.⁹⁴

V. EXTRAPOLATIONS

Electronic visual representations

54. Visual aids might become evidence in the course of proceedings.⁹⁵
55. Visual aids need to be timely disclosed to ensure a fair trial to the defendant.⁹⁶
56. Disclosure of electronic visual representations, in accordance with the general rules, is necessary.⁹⁷

Intercepted radio communications

57. If the interception collection process necessitates regularity and accuracy, then the intercept evidence has implicitly imbued with indicia of reliability.⁹⁸

⁹² *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [7].

⁹³ *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [46].

⁹⁴ *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [46].

⁹⁵ *Prosecutor v Ongwen* (Transcript) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX).

⁹⁶ *Prosecutor v Ongwen* (Transcript) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX).

⁹⁷ *Prosecutor v Ongwen* (Transcript) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX).

⁹⁸ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [28].

58. The probative nature of the intercept evidence, including its reliability and authenticity, can be demonstrated by the number and consistency of the Prosecution witnesses' statements, and by the intercept evidence itself.⁹⁹
59. Several technical and/or human factors can introduce major gaps and errors into the intercept collection process.¹⁰⁰
60. The Court should act with caution in admitting disputed intercept material, bearing in mind its volume and significance to the issues at hand which could greatly impact fair trial rights of the accused.¹⁰¹
61. Failure to conduct an authentication procedure could result in making the intercept evidence unreliable.¹⁰²
62. Enhancement of sound recordings, done by those with insufficient training, which might result in the alteration of the content, or impact upon the character of the voice recordings, and therefore the attributions, can contribute to the unreliability of the evidence.¹⁰³

Photographs

63. Photographic evidence providing a contemporaneous account of the events in question can be relevant.¹⁰⁴
64. Photographs of unknown locations introduced during the trial have a prejudicial effect and outweigh their probative value and relevance.¹⁰⁵
65. Without proper information, photographs have no probative value, little to no relevance and amount to hearsay evidence which is highly prejudicial.¹⁰⁶

⁹⁹ *Prosecutor v Ongwen* (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) [25].

¹⁰⁰ *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [12].

¹⁰¹ *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [12].

¹⁰² *Prosecutor v Ongwen* (Public Redacted Version of 'Corrected Version of "Defence Closing Brief", filed on 24 February 2020') ICC-02/04-01/15-1722-Corr-Red (13 March 2020) (TC IX).

¹⁰³ *Prosecutor v Ongwen* (Public Redacted Version of 'Corrected Version of "Defence Closing Brief", filed on 24 February 2020') ICC-02/04-01/15-1722-Corr-Red (13 March 2020) (TC IX).

¹⁰⁴ *Prosecutor v Ongwen* (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) [38].

¹⁰⁵ *Prosecutor v Ongwen* (Defence Response to "Prosecution's request to submit 1006 items of evidence from the 'bar table'" (ICC-02/04-01/15-654)) ICC-02/04-01/15-701 (7 February 2017) (TC IX).

¹⁰⁶ *Prosecutor v Ongwen* (Defence Response to "Prosecution's request to submit 1006 items of evidence from the 'bar table'" (ICC-02/04-01/15-654)) ICC-02/04-01/15-701 (7 February 2017) (TC IX).

Video

66. For the Defence to properly respond to the relevance and probative value of the material the description of the contents of the video must match the contents indicated by the Prosecution.¹⁰⁷
67. News video reports should be approached with caution as the standard of proof for journalism is not the same as for criminal trials which affects the probative value of the materials.¹⁰⁸
68. Videos that are only partially not in a working language of the Court and are not translated, can be submitted on condition that the tendering party will provide translation into a working language of the Court.¹⁰⁹ The access of the party to the tendered videos allows that party to comment on the videos' relevance and probative value in relation to what the tendering party purported to utilize them for.¹¹⁰

VI. CITATIONS

Prosecutor v Ongwen (Transcript) ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (PTC II) <https://www.legal-tools.org/doc/592d06/>;

Prosecutor v Ongwen (Decision on the confirmation of charges against Dominic Ongwen) ICC-02/04-01/15-422-Red (23 March 2016) (PTC II) <https://www.legal-tools.org/doc/74fc6e/>;

Prosecutor v Ongwen (Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016) ICC-02/04-01/15-438 (18 May 2016) (TC IX) <https://www.legal-tools.org/doc/653831/>;

Prosecutor v Ongwen (Transcript) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX) <https://www.legal-tools.org/doc/7kdsi7/>;

Prosecutor v Ongwen (Decision on Disclosure Issues Arising Out of First Status Conference) ICC-02/04-01/15-457 (7 June 2016) (TC IX) <https://www.legal-tools.org/doc/bc0de4/>;

Prosecutor v Ongwen (Joint Prosecution and Defence submissions on the conduct of proceedings) ICC-02/04-01/15-486 (30 June 2016) (TC IX) <https://www.legal-tools.org/doc/e7959a/>;

Prosecutor v Ongwen (Initial Directions on the Conduct of the Proceedings) ICC-02/04-01/15-497 (13 July 2016) (TC IX) <https://www.legal-tools.org/doc/60d63f/>;

Prosecutor v Ongwen (Prosecution's Pre-Trial Brief) ICC-02/04-01/15-533 (6 September 2016) (TC IX) <https://www.legal-tools.org/doc/6ecd6a/>;

Prosecutor v Ongwen (Prosecution's Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses) ICC-02/04-01/15-577 (24 October 2016) (TC IX) <https://www.legal-tools.org/doc/3175af/>;

¹⁰⁷ *Prosecutor v Ongwen* (Defence Response to "Prosecution's request to submit 1006 items of evidence from the 'bar table'" (ICC-02/04-01/15-654)) ICC-02/04-01/15-701 (7 February 2017) (TC IX) [12].

¹⁰⁸ *Prosecutor v Ongwen* (Defence Response to "Prosecution's request to submit 1006 items of evidence from the 'bar table'" (ICC-02/04-01/15-654)) ICC-02/04-01/15-701 (7 February 2017) (TC IX) [12].

¹⁰⁹ *Prosecutor v Ongwen* (Decision on Defence Request regarding the Evidentiary Regime) ICC-02/04-01/15-1546 (19 June 2019) (TC IX) [1].

¹¹⁰ *Prosecutor v Ongwen* (Defence Response to "Prosecution's request to submit 1006 items of evidence from the 'bar table'" (ICC-02/04-01/15-654)) ICC-02/04-01/15-701 (7 February 2017) (TC IX) [48].

Prosecutor v Ongwen (Prosecution's formal submission of intercept evidence via the 'bar table') ICC-02/04-01/15-580 (28 October 2016) (TC IX) <https://www.legal-tools.org/doc/61b8de/>;

Prosecutor v Ongwen (Defence Response to "Prosecution's formal submission of intercept evidence via the 'bar table'" (ICC-02/04-01/15-580)) ICC-02/04-01/15-599 (21 November 2016) (TC IX) <https://www.legal-tools.org/doc/ccc5e3/>;

Prosecutor v Ongwen (Decision on Prosecution Request to Submit Interception Related Evidence) ICC-02/04-01/15-615 (1 December 2016) (TC IX) <https://www.legal-tools.org/doc/0c1113/>;

Prosecutor v Ongwen (Prosecution's request to submit 1006 items of evidence from the 'bar table') ICC-02/04-01/15-654 (16 January 2017) (TC IX) <https://www.legal-tools.org/doc/22e6d2/>;

Prosecutor v Ongwen (Defence Response to "Prosecution's request to submit 1006 items of evidence from the 'bar table'" (ICC-02/04-01/15-654)) ICC-02/04-01/15-701 (7 February 2017) (TC IX) <https://www.legal-tools.org/doc/86826f/>;

Prosecutor v Ongwen (Decision on Prosecution's Request to Submit 1006 Items of Evidence) ICC-02/04-01/15-795 (28 March 2017) (TC IX) <https://www.legal-tools.org/doc/ca2a41/>;

Prosecutor v Ongwen (Transcript) ICC-02/04-01/15-T-119-Red-ENG (5 October 2017) (TC IX) <https://www.legal-tools.org/doc/029393/>;

Prosecutor v Ongwen (Public Redacted Version of "Defence Request for a Rule 77 Disclosure Order Concerning the Requests for Assistance and Other Related Items", filed on 16 January 2018) ICC-02/04-01/15-1137-Red (16 January 2018) (TC IX) <https://www.legal-tools.org/doc/24c266/>;

Prosecutor v Ongwen (Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items) ICC-02/04-01/15-1161 (1 February 2018) (TC IX) <https://www.legal-tools.org/doc/fab68d/>;

Prosecutor v Ongwen (Decision on Defence Request regarding the Evidentiary Regime) ICC-02/04-01/15-1546 (19 June 2019) (TC IX) <https://www.legal-tools.org/doc/d09eff/>;

Prosecutor v Ongwen (Public Redacted Version of "Prosecution Closing Brief") ICC-02/04-01/15-1719-Red (24 February 2020) (TC IX) <https://www.legal-tools.org/doc/msix71/>;

Prosecutor v Ongwen (Public Redacted Version of 'Corrected Version of "Defence Closing Brief", filed on 24 February 2020') ICC-02/04-01/15-1722-Corr-Red (13 March 2020) (TC IX) <https://www.legal-tools.org/doc/xibh9t/>.

Prosecutor v Vujadin Popović et al (IT-05-88)

I. CASE DETAILS

- **Case name:** *Prosecutor v Vujadin Popović et al* (IT-05-88-T)
- **Tribunal/Court:** International Criminal Tribunal for the Former Yugoslavia since 1991 (“ICTY”)
- **Offence charged**¹¹¹:
 - **Vujadin Popovic** was charged with Genocide, Conspiracy to Commit Genocide, 2 counts of Murder, Extermination, Persecution, Inhumane Acts (Forcible Transfer) and Deportation. The Trial Chamber found him guilty of all except Inhumane Acts (Forcible Transfer) and Deportation.
 - **Ljubisa Beara** was charged with Genocide, Conspiracy to Commit Genocide, 2 counts of Murder, Extermination, Persecution, Inhumane Acts (Forcible Transfer). The Trial Chamber found him guilty of all except Inhumane Acts (Forcible Transfer) and Deportation.
 - **Drago Nikolic** was charged with Genocide, Conspiracy to Commit Genocide, 2 counts of Murder, Extermination, Persecution, Inhumane Acts (Forcible Transfer) and Deportation. The Trial Chamber found him guilty of all except Conspiracy to Commit Genocide, Inhumane Acts (Forcible Transfer) and Deportation.
 - **Ljubomir Borovcanin** was charged with Genocide, Conspiracy to Commit Genocide, 2 counts of Murder, Extermination, Persecution, Inhumane Acts (Forcible Transfer) and Deportation. The Trial Chamber found him guilty of all except Genocide, Conspiracy to Commit Genocide, and Deportation.
 - **Radivoje Miletic** was charged with 2 counts of Murder, Persecution, Inhumane Acts (Forcible Transfer) and Deportation. The Trial Chamber found him guilty of all except Deportation.
 - **Milan Gvero** was charged with 2 counts of Murder, Persecution, Inhumane Acts (Forcible Transfer) and Deportation. The Trial Chamber found him guilty of all except Murder and Deportation.
 - **Vinko Pandurevic** was charged with Genocide, Conspiracy to Commit Genocide, 2 counts of Murder, Extermination, Persecution, Inhumane Acts (Forcible Transfer) and Deportation. The Trial Chamber found him guilty of all except Genocide, Conspiracy to Commit Genocide, Murder and Deportation.
- **Stage of the proceedings:** Trial
- **Keywords:** Reliability, Authentication, Chain of custody, Corroboration

¹¹¹ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) 785-793.

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

Aerial Images

1. Aerial Images (Exh. P01605, P01608 through P0161; Exh. P001721, P01723 through P01724; Exh. P01746 and Exh. P01747; Exh. P01761 and P01763; Exh. P01788, P01799 through P01802 and P03009; Exh P01649 through P01659; Exh. P01821 through P01832; Exh. P01833 through 1840 and Exh. P01842 through P01869, Ex. P03483.¹¹²
2. The DDE was introduced by the OTP. The aerial images were provided to the OTP by the Government of the USA.¹¹³

Intercepted Communications

3. Intercepted Communications (The Prosecution and the Defence tendered a total of 722 intercept exhibits¹¹⁴. The intercept evidence comprised of transcribed entries of radio relay communications contained in original notebooks and/or typewritten printouts of transcriptions. Audiotapes of certain intercepts were also introduced, along with transcriptions of the recordings.¹¹⁵ For the purposes of admissibility, the Trial Chamber addressed them collectively¹¹⁶. In case of specific challenge to certain intercepts, the Chamber addressed them individually.¹¹⁷ (For the purposes of this summary, they are considered collectively.
4. The Prosecution tendered 213 individual intercepts. In support of a challenge to the admissibility of the intercepts, some of the accused also tendered exhibits, such as the Defence expert Duro Rudic's report on the radio relay communications.¹¹⁸ The majority of intercepts were obtained by the OTP from the ABiH 2nd Corps Anti Electronic Warfare Unit (PEB), the ABiH 21st Division, and the State Security Services of Bosnia and Herzegovina (SDB).¹¹⁹

¹¹² *Prosecutor v Popovic et al* (Prosecution's Notice of Filing a Public Redacted Version of the Prosecution Final Trial Brief) IT-05-88-T (14 July 2010) (TC I) (TC) fn 3118.

¹¹³ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [72].

¹¹⁴ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [3].

¹¹⁵ *Prosecutor v Popovic et al* (Prosecution's Notice of Filing a Public Redacted Version of the Prosecution Final Trial Brief) IT-05-88-T (14 July 2010) (TC I) (TC) [1175]; *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [3].

¹¹⁶ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [3].

¹¹⁷ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [66].

¹¹⁸ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [54].

¹¹⁹ *Prosecutor v Popovic et al* ([Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis](#)) IT-05-88-T (12 September 2006) (TC II); *Prosecutor v Popovic et al* (Prosecution's Notice of Filing a Public Redacted Version of the Prosecution Final Trial Brief) IT-05-88-T (14 July 2010) (TC I) (TC) [1176].

Video

5. Video- P02000 (Video footage shot by journalist Zoran Petrovic during July 1995).¹²⁰
6. The Video footage (shot by Zoran Petrovic during July 1995) was presented by the OTP and it was disclosed and provided to it by the Defendant/Accused Borovcanin himself.¹²¹

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

Aerial Images:

7. **Aerial Images:** The aerial images were used to show disturbances in the earth after the alleged murders were committed, so as to establish the alleged burial and reburial operation.¹²²
8. To establish the reliability of the aerial imagery, the OTP used expert and witness testimonies. The Prosecution expert Richard Butler testified that he did not believe that the aerial images could be altered by anyone, whereas Jean-René Ruez, the Prosecution witness through whom the aerial images were tendered, explained why he had added and removed dates on certain aerial images.¹²³
9. The Defence for Beara raised an objection to the admissibility of the aerial images and argued that the aerial images tendered by the Prosecution were not reliable.¹²⁴ In his Final Brief, the Defence for Popović argued that the disturbance of the earth, shown on certain aerial images, cannot be properly linked to the alleged crimes due to lack of comparative aerial imagery. He also pointed out the absence of “site code or coordinates on the images.”¹²⁵
10. On admissibility, the Trial Chamber held that the Prosecution had adduced sufficient evidence regarding the relevance and the probative value of all aerial images tendered by it and therefore admitted them into evidence, without prejudice to the weight that would be attached to them at the end of the case.¹²⁶
11. In its final judgement, the Trial Chamber held that the weight of the aerial images was not adversely affected by the markings and erasure of certain data. The Trial Chamber rejected

¹²⁰ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) fn 1439.

¹²¹ *Prosecutor v Popovic et al* (Prosecution’s Notice of Filing a Public Redacted Version of the Prosecution Final Trial Brief) IT-05-88-T (14 July 2010) (TC I) (TC) fn 1439; *Prosecutor v Popovic et al* ([Ljubomir Borovcanin’s Public and Corrected Final Trial Brief](#)) IT-05-88-T (23 April 2010) (TC I) (TC II) 538.

¹²² *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [72].

¹²³ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [73].

¹²⁴ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [73].

¹²⁵ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [74].

¹²⁶ *Prosecutor v Popovic et al* (Transcript) IT-05-88-T (7 February 2008) (TC).

Defence's argument alleging that insufficient description (site code or coordinates) was provided for the images tendered given by the United States Government, and so could not be relied upon. The Trial Chamber therefore found the aerial images to be authentic and reliable, and accorded them due weight.¹²⁷

Intercepted Communications:

12. The intercept evidence was submitted by the Prosecution to set out crimes and events by showing communications within the VRS chain of command. Collectively, the intercepts were used to provide a narrative of the VRS attack on Srebrenica and the events that followed.¹²⁸
13. The Prosecution submitted the intercept evidence as prima facie relevant to the crimes and events.¹²⁹ It submitted the evidence as authentic, accurate and reliable¹³⁰. It also argued that neither conclusive evidence of reliability nor absolute authenticity is a requirement of admissibility. Rather, the implicit requirement of reliability means that there must be sufficient indicia of reliability to make out a prima facie case for the admission of a document.¹³¹
14. To support the DDE, the Prosecutor called former intercept operators to testify at trial. According to the Prosecution, the detailed and credible testimony provided by 28 experienced intercept operators and supervisors clearly established the authenticity, accuracy and reliability of this evidence.¹³² Moreover, the Prosecution submitted that the chain of custody as established by the evidence in the case was clear.¹³³
15. Further the Prosecution also argued that the un-contradicted testimony of the Prosecution Analyst, who had worked with the intercepts for over two years, validated and tendered many intercepts, as did several witnesses who acknowledged intercepts in which they were either involved or had knowledge of the subject matter.¹³⁴ The Prosecution submitted that despite extensive challenges to the admissibility of this evidence, the Defence themselves made ample use of, and tendered many intercepts.¹³⁵ The Prosecution explained the procedure of the intercept recording, wherein the Intercepted communications were

¹²⁷ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [75].

¹²⁸ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [7].

¹²⁹ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [7].

¹³⁰ *Prosecutor v Popovic et al* (Prosecution's Notice of Filing a Public Redacted Version of the Prosecution Final Trial Brief) IT-05-88-T (14 July 2010) (TC I) (TC) [1175].

¹³¹ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [31].

¹³² *Prosecutor v Popovic et al* (Prosecution's Notice of Filing a Public Redacted Version of the Prosecution Final Trial Brief) IT-05-88-T (14 July 2010) (TC I) (TC) [1177].

¹³³ *Prosecutor v Popovic et al* (Prosecution's Notice of Filing a Public Redacted Version of the Prosecution Final Trial Brief) IT-05-88-T (14 July 2010) (TC I) (TC) [1177]; *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II).

¹³⁴ *Prosecutor v Popovic et al* (Prosecution's Notice of Filing a Public Redacted Version of the Prosecution Final Trial Brief) IT-05-88-T (14 July 2010) (TC I) (TC) [1178].

¹³⁵ *Prosecutor v Popovic et al* (Prosecution's Notice of Filing a Public Redacted Version of the Prosecution Final Trial Brief) IT-05-88-T (14 July 2010) (TC I) (TC) [1178].

transcribed contemporaneously. Herein, the operators could not add or alter the intercept material and also took great caution to ensure that no error occurred.¹³⁶

16. The Defence for Popovic submitted that for the intercepts to be admissible, the Prosecution must prove their reliability beyond reasonable doubt.¹³⁷ It stressed that the evidence proffered by the Prosecution as intercepts had not been properly named.¹³⁸ It also highlighted some technical errors, including the lack of requisite knowledge of the ABiH.¹³⁹ The Defence also raised doubts about the standards and protocols governing intercept procedure, as put forth by the Prosecution, and argued that admitted intercept materials are not real time products.¹⁴⁰ Relying on its expert, the Defence challenged the chain of custody of the intercepts highlighting various anomalies and inconsistencies in it, and alleging that the intercepts were fabricated by BiH Authorities.¹⁴¹
17. The Defence for Beara argued that the intercepts were obscure and not reliable. It challenged them on the basis of partiality alleging that they were provided by the Security agencies of one of the parties of the conflict to inculcate the other many years after they were recorded.¹⁴² Beara also criticised the lack of training of the intercept operators, and argued that since the intercepts had no probative value, their admission hindered his right to fair trial and damaged the integrity of the proceedings.¹⁴³ The Defence for Nikolic argued that the Prosecution must not be allowed to construct events on the basis of an intercept in the absence of any corroborating proof.¹⁴⁴ It submitted that the Prosecution must establish the authenticity of the intercepts beyond reasonable doubt and make a prima facie of the reliability of the intercepts before admitting them into evidence.¹⁴⁵ It argued that the Prosecution's failure to adduce audio recordings for the vast majority of the intercepts made them inadmissible.¹⁴⁶
18. The Defence for Pandurevic submitted that although it accepted that the forces of the ABiH had the capability to intercept and record certain radio conversations, as did their counterparts in the Army of the Republicka Srpska (VRS) and Croatian Army, it did not endorse the intercepts as an unimpeachable evidential source.¹⁴⁷ It argued that the

¹³⁶ *Prosecutor v Popovic et al* (Prosecution's Notice of Filing a Public Redacted Version of the Prosecution Final Trial Brief) IT-05-88-T (14 July 2010) (TC I) (TC) [1180].

¹³⁷ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [9].

¹³⁸ *Prosecutor v Popovic et al* (Defence Notice of Filing Public Redacted Version of Vujadin Popovic's Final Brief) IT-05-88-T (28 July 2010) (TC I) (TC) [138].

¹³⁹ *Prosecutor v Popovic et al* (Defence Notice of Filing Public Redacted Version of Vujadin Popovic's Final Brief) IT-05-88-T (28 July 2010) (TC I) (TC) [140].

¹⁴⁰ *Prosecutor v Popovic et al* (Defence Notice of Filing Public Redacted Version of Vujadin Popovic's Final Brief) IT-05-88-T (28 July 2010) (TC I) (TC) [142].

¹⁴¹ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [10].

¹⁴² *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [12].

¹⁴³ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [13].

¹⁴⁴ *Prosecutor v Popovic et al* (Public Redacted Version of The Final Trial Brief on Behalf of Drago Nikolic) IT-05-88-T (30 July 2010) (TC I) (TC II) [1199].

¹⁴⁵ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [14].

¹⁴⁶ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [15].

¹⁴⁷ *Prosecutor v Popovic et al* (Pandurevic Notice of Filing a Public Redacted Version of The Pandurevic Final Trial Brief) IT-05-88-T (26 July 2010) (TC I) (TC) [20].

computer printouts and notebooks that were submitted had many obvious weaknesses. Further, it stated that the records of these conversations do not have the same evidentiary force of a video tape, which “speaks for itself.”¹⁴⁸ It advised the Trial Chamber to exercise great caution before accepting as accurate without corroboration: the alleged time and date of any particular conversation; the identity of the so-called collocutors; the attribution of dialogue to each person; and the content of the alleged conversation.¹⁴⁹

19. In its decision on intercept communications, the Trial Chamber found the evidence as a whole prima facie relevant and probative and therefore admitted it.¹⁵⁰ The Chamber admitted the evidence despite noting discrepancies between some original handwritten versions of the intercepts and the electronically typed versions; some of the handwritten versions lacked specific dates; several of the conversations were incomplete; and participants were frequently unidentified.¹⁵¹
20. In the final judgement, the Trial Chamber remained satisfied, particularly in light of the evidence provided by the intercept operators, that the intercepts were a contemporaneous record of intercepted VRS communications.¹⁵² It held that there were no deficiency in the chain of custody of the intercept materials, and found that there was no evidence in support of the Defence allegation that the intercepts were either fabricated or tampered with.¹⁵³ As a result, The Trial Chamber found that the evidence of Defence Expert failed to raise a reasonable doubt in this respect.¹⁵⁴
21. In sum, the Trial Chamber found the intercepts to be overall probative and reliable. With regards to specific challenges to certain intercepts, the Trial Chamber addressed those challenges individually.¹⁵⁵

Video- P02000:

22. The video was used to show the location of the accused Borovcanin on 13th of July in Potočari.¹⁵⁶
23. The Prosecution or the Defence for Borovcanin did not argue on the evidentiary weight of the video evidence as it was provided by the Defendant himself. Their arguments were based on the interpretation of the events in the video.¹⁵⁷

¹⁴⁸ *Prosecutor v Popovic et al* (Pandurevic Notice of Filing a Public Redacted Version of The Pandurevic Final Trial Brief) IT-05-88-T (26 July 2010) (TC I) (TC) fn 15.

¹⁴⁹ *Prosecutor v Popovic et al* (Pandurevic Notice of Filing a Public Redacted Version of The Pandurevic Final Trial Brief) IT-05-88-T (26 July 2010) (TC I) (TC) [20].

¹⁵⁰ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [78].

¹⁵¹ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [75].

¹⁵² *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [65].

¹⁵³ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [65].

¹⁵⁴ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [65].

¹⁵⁵ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [66].

¹⁵⁶ *Prosecutor v Popovic et al* (Prosecution's Notice of Filing a Public Redacted Version of the Prosecution Final Trial Brief) IT-05-88-T (14 July 2010) (TC I) (TC) [1902].

¹⁵⁷ *Prosecutor v Popovic et al* ([Ljubomir Borovcanin's Public and Corrected Final Trial Brief](#)) IT-05-88-T (23 April 2010) (TC I) (TC II).

Was the DDE admitted and/or relied upon?

24. **Aerial Images:** Admitted and relied upon.¹⁵⁸
25. **Intercepted Communications:** Admitted and relied upon.¹⁵⁹
26. **Video- P02000** Admitted and relied upon.¹⁶⁰

General Legal Submissions on DDE

27. **Standard of proof:** The Trial Chamber determined whether the ultimate weight of the admitted evidence is sufficient to establish beyond reasonable doubt the elements of the crimes charged in the Indictment, and ultimately, the responsibility of the Accused. When the Prosecution relied upon proof of the state of mind of an Accused by inference, the Trial Chamber considered whether that inference was the only reasonable inference that could be made based on that evidence. Where it was not, it found that the Prosecution had not proved its case. The Trial Chamber noted that it had not always reiterated the phrase “beyond reasonable doubt” to its findings, notwithstanding the fact that this standard of proof was applied throughout the Judgement.¹⁶¹
28. **Witnesses:** In its evaluation of viva voce witnesses, the Trial Chamber had regard to the demeanour, conduct, and character of witnesses, as well as to the passage of time since the events charged in the Indictment and its possible impact on the reliability of the evidence.¹⁶²
29. **Hearsay:** Hearsay evidence was admissible under the case law of the Tribunal. The weight to be attributed to that evidence depended upon the infinitely variable circumstances which surround hearsay evidence and as such, the Trial Chamber assessed hearsay evidence on a case-by-case basis.¹⁶³
30. **Circumstantial evidence:** The Trial Chambers considered that circumstantial evidence may be necessary in order to establish an alleged fact, particularly in criminal trials such as those before it, where there are often no eyewitnesses or conclusive documents relating to a particular alleged fact. While individual items of circumstantial evidence may, by themselves, be insufficient to establish a fact, their cumulative effect may have a decisive role. Circumstantial evidence was not considered to be of less probative value than direct evidence.¹⁶⁴ As with direct evidence, where an inference is drawn from circumstantial

¹⁵⁸ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [73].

¹⁵⁹ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [78].

¹⁶⁰ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [329].

¹⁶¹ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [9].

¹⁶² *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [10].

¹⁶³ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [11].

¹⁶⁴ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [12].

evidence to establish a fact on which a conviction relies, that inference must be the only reasonable one that could be drawn from the evidence presented.¹⁶⁵

31. **Authenticity:** Where the authenticity of a document was challenged, the Trial Chamber considered various factors in assessing it, including the evidence relating to its source, chain of custody, evidence of handwriting experts, and other evidence relating to the document. The Trial Chamber did not consider unsigned, undated or unstamped documents to be necessarily void of authenticity.¹⁶⁶ Even when the Trial Chamber was satisfied with the authenticity of a particular document, it did not automatically accept the statements contained therein to be an accurate portrayal of the facts. The Trial Chamber evaluated this evidence within the context of the trial record as a whole¹⁶⁷.
32. **Rights of accused:** The Chamber stated that the right of an accused to a reasoned opinion, as set forth in Article 23(2) of the Statute and Rule 98 ter (C), did not mean that the Chamber was required to discuss every factual assertion in the Indictment or to explain every detail of its assessment of the evidence presented to it. It noted that even where it has not specifically mentioned a particular piece of evidence in the Judgement, all relevant evidence must be considered.¹⁶⁸
33. The Court did not specifically refer to the weight of the video evidence in question. However, generally, with respect to the identification evidence, such as images or recordings, the Chamber laid down evidentiary considerations. It stated that, like all elements of a crime, the identification of the Accused must be proved by the Prosecution beyond reasonable doubt. Further, where questions relating to the identity of the Accused arise, they must be determined in light of all the relevant available evidence.
34. The Court referred to its earlier jurisprudence and opined that even though each visual identification and each other relevant piece of evidence, viewed in isolation, may not be sufficient to satisfy the obligation of proof on the Prosecution, it is the cumulative effect of the evidence, i.e. the totality of the evidence bearing on the identification of an Accused, which must be weighed to determine whether the Prosecution has proved beyond reasonable doubt that each Accused is a perpetrator as alleged.
35. The Trial Chamber recognised that identification evidence can be particularly liable to error and that, even where a witness appears to be honest, the Trial Chamber must be convinced that his or her evidence is objectively reliable before it will be sufficient to establish a positive identification. In assessing identification evidence, the Trial Chamber took into account a number of relevant factors, including: the circumstances in which each witness claimed to have observed the Accused; the length of the observation; the

¹⁶⁵ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [12].

¹⁶⁶ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [14].

¹⁶⁷ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [14].

¹⁶⁸ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [15].

familiarity of the witness with the Accused prior to the identification; and the description given by the witness of his or her identification of the Accused.¹⁶⁹

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

36. Rule 70 of the Rules of Procedure and Evidence:¹⁷⁰ Rule 70 deals with “Matters not Subject to Disclosure,” regulating what confidential information is not subject to disclosure.¹⁷¹
37. Rule 89 and 95 of the Rules of Procedure and Evidence: Rule 89 (C) provides that a chamber “may admit any relevant evidence which it deems to have probative value.” Rule 89(D) provides that a chamber “may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”
38. Rule 95 provides that evidence shall not be admissible “if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to and would seriously damage the integrity of the proceedings.”¹⁷²

Application of Rules of Evidence

39. The aerial images were provided by the USA government under Rule 70 of the Rules to the OTP, meaning that they were provided as confidential information which is not subject to disclosure.¹⁷³
40. The admission of the intercept evidence was considered by the Tribunal under Rules 89 and 95.¹⁷⁴ The Prosecution submitted the intercepts under Rule 89. Popovic argued that the Prosecution must prove their reliability beyond reasonable doubt under Rule 95.¹⁷⁵ The Trial Chamber favoured the approach adopted in Rule 89(C) for admission of such

¹⁶⁹ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [55].

¹⁷⁰ *Prosecutor v Popovic et al* ([Defence Notice of Filing Public Redacted Version of Vujadin Popovic's Final Brief](#)) IT-05-88-T (28 July 2010) (TC I) (TC) [737].

¹⁷¹ [ICTY Rules of Procedure and Evidence](#).

¹⁷² *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [26].

¹⁷³ *Prosecutor v Popovic et al* (Defence Notice of Filing Public Redacted Version of Vujadin Popovic's Final Brief) IT-05-88-T (28 July 2010) (TC I) (TC) [737].

¹⁷⁴ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [26].

¹⁷⁵ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [9].

evidence¹⁷⁶ and was satisfied that the Prosecution had demonstrated that the intercepts fulfilled the Rule 89(C) relevance requirement¹⁷⁷.

41. In line with its interpretation of Rule 92 *bis* of the 12th September 2006 Decision, the Prosecutor called each and every operator who transcribed or intercepted communications to testify.¹⁷⁸

V. EXTRAPOLATIONS

Intercepted Communications

42. Intercept evidence can be submitted as prima facie relevant to the crimes and events.¹⁷⁹
43. The procedure to obtain a piece of intercept evidence is relevant to its evidentiary value.¹⁸⁰
44. Operators of intercept evidence must follow proper protocol and procedure and have proper knowledge and understanding of the intercepts in hand.¹⁸¹
45. For the admission of a document, such as transcripts of audio recordings, the proponent of the evidence must demonstrate a minimum of proof—sufficient indicia of reliability—to make out a prima facie case.¹⁸²
46. The Prosecution must not be allowed to construct events on the basis of an intercept in the absence of any corroborating proof.¹⁸³
47. Even where there exist discrepancies between handwritten transcripts of intercepts and the electronic data itself, intercept evidence as a whole may still be considered prima facie relevant and probative.¹⁸⁴

¹⁷⁶ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [27].

¹⁷⁷ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [78].

¹⁷⁸ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [4].

¹⁷⁹ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [7].

¹⁸⁰ *Prosecutor v Popovic et al* (Defence Notice of Filing Public Redacted Version of Vujadin Popovic's Final Brief) IT-05-88-T (28 July 2010) (TC I) (TC) [142].

¹⁸¹ *Prosecutor v Popovic et al* (Defence Notice of Filing Public Redacted Version of Vujadin Popovic's Final Brief) IT-05-88-T (28 July 2010) (TC I) (TC) [142].

¹⁸² *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [31].

¹⁸³ *Prosecutor v Popovic et al* (Public Redacted Version of The Final Trial Brief on Behalf of Drago Nikolić) IT-05-88-T (30 July 2010) (TC I) (TC II) [1199].

¹⁸⁴ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [78].

Video

48. The identification of the Accused, as to a particular time or location, must be proved by the Prosecution beyond reasonable doubt.¹⁸⁵
49. Each visual identification, viewed in isolation, may not be sufficient to satisfy the obligation of proof on the Prosecution, and so it is the cumulative effect of the evidence—i.e., the totality of the evidence bearing on the identification of an Accused—which must be weighed to determine whether the Prosecution has proved beyond reasonable doubt that each Accused is a perpetrator as alleged.¹⁸⁶
50. In assessing visual or oral identification evidence, the Court should consider a number of relevant factors, including: the circumstances in which each witness claimed to have observed the Accused; the duration of the observation; the familiarity of the witness with the Accused prior to the identification; and the description given by the witness of his or her identification of the Accused.¹⁸⁷
51. Identification evidence can be particularly liable to error and a Court must be convinced that a witness' evidence is objectively reliable before it will be sufficient to establish a positive identification.¹⁸⁸

Aerial Images

52. Proper foundation and authenticity of the document must be established to be admitted into evidence.¹⁸⁹
53. The overall weight of aerial images may not be adversely affected by a few errors, such as technical errors or discrepancies in some of the data.¹⁹⁰
54. With adequate witness/expert corroboration, aerial images can be considered authentic and reliable and due weight can be accorded to them.¹⁹¹
55. Unsigned, undated, or unstamped documents are not necessarily void of authenticity.¹⁹²
56. The authenticity of the aerial imagery evidence goes to the weight of the evidence rather than its admissibility.¹⁹³

¹⁸⁵ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [54].

¹⁸⁶ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [55].

¹⁸⁷ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [55].

¹⁸⁸ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [55].

¹⁸⁹ *Prosecutor v Popovic et al* (Transcript) IT-05-88-T (6 February 2008) (TC) 21172, lines 4-8.

¹⁹⁰ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [75].

¹⁹¹ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [75].

¹⁹² *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [14].

¹⁹³ *Prosecutor v Popovic et al* (Transcript) IT-05-88-T (TC II) (7 February 2008) 21187, lines 20-22.

Non-Specific DDE Extrapolations

57. **Relevance:**¹⁹⁴ The Trial Chamber intercept evidence to be a contemporaneous record, thus fulfilling the requirement of relevancy.¹⁹⁵
58. **Probative Value and Reliability:**¹⁹⁶ For aerial imagery, the Defence raised concerns on the reliability of the evidence.¹⁹⁷ However, the Trial Chamber relied upon the evidence provided by expert and witness testimonies and found the aerial images to be authentic and reliable.¹⁹⁸ For intercept communications, the Prosecution argued that with the extensive evidence provided and chain of custody established, it was reliable.¹⁹⁹
59. The Defence challenged the same by alleging it to be fabricated and riddled with inconsistencies.²⁰⁰ However, in light of evidence to support the intercept, the Trial Chamber found the intercepts to be overall probative and reliable.²⁰¹
60. **Corroborative Proof:** For intercept communications, the Defence argued that the Prosecution must not be allowed to construct events on the basis of an intercept in the absence of any corroborating proof.²⁰² The Trial Court held that with proper corroboration, the DDE can be admitted as evidence and relied upon.²⁰³

VI. CITATIONS

Prosecutor v Popovic et al (Decision on Prosecution's Confidential Motion for Admission of Written Evidence in Lieu of Viva Voce Testimony Pursuant to Rule 92 bis) IT-05-88-T (12 September 2006) (TC II) <https://www.icty.org/x/cases/popovic/tdec/en/060912.pdf>;

Prosecutor v Popovic et al (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) <https://www.icty.org/x/cases/popovic/tdec/en/071207a.pdf>;

Prosecutor v Popovic et al (Transcript) IT-05-88-T (7 February 2008) (TC) <https://icty.org/x/cases/popovic/trans/en/080207ED.htm>;

¹⁹⁴ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [26].

¹⁹⁵ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [28].

¹⁹⁶ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [30].

¹⁹⁷ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [73].

¹⁹⁸ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [75].

¹⁹⁹ *Prosecutor v Popovic et al* (Prosecution's Notice of Filing a Public Redacted Version of the Prosecution Final Trial Brief) IT-05-88-T (14 July 2010) (TC I) (TC) [1175].

²⁰⁰ *Prosecutor v Popovic et al* (Decision on Admissibility of Intercepted Communications) IT-05-88-T (7 Dec 2007) (TC II) [10].

²⁰¹ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [66].

²⁰² *Prosecutor v Popovic et al* (Public Redacted Version of The Final Trial Brief on Behalf of Drago Nikolić) IT-05-88-T (30 July 2010) (TC I) (TC II) [1199].

²⁰³ *Prosecutor v Popovic et al* (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC I) (TC II) [75].

Prosecutor v Popovic et al (Judgment, Volume I) IT-05-88-T (10 June 2010) (TC II)
<https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>;

Prosecutor v Popovic et al (Prosecution's Notice of Filing a Public Redacted Version of the Prosecution Final Trial Brief) IT-05-88-T (14 July 2010) (TC)
<https://www.icty.org/x/cases/popovic/custom5/en/100714.pdf>;

Prosecutor v Popovic et al (Public Redacted Version of The Final Trial Brief on Behalf Of Drago Nikolić) IT-05-88-T (30 July 2010) (TC II)
<https://www.icty.org/x/cases/popovic/custom5/en/100730.pdf>;

Prosecutor v Popovic et al (Pandurevic Notice of Filing a Public Redacted Version of The Pandurevic Final Trial Brief) IT-05-88-T (26 July 2010) (TC)
<https://www.icty.org/x/cases/popovic/custom5/en/100726.pdf>;

Prosecutor v Popovic et al (Defence Notice of Filing Public Redacted Version of Vujadin Popovic's Final Brief) IT-05-88-T (28 July 2010) (TC)
<https://www.icty.org/x/cases/popovic/custom5/en/100728.pdf>.

Prosecutor v Tharcisse Renzaho (ICTR-97-31)

I. CASE DETAILS

- **Case name:** *Prosecutor v Tharcisse Renzaho* (ICTR-97-31)
- **Tribunal/Court:** International Criminal Tribunal for Rwanda (“ICTR”)
- **Offence charged:** Genocide, or, in the alternative, complicity in genocide; murder and rape, as crimes against humanity; and war crimes.
- **Stage of the proceedings:** Trial
- **Keywords:** Authenticity, Provenance, Privacy

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. An audio recording of a telephone conversation.
2. The telephone call was intercepted by Rwandan Patriotic Front (RFP) soldiers using a walkie-talkie¹ and was purported to be a telephone conversation between the Accused and the *bourgmestre* of Bicumbi, Mr. Rugambarara.²
3. During the telephone conversation, the Accused could be heard ordering for the ‘*extermination*,’ of people,³ purportedly of the Tutsis.
4. It was alleged that the telephone call took place from around 14 to 18 April 1994 and was intercepted on the same day.⁴
5. The audio recording was originally recorded by a journalist on a small Sony tape recorder onto an audio cassette tape.⁵
6. The audio cassette tape was then obtained by ICTR investigators from the Rwandan government, who then copied the tape for analysis (note: there is no information about what type of form the audio recording was copied into by the investigators).⁶

¹ *Prosecutor v Renzaho* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 7, lines 2-5.

² *Prosecutor v Renzaho* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 47, lines 23-27, which refers to the *Prosecutor v. Renzaho* (Prosecution Pre-Trial Brief) ICTR-97-31-I, (31 October 2005) [89(a)]; see also pg 48, lines 12-13.

³ *Prosecutor v Renzaho* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 47, line 23-27, lines 33-36, which refers to the *Prosecutor v. Renzaho* (Prosecution Pre-Trial Brief) ICTR-97-31-I, (31 October 2005) [89(a)]; see also pg 48, lines 12-13.

⁴ *Prosecutor v Renzaho* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 7, lines 11-16.

⁵ *Prosecutor v Renzaho* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 6 lines 5-8

⁶ *Prosecutor v Renzaho* (Transcript) ICTY-97-31-T (8 January 2007) (TC) pg 46, lines 21-23

7. It was then subsequently copied onto a CD-ROM by the Prosecution to use and show witnesses during examination-in-chief before the Court.⁷
8. The audio recording was referred to as ‘AV938’⁸; and later referred to as ‘KTOO-1084’ when the Prosecution sought to tender the audio as an exhibit on 2 March 2007.⁹
9. The audio recording was transcribed into three languages; Kinyarwandan, English, and French.¹⁰ The original language being in Kinyarwandan.¹¹
10. Although an audio cassette tape is arguably not considered to be digitally derived evidence, it has been subsequently copied onto a CD-ROM by the Prosecution and in that sense, it can be considered as evidence that has been digitally derived, as it has been converted from a physical tape into a digital form onto a CD-ROM. In any event, considering that these events occurred in 1994, the use of digital technology was scarce at the time. However, the legal arguments raised by the parties and the Court’s considerations on evidentiary standards of the cassette tape are still relevant and can be applied to digitally derived evidence today.
11. The Prosecution sought to admit the audio recording together with the transcripts on three occasions; first at the hearing on 8 January 2007,¹² second at the hearing on 22 January 2007¹³ and third at the hearing on 2 March 2007.¹⁴ The audio recording and its transcriptions were finally admitted as evidence by the Court’s Decision on Exclusion of Testimony and Admission of Exhibit on 20 March 2007.¹⁵
12. The provenance of the audio recording was the central issue discussed between the parties and a concern for the Court. The matter was debated at length during several hearings over the course of 3 months.

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

13. On 8 January 2007, the Prosecution called on an ICTR investigator, named Rajesh Neupane, as a witness.¹⁶

⁷*Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 46, lines 3-10.

⁸ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 46, line 1.

⁹ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 11 lines 22-33; pg 48, lines 4-36.

¹⁰ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 45, lines 36-37.

¹¹ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 10, lines 6-7.

¹² *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 46.

¹³ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (22 January 2007) (TC) pg 9-10.

¹⁴ *Prosecutor v Renzabo* (Transcript), ICTR97-31-T (2 March 2007) (TC)

¹⁵ *Prosecutor v Renzabo* (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [11]-[17]

¹⁶ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) Starting at pg 9 line 36

14. The Prosecution showed a CD-ROM to the investigator and the investigator confirmed that the audio of AV938 was on the CD-ROM.¹⁷
15. The investigator testified that ICTR investigators copied 259 audio tapes from the Ministry of Rehabilitation of Rwanda from 1996 to 1997,¹⁸ of which this audio recording was one of them.¹⁹ He stated that the Rwandan authorities archive still had the original tape in their possession.²⁰
16. The Prosecution then sought to admit the audio tape together with the transcriptions as evidence.²¹
17. The Defence however, objected to the Prosecution's request on the basis of three grounds:
 - 17.1. **First ground:** The recording was inadmissible because the tape had not been timely disclosed to the Defence by the Prosecution. The Defence claimed that they never received the audio recording.
 - 17.2. **Second ground:** That the recording was inadmissible for issues of authenticity. The Defence argued that it was not known how the recording was made and where it originally came from and this therefore '*casts doubt and ambiguity as to the authenticity of these tapes.*'²²
 - 17.3. **Third ground:** The Defence argued that the legality of the recording was not established by the Prosecution and therefore the admission of the audio recording would contravene Rule 95 of the Rules of Procedure and Evidence.²³
18. Rule 95 provides that: 'No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability, or if its admission is antithetical to and would seriously damage the integrity of the proceedings.'
19. The Defence stated that 'We do not know who ordered the interception, who authorised that interception, what were the legal conditions allowing for such telephone conversations to be intercepted.'²⁴ The Defence also stated that 'there is a lot of ambiguity around this document. And for these reasons I believe that the illegality is obvious.'²⁵

¹⁷ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 46, lines 7-28.

¹⁸ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 46, lines 21-25.

¹⁹ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 46, lines 19-23; pg 50, lines 26-29.

²⁰ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 50, lines 28-29.

²¹ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 46, lines 27-28.

²² *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 47, lines 4-8.

²³ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 52, lines 24-28.

²⁴ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 49, lines 27-29.

²⁵ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 50, lines 19-22.

20. In response to the first ground, the Prosecution submitted that adequate notice was provided to the Defence of the existence of the recording as it was contained in the Pre-Trial Brief filed on 31 October 2005,²⁶ which addressed the issue of the Accused's intent for conviction of the charge of genocide.²⁷ In addition, the Witness Summaries attached to the Pre-Trial Brief provided additional notice to the Defence as the Prosecution envisaged calling on at least one witness to testify.²⁸
21. In relation to the second and third ground, the investigator was questioned by the Court and the investigator testified that he did not know who intercepted the telephone call, but he believed that it was the Rwandan government; however, he was uncertain as he was not personally involved in the acquisition of the tapes.²⁹
22. The Prosecution made an additional submission to the Court that the audio recording was of the 'highest degree of relevance' as it proved the Accused's intent to commit genocide. The Prosecution stated that 'we believe the only time in the Tribunal's history that there is evidence -- direct evidence of a tape recording where an accused orders the extermination of people,³⁰ the audio tape was therefore of 'extreme probative value and great relevance.'³¹
23. The Court ultimately denied the request by the Prosecution due to a lack of information about the recording and its provenance.³²
24. Between the 11th of January 2007 and 31st of January 2007, the Prosecution brought several witnesses to testify that they recognised the Accused voice in the audio recording over the course of several hearings.³³
25. On 22 January 2007, the Prosecution made further submissions in response to Defence's previous submissions.
26. The Prosecution drew the Court's attention to the Appeals Court decision of *Ntabobali and Nyiramasuhuko* made on 2 July 2004, issued by Judge Shahabuddeen.³⁴ This case dealt with the authority of Chamber's pursuant to Rule 89(C) of the Rules of Procedure and

²⁶ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (22 January 2007) (TC) pg 8, lines 14-20.

²⁷ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 47 lines 23-27, lines 33-36.

²⁸ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 47-48, see also the *Prosecutor v Renzabo* (Prosecution Pre-Trial Brief) ICTR-97-31-I, (31 October 2005) p. 66 (Witness BKX).

²⁹ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 51 lines 9-18.

³⁰ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 48, lines 12-24.

³¹ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC), pg 48, lines 23-24.

³² *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 52, lines 35-36.

³³ Testimonies of Witnesses: GLJ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (22 January 2007) (TC), pg 40; UB *Prosecutor v Renzabo* (Transcript), ICTR-97-31-T (23 January 2007) (TC) pg. 24; ALG *Prosecutor v Renzabo* (Transcript), ICTR-97-31-T (11 January 2007) (TC) pg. 64 and AWE *Prosecutor v Renzabo* (Transcript), ICTR-97-31-T (31 January 2007) (TC) pg. 31.

³⁴ *Ntabobali and Nyiramasuhuko v Prosecutor* ([Decision on the Appeals](#) by Pauline Nyiramasuhuko and Arsine Shalom Ntabobali on the Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible) ICTR-97-21-AR73 (2 July 2004) (AC) [14]-[16].

Evidence which stated that “A Chamber may admit any relevant evidence which it deems to have probative value.”

27. In this case, the Court granted its discretion to admit evidence even where it is not possible to convict an Accused on an allegation due to lack of notice.³⁵ The Prosecution therefore requested the Court to enter the evidence on the basis that the audio recording and its transcripts were relevant pursuant to Rule 89(C).³⁶
28. The Prosecution also submitted that the Defence never requested to listen to the original audio recording and that there was ‘no obligation to disclose exhibits in any particular time frame, other than the Defence have the right to ask us to inspect any such exhibits.’³⁷
29. The Prosecution stated that they were still in the process of making enquiries to find the person who had made the audio recording.³⁸
30. The Defence argued an additional **fourth ground**, that the admission of the audio tape and its transcription would contravene Article 14 and Article 17 of the *Covenant on Civil and Political Rights*. Article 14 concerning the Accused’s right to a fair trial since the audio tape was not disclosed in a timely manner and Article 17 concerning the right to privacy since the telephone conversation was intercepted and therefore it was unknown whether it was obtained lawfully.³⁹
31. The Court ultimately denied the request by the Prosecution again, due to a lack of information about the recording and its provenance.⁴⁰
32. On 6 February 2007, The Prosecution filed a motion to request leave to vary its witness list to remove Witness BKX who was to testify that they recognised the voice of the accused on the audio; and replace the witness with Witness ADU who was a journalist and who had purportedly made the recording himself and was therefore able to testify on the recording’s provenance.⁴¹
33. On 12th February 2007, the Defence filed a Response to the Prosecution’s motion. Defence agreed to removing Witness BKX but did not agree to adding Witness ADU.⁴²

³⁵ *Prosecutor v Renzaho* (Transcript) ICTR-91-31-T (22 January 2007) (TC) pg 8, lines 34-37, pg 9.

³⁶ *Prosecutor v Renzaho* (Transcript) ICTR-97-31-T (22 January 2007) (TC) pg 10, lines 1-12.

³⁷ *Prosecutor v Renzaho* (Transcript) ICTR-97-31-T (22 January 2007) (TC) pg 9, lines 26-29

³⁸ *Prosecutor v Renzaho* (Transcript) ICTR-97-31-T (22 January 2007) (TC) pg 10, lines 17-20.

³⁹ *Prosecutor v Renzaho* (Transcript) ICTR-97-31-T (22 January 2007) (TC) pg 7, lines 1-28.

⁴⁰ *Prosecutor v Renzaho* (Transcript) ICTR-97-31-T (22 January 2007) (TC) pg 12, lines 9-12.

⁴¹ Referred *Prosecutor v Renzaho* (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC) [1].

⁴² Referred to in *Prosecutor v Renzaho* (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC)

34. On 13th February 2007, the Prosecution filed a Reply to the Defence's Response.⁴³
35. On 16th February 2007 The Court handed down its Decision on Prosecution Motion to Vary Witness List.⁴⁴
36. The Court granted the Prosecution's request to vary its witness list to remove Witness BKX and replace it with Witness ADU (who was later referred to by his full name, Faustin Kagame).⁴⁵
37. On 2 March 2007, the Prosecution called on Faustin Kagame as a witness. He testified that he was a freelance journalist in 1994.⁴⁶
38. The journalist stated that he was in Rwanda in April 1994 to prepare news reports on the events unfolding.⁴⁷
39. From around 2 to 23 April 1994, he stated that he was staying in a building that accommodated the battalion of the RFP called the 'CND,' which was located in Kimihurura, in Kigali.⁴⁸
40. He had a small radio and a small Sony tape recorder, which was a bit more sophisticated than a Dictaphone because it had an equaliser on the device; and he was able to make recordings with them.⁴⁹
41. While he was in the CND building, he was able to conduct interviews, record radio broadcasts and record telephone conversations that were intercepted by walkie-talkies.⁵⁰
42. In relation to the audio recording in issue, he stated that he had approached a few soldiers nearby who were listening to a telephone conversation that they had intercepted using a walkie-talkie.⁵¹ He asked the soldiers whether he could make recordings of the telephone conversations on the walkie-talkie and they agreed.⁵²
43. The journalist testified that he had made tape recordings of the telephone conversation between 14 to 18 April 1994 with his Sony tape recorder.⁵³

⁴³ Referred to in *Prosecutor v Renzabo* (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC)

⁴⁴ *Prosecutor v Renzabo* (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC)

⁴⁵ *Prosecutor v Renzabo* (Judgment and Sentence) ICTR-97-31-T (14 July 2009) (TC) [841]

⁴⁶ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 2, lines 24-29.

⁴⁷ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 3, lines 21-30.

⁴⁸ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 3, lines 8-19.

⁴⁹ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 6, lines 4-8.

⁵⁰ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 5; pg 6, lines 1-3; pg 7, lines 1-5.

⁵¹ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 7, lines 8-16.

⁵² *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 7, lines 1-5, 8-11

⁵³ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg, 6, 5-8, pg 7, lines 6-16.

44. He confirmed that he had recently heard the audio recording in question, prior to today's hearing and had identified them to be his recording.⁵⁴ The journalist confirmed that the originals of the audio tapes were currently at his home.⁵⁵
45. The Prosecution showed the CD-ROM containing the audio and the transcription in Kinyarwanda and the journalist testified that it was his recording and the transcription.⁵⁶
46. The Prosecution then sought to tender the audio recording, with the reference number 'KTOO-1084,' and its transcriptions.⁵⁷
47. The Defence sought to exclude the audio recording and its transcriptions on the basis of the same grounds previously raised; and also, to exclude the witness testimony of the journalist on the basis that it introduced a new material fact that did not appear in the Amended Indictment and that the Defence had not been given adequate notice of this new fact.⁵⁸
48. Defence Counsel also argued that it could not properly prepare its Defence for the testimony since the Prosecution only submitted the last of the information regarding the witness on 1 March 2007.⁵⁹
49. In response, the Prosecution submitted that the witness's testimony did not amount to a material fact and therefore the Accused was in no danger of conviction based on the facts that the witness was testifying on.⁶⁰ This was because the testimony supported the Accused's criminal intent by shedding light on the origin of the recording.⁶¹
50. The Court denied the Defence's motion to exclude the testimony of the witness and stated that it would issue a written decision explaining its reasons.⁶²
51. The Court handed down its formal Decision on Exclusion of Testimony and Admission of Exhibit on 20 March 2007.

Was the DDE admitted and/or relied upon?

Decision on Prosecution Motion to vary Witness List

52. On 16 February 2007, the Court handed down its formal decision on whether or not to grant the Prosecution's request to vary its witness list to remove witness BKX and

⁵⁴ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 7-8.

⁵⁵ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 10, lines 33-34.

⁵⁶ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 10-11.

⁵⁷ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 48, lines 28-32.

⁵⁸ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 12, 15 and 16.

⁵⁹ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 24, lines 21-25

⁶⁰ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 21, lines 12-18.

⁶¹ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 21 lines 6-8.

⁶² *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 25, lines 4-8.

include Witness ADU (now known as Faustin Kagame), in its Decision on Exclusion of Testimony and Admission of Exhibit.⁶³

53. The Court considered Rule 73 bis (E) of the Rules of Procedure and Evidence, which stated that, ‘After commencement of Trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.’⁶⁴
54. In determining whether or not to grant the Prosecution leave to vary the witness list, the Chamber assessed both the ‘interests of justice’ and the existence of ‘good cause’ in the circumstances at hand.⁶⁵
55. A variety of factors was used by the Court in its assessment, including ‘the sufficiency and time of disclosure of the witness’s information; the materiality and probative value of the proposed testimony in relation to existing witnesses and allegations in the indictment; the ability of the other party to make an effective cross-examination of the witness; and the justification offered by the party for the addition of the witness.’⁶⁶
56. The Court considered that the removal of Witness BKX would ‘*economise judicial resources*,’ since the Prosecution had already presented 4 witnesses (ALG, GLJ, UB and AWE) who testified that they recognised the Accused’s voice on the recording, but none of them could verify the provenance of the audio recording, like witness ADU purportedly could.⁶⁷
57. The Court noted that the testimony of witness ADU would therefore ‘prove material to the Prosecution case by shedding light on the provenance of the audio tape, which has been a matter of dispute between the parties.’⁶⁸
58. The Chamber noted the Defence’s arguments that the admissibility of the audio recording would be contrary to Rule 95 as well as Article 17 of the Covenant on Civil and Political Rights, however the Court considered that these issues were *separate* from the testimony about the origin of the recording.⁶⁹

⁶³ *Prosecutor v Renzabo* (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC) [1]

⁶⁴ *Prosecutor v Renzabo* (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC) [2].

⁶⁵ *Prosecutor v Renzabo* (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC) [2], referring to *Prosecution v Bagosora et al.* ([Decision on Bagosora Motion to Modify Its Witness List](#)) ICTR-98-41-T (11 September 2006) (TC) [8].

⁶⁶ *Prosecutor v Renzabo* (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC) [3], referring to *Prosecution v Bagosora et al.* ([Decision on Bagosora Motion to Modify Its Witness List](#)) ICTR-98-41-T (11 September 2006) (TC) [3].

⁶⁷ *Prosecutor v Renzabo* (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC) [4].

⁶⁸ *Prosecutor v Renzabo* (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC) [5].

⁶⁹ *Prosecutor v Renzabo* (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC) [5].

59. The Chamber did not consider that the addition of Witness ADU would result in ‘unfair surprise or prejudice’ because of insufficient notice to the Defence. This was because the Defence was given notice on the hearing of 22 January 2007, that the Prosecution was conducting inquiries to locate the person who had originally made the recording; and that the Prosecution’s Pre-Trial Brief, filed on 31 October 2005, gave notice to the Defence of its intention to use an intercepted telephone conversation to demonstrate the Accused’s intent to commit genocide; and that the Witness Summaries attached to the Pre-Trial Brief provided additional notice that the Prosecution envisaged calling at least one witness to testify.⁷⁰
60. The Chamber therefore considered that the Defence had adequate time to prepare for the testimony of Witness ADU and concluded that the conditions for the Prosecution to modify its witness list, to include Witness ADU, were fulfilled.⁷¹
61. On 20 March 2017, in its Decision on Exclusion of Testimony and Admission of Exhibit, the Court provided its reasons for denying the Defence’s oral motion to exclude the testimony of Faustin Kagame and its decision on the Prosecution’s oral motion made on 2 March 2007 to tender the audio recording and its transcripts as an exhibit.⁷²
62. On the basis of **exclusion** of the witness’s testimony, the Court responded to two issues raised by the Defence:
- 62.1. The Court did not agree with the Defence that; (1) the testimony introduced a new material fact and, (2) that the Defence was not given adequate notice.⁷³
- 62.2. On the basis of whether the testimony introduced a new fact, the Court considered Article 17 (4) of the Tribunal’s Statute and Rule 47 (C) of the Rules of Procedure and Evidence and concluded that the journalist’s testimony was considered to be ‘authenticating evidence and did not amount to a material fact and need not be pleaded in the Amended Indictment.’⁷⁴
63. On the basis that the Defence did not receive adequate notice, the Court concluded that allowing the journalist’s testimony would *not* result in unfair prejudice to the Accused and that the Defence had sufficient time to prepare for the testimony.⁷⁵

⁷⁰ *Prosecutor v Renzabo* (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC) [6]

⁷¹ *Prosecutor v Renzabo* (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC) [6]

⁷² *Prosecutor v Renzabo*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007)

⁷³ *Prosecutor v Renzabo*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [5].

⁷⁴ *Prosecutor v Renzabo*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [10].

⁷⁵ *Prosecutor v Renzabo*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [10].

64. On the basis of **admission** of the audio recording and its transcripts, the Court responded to two issues raised by the Defence:

64.1. The Court did not agree with the Defence that: (1) the recording was inadmissible because it had not been timely disclosed to the Defence by the Prosecution, (2) that it was not known how the recording was made and the authenticity of the recording had not been established and that its admission would contravene Rule 95.⁷⁶

64.2. (1) On the basis that the recording was not timely disclosed, the Court considered Rule 89(C) of the Rules of Procedure and Evidence which stated that: 'A Chamber may admit any relevant evidence which it deems to have probative value.'⁷⁷

64.3. The Court noted that the Appeals Chamber emphasised that a Trial Chamber's authority pursuant to Rule 89 (C) 'grants it the discretion to admit evidence even where it is not possible to convict an accused on an allegation due to lack of notice.'⁷⁸

64.4. The Court determined that the Defence had notice of the existence, content and purpose of the recording from 31 October 2005. The transcripts were provided to the Defence on 6 December 2006 and the audio recording on 11 January 2007. The Chamber therefore considered that 'the elements furnished to the Defence regarding the recording provided timely, clear and consistent information that the Defence could then use to investigate and to prepare for the evidence in question.'⁷⁹

64.5. (2) On the basis of the authenticity of the tape and its provenance, the Court considered the testimony of the journalist, Faustin Kagame. The journalist testified that he recognised the audio recording and its transcript in Kinyarwanda when this was shown to him during examination-in-chief, and he was also able to identify that the audio recording in question was the same as the one he made in 1994. The Court considered that the testimony given was a *prima facie* basis to admit the tape and the transcriptions.⁸⁰

65. In relation to the Defence's submission that the audio recording's admission would contravene Rule 95 of the Rules of Procedure and Evidence which stated that: 'No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability, or if its admission is antithetical to and would seriously damage the integrity

⁷⁶ *Prosecutor v Renzaho*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [11].

⁷⁷ *Prosecutor v Renzaho*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [12].

⁷⁸ *Prosecutor v Renzaho*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [12], referencing *Prosecutor v. Ntabobali and Nyiramasubuko*, ([Decision on the Appeals](#) by Pauline Nyiramasuhuko and Arsine Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible") ICTR-97-21-AR73 (2 July 2004) (AC), [14]-[16].

⁷⁹ *Prosecutor v Renzaho*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [12].

⁸⁰ *Prosecutor v Renzaho*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [13].

of the proceedings;' the Court stated that 'the question is whether RPF's eavesdropping on Rwandan authorities' telephone calls in April 1994 should lead to exclusion of evidence in pursuance of that provision.'⁸¹

66. In determining this question, the Court observed established ICTY case law, in the case of *Prosecutor v. Brdjanin*.⁸² In this case, the Trial Chamber considered relevant international law and national law, and determined that the communications intercepted during the armed conflict in the Former Yugoslavia were not the subject of exclusion and that the intercepts were **admissible** and did **not** violate Rule 95, quoting para 53:

“[T]here is nothing in the Rules concerning the exclusion of illegally obtained evidence and ... as affirmed in the Kordic case, 'even if the illegality was established [. . .] [w]e have come to the conclusion that [. . .] evidence obtained by eavesdropping on an enemy's telephone calls during the course of a war is certainly **not within the conduct which is referred to in Rule 95. It's not antithetical to and certainly would not seriously damage the integrity of the proceedings.**' This Trial Chamber cannot but agree that communications intercepted during an armed conflict are not as such subject to exclusion under Rule 95 and should therefore be admitted upon a challenge based on the grounds laid down in that Rule.”⁸³

67. In the present case, the journalist testified that he had actually obtained **consent** from the RPF soldiers to make recordings of the conversations they were allegedly able to hear over the walkie-talkies.⁸⁴

68. The Court also noted that there was **no** information about any Rwandan law that was applicable to intercepts during the circumstances in April 1994, when the recording was made, and hence whether the interception was illegal.⁸⁵

69. In any event, the Court 'did not consider that this would not in itself lead to exclusion under human rights law or Tribunal case law.'⁸⁶

⁸¹ *Prosecutor v Renzabo*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [14]-[15].

⁸² *Prosecutor v Renzabo* (Decision on Exclusion of Testimony and Admission of Exhibit) Record no. ICTR-97-31-0163, ICTR-97-31-T (20 March 2007) pg 5, referring to *Prosecutor v. Brdjanin* ([Decision on the Defence 'Objection to Intercept Evidence'](#)) IT-99-36-T (3 October 2003) (TC)

⁸³ *The Prosecutor v Tharisse Renzabo*, (Decision on Exclusion of Testimony and Admission of Exhibit) Record no. ICTR-97-31-0163, ICTR-97-31-T (20 March 2007) [15] referring to *Prosecutor v. Brdjanin* ([Decision on the Defence 'Objection to Intercept Evidence'](#)) IT-99-36-T (3 October 2003) (TC) [53]. See also paras. 61 and 63. The Defence objected in vain to the admission of transcripts of intercepted telephone conversations, recorded by internal security personnel of the government of the Republic of Bosnia and Herzegovina before and during the war, on the grounds that the intercepts were illegally obtained. Reference is also made to the oral decision of *Prosecutor v. Kordic and Cerkez* ([Transcript](#)) IT-95-14/2-T (2 February 200) pg 13694 lines 15-21

⁸⁴ *Prosecutor v Renzabo*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [16].

⁸⁵ *Prosecutor v Renzabo*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [16].

⁸⁶ *Prosecutor v Renzabo*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [16], referring to *Prosecutor v Brdjanin* ([Decision on the Defence 'Objection to Intercept Evidence'](#)) IT-99-36-T (3 October 2003) (TC) [42]-[56].

70. The Chamber therefore stated that it ‘does not have a basis to conclude that this evidence is antithetical to, and would seriously damage the integrity of the proceedings.’⁸⁷
71. Finally, the Court noted that ‘the admissibility of the recording should not be confused with the exact probative weight to be attached to it: the former requires some relevance and probative value, whereas the latter is an assessment to be made by the Trial Chamber at the end of the case.’⁸⁸
72. On the basis of the above, the audio recording and its transcriptions were allowed to be admitted as evidence on 20 March 2007.
73. The audio recording was used to support the Accused’s *intent* in relation to the conviction of the charge of genocide,⁸⁹ as discussed above.

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

74. Rule 95 of the Rules of Procedure and Evidence states that: ‘No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability, or if its admission is antithetical to and would seriously damage the integrity of the proceedings.’ This rule was used to support the argument made by the Defence to dismiss the admissibility of the audio recording and its transcripts, however the Court considered that the admission of the audio tape and its transcripts did not violate Rule 95 in its Decision on Exclusion of Testimony and Admission of Exhibit, please see above.
75. Rule 89(C) of the Rules of Procedure and Evidence states that: ‘A Chamber may admit any relevant evidence which it deems to have probative value.’ This rule was used to support the argument made by the Prosecution to submit the audio recording and its transcripts as evidence and was also used by the Court to exercise its discretion to admit the audio recording and its transcripts in its Decision on Exclusion of Testimony and Admission of Exhibit, please see above.
76. Rule 73 bis (E) of the Rules of Procedure and Evidence, which stated that: ‘After commencement of Trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.’ This rule was used by the Court to

⁸⁷ *Prosecutor v Renzaho*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (IC) [16].

⁸⁸ *Prosecutor v Renzaho*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (IC) [17] referring to *Nyiramasubuko v. Prosecutor* ([Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence](#)) ICTR-98-42-AR73.2 (4 October 2004) (AC) [6].

⁸⁹ *Prosecutor v Renzaho* (Transcript) ICTR-97-31-T (22 January 2007) (IC) pg 10, line 33-35.

exercise its discretion to allow the Prosecution to vary the witness list to remove witness BXX and include witness ADU, in its Decision on Prosecution Motion to Vary Witness List on 16 February 2007, please see above.

77. The Court considered Article 17 (4) of the Tribunal's Statute and Rule 47 (C) of the Rules of Procedure and Evidence in its Decision on Exclusion of Testimony and Admission of Exhibit which together stated that, 'the Prosecution must set forth in the indictment a concise statement of the facts of the case and of the crime with which the suspect is charged. This obligation must be interpreted in light of the rights of the accused to a fair trial, to be informed of the charges against him, and to have adequate time and facilities for the preparation of his defence.
78. The indictment has to fulfil the fundamental purpose of informing the accused of the charges against him with sufficient particularity to enable him to mount his defence.' The Court used this to determine that the journalist's testimony was authenticating evidence and not a material fact, and therefore did not need to be pleaded in the Amended Indictment.

V. EXTRAPOLATIONS

Audio Recordings:

79. The Court should admit an audio recording where it is relevant and has probative value, pursuant to Rule 89(C) of the Rules of Procedure and Evidence.⁹⁰
80. It should be known how an audio recording was made and where it originally came from.⁹¹
81. Where an audio recording is intercepted, its legality should be established, so as to not contravene Rule 95 of the Rules of Procedure and Evidence.⁹² It should therefore be known who authorised the intercept and whether it was done legally within the applicable laws.⁹³
82. The admission of an audio recording of a telephone conversation which has been intercepted is contrary to Article 17 of the *Covenant on Civil and Political Rights*, concerning the right to privacy.⁹⁴

⁹⁰ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (22 January 2007) (TC) pg 10, lines 10-11; *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 48, lines 30-31.

⁹¹ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 46-47.

⁹² *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 49, lines 18-20, pg 52, lines 27-28; *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (22 January 2007) (TC) pg 6.

⁹³ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 50, lines 28-29.

⁹⁴ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (22 January 2007) (TC) pg 6, lines 23-28; pg 7, lines 26-28.

83. The admission of an audio recording which has not been timely disclosed to the other party is contrary to Article 14 of the *Covenant on Civil and Political Rights*, concerning the Accused's right to a fair trial.⁹⁵
84. The provenance of an audio recording must be clearly established, otherwise the Court will not admit the audio recording and its transcription as evidence.⁹⁶
85. The Court will allow the Prosecution to vary its witness list after the commencement of trial to add a witness who is able to testify on the provenance of the audio recording in circumstances where sufficient time has been given to the Defence to prepare for the testimony.⁹⁷
86. The Court will have *prima facie* basis to admit the audio recording and its transcriptions where its authenticity and provenance can be shown through a witness's testimony.⁹⁸ The witness must be able to testify that he or she recognises the audio recording and its transcriptions, and that they are able to identify the audio recording as the same one they had made.⁹⁹
87. The Court will consider telephone calls that have been intercepted during war time to *not* violate Rule 95 of the Rules of Procedure and Evidence, as it is not antithetical to and would not seriously damage the integrity of the proceedings.¹⁰⁰

VI. CITATIONS

Prosecutor v. Renzabo (Prosecution Pre-Trial Brief) ICTR-97-31-I (31 October 2005);

Prosecutor v Renzabo (Decision on Prosecution Motion to Vary Witness List) Record no. ICTR-97-31-0160 (16 February 2007) (TC) <https://www.legal-tools.org/doc/2aa190/>;

Prosecutor v Renzabo (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) <https://www.legal-tools.org/doc/e2ab00/>;

Prosecutor v Renzabo (Judgment and Sentence) ICTR-97-31-T (14 July 2009) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-97-31/MSC14156R0000559861.PDF>;

⁹⁵ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (22 January 2007) (TC) pg 6, pg 7, lines 26-28.

⁹⁶ *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (8 January 2007) (TC) pg 52, lines 10-11; *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (22 January 2007) (TC) pg 12, lines 13-14.

⁹⁷ *Prosecutor v Renzabo*, (Decision on Prosecution Motion to Vary Witness List) ICTR-97-31-0160 (16 February 2007) (TC) [6].

⁹⁸ *Prosecutor v Renzabo*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [13].

⁹⁹ *Prosecutor v Renzabo*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [13]; *Prosecutor v Renzabo* (Transcript) ICTR-97-31-T (2 March 2007) (TC) pg 10-11.

¹⁰⁰ *Prosecutor v Renzabo*, (Decision on Exclusion of Testimony and Admission of Exhibit) ICTR-97-31-0163 (20 March 2007) (TC) [15], referring to *Prosecutor v Brdjanin* ([Decision on the Defence 'Objection to Intercept Evidence'](#)) IT-99-36-T (3 October 2003) (TC) [53]

Prosecutor v Renzabo (Transcript) ICTR-97-31-T (8 January 2007) (TC I); <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-97-31/TRS18487R0000627788.DOC>;

Prosecutor v Renzabo (Transcript), ICTR-97-31-T (11 January 2007) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-97-31/TRS15982R0000627908.DOC>;

Prosecutor v Renzabo, (Transcript) ICTR-97-31-T (22 January 2007) (TC I) Link: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-97-31/TRS19358R0000627926.DOC>;

Prosecutor v Renzabo (Transcript), ICTR-97-31-T (23 January 2007) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-97-31/TRS14042R0000627928.DOC>;

Prosecutor v Renzabo (Transcript), ICTR-97-31-T (31 January 2007) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-97-31/TRS17329R0000630216.DOC>;

Prosecutor v Renzabo (Transcript) ICTR-97-31-T (2 March 2007) (TC I) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/ICTR-97-31/TRS15334R0000630256.DOC>.

Prosecutor v Zdravko Tolimir (IT-05-88/2)

I. CASE DETAILS

- **Case name:** *Prosecutor v Zdravko Tolimir* (IT-05-88/2)
- **Tribunal/Court:** International Criminal Tribunal for the Former Yugoslavia (“ICTY”)
- **Offence charged:** One count of genocide, one count of conspiracy to commit genocide, five counts of crimes against humanity (extermination, murder, persecution, inhumane acts (forcible transfer) and deportation) and one count of the violations of the laws or customs of war (murder). The Accused was found guilty of all charges.
- **Stage of the proceedings:** Trial, Appeal, Sentence and Judgement
 - The Appeals Chamber confirmed Tolimir’s conviction
- **Keywords:** Authenticity, Corroboration, Reliability, Probative value, Credibility, Utility, Hearsay, Chain of custody

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

Videos

1. The videos depicted a New Year’s Eve party, Pilica Cultural Centre and Srebrenica related footage¹. (Exh. P01029; P00624; P02471; P00083; P00991; P02798; P01349; P01024; D00280; P01137; P01027; P002789, P02734, P02228. Video compilation of Srebrenica-related footage from 1995 (ERN: V000-4458). Video of Pilica Cultural Centre (ERN: V000-6972-V000-6972))
2. A video was taken by an attendee at a New Year’s Party.² Videos were introduced by the Prosecution.³ The Prosecution also introduced the video compilation of Srebrenica-related footage from 1995 (ERN: V000-4458) and video of Pilica Cultural Centre (ERN: V000-6972-V000-6972).⁴ Some of those videos were taken by journalists.⁵ Some of the videos were taken by the Serb Scorpions Unit.⁶ Video footage was also tendered by the Accused.⁷ The video footage which was tendered by the Accused was obtained from the Association of Serb Victims and it was produced by individuals in Srebrenica present during the review of troops of the 28th Divisions during the reading out of commendations.⁸

¹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) fn 258; *Prosecutor v Tolimir* (Prosecution Filing of Public Version of Pre-Trial Brief) IT-05-88/2-PT (29 September 2009) (TC I) (PTC) [65], [112].

² *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) fn 258.

³ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [343].

⁴ *Prosecutor v Tolimir* (Prosecution Filing of Public Version of Pre-Trial Brief) IT-05-88/2-PT (29 September 2009) (TC I) (PTC) [65], [112].

⁵ *Prosecutor v Tolimir* (Prosecution Filing of Public Version of Pre-Trial Brief) IT-05-88/2-PT (29 September 2009) (TC I) (PTC) [65].

⁶ *Prosecutor v Tolimir* (Prosecution Filing of Public Version of Pre-Trial Brief) IT-05-88/2-PT (29 September 2009) (TC I) (PTC) [120].

⁷ *Prosecutor v Tolimir* (Transcript) IT-05-88/2-T (25 March 2010) (TC I) (TC) 852.

⁸ *Prosecutor v Tolimir* (Transcript) IT-05-88/2-T (25 March 2010) (TC I) (TC) 852, lines 10-15.

Intercepted Communications

3. The intercepted communications were from the ABiH radio and were in the form of handwritten transcriptions of intercepted radio communications, electronic data with typewritten versions of the intercepts, hard copy of the typewritten material and audiotapes of intercepts.⁹ (Exh. P00162a; P00664b; P00699; P00311 (confidential); Ex. P00786; P00306 (confidential); P00373b (confidential); P00016c (confidential); P00244; P01539b; P00245; P00241; P01566a; P01565a; P01537a; P01227d; P01228b; P00660a; P00663a; P00663b (confidential); P02205; P00526a; P00846 (confidential); P02550; P02863 (confidential); P00651; P00378a; P00378b (confidential); P00379a; P00379b (confidential); P02553; P00850a; P00851b; P00568a; P00568b (confidential); P00483; P00345 (confidential); P00346 (confidential); P00347 (confidential); P00528a; Ex. P00529a; P00529c; P02156; P00679; P01544b (confidential); P00836a; P00394a; P00554a; P00354a; P00383a; P00561a; P02488; P02815; P00371a; P02657; P00384a; P00723a; P00578a; P00300 (confidential); P00359a; P00367a; P00368a; P02855; P02807; P00370a; P00417a; P00418a; P02875; P02457; P02463; P02464; P02465; P02466; P00411a; P02468.)
4. The intercepted communications were produced by the Bosnian-Muslim side.¹⁰ Seventeen intercept operators, two supervisors and a former OTP research officer and analyst Stefanie Frease described the compilation and production of the intercept evidence via *viva voce* testimony.¹¹ Frease also provided evidence of the methods used in recording the intercepts which were in the form of specific instructions and practices followed by the intercept operators that promoted reliability.¹² These intercepts were first recorded on tape by the Bosnian-Muslim interceptors, who then transcribed it onto paper, then into a notebook and then typed it on computer to be sent to their headquarters.¹³
5. Intercepts first started coming into the OTP from the Army of Bosnia and Herzegovina (ABiH) in 1998.¹⁴ A part of the intercepts was admitted in *Tolimir* through a judicial notice of adjudicated facts pursuant to Rule 94(B).¹⁵ 107 exhibits were tendered through the Prosecution investigator Stefanie Frease during her testimony.¹⁶ The Trial Chamber also admitted a number of intercepts from the bar table following a Prosecution motion.¹⁷

⁹ *Prosecutor v Tolimir* (Transcript) IT-05-88/2-T (7 September 2010) (TC I) (TC) 4968, lines 4-8.

¹⁰ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [63].

¹¹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [63].

¹² *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [64].

¹³ *Prosecutor v Tolimir* (Decision On Prosecution Motion For Judicial Notice Of Adjudicated Facts Pursuant To Rule 94(B)) IT-05-88/2-T (17 December 2009) (TC I) (TC II) 53.

¹⁴ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [66].

¹⁵ *Prosecutor v Tolimir* (Decision On Prosecution Motion For Judicial Notice Of Adjudicated Facts Pursuant To Rule 94(B)) IT-05-88/2-T (17 December 2009) (TC I) (TC II) 53.

¹⁶ *Prosecutor v Tolimir* (Transcripts) IT-05-88/2-T (7 and 8 September 2010) (TC I) (TC); *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) fn 88.

¹⁷ *Prosecutor v Tolimir* (Decision On Prosecution's Motion For Admission Of 28 Intercepts From The Bar Table) IT-05-88/2-T (20 January 2012) (TC II) 6.

Photographs

6. Depicting participants of certain meetings, buildings of interest such as houses and schools, men on the ground, identification of key individuals, bodies, crime scenes, prisoners and killing sites ¹⁸(Exh. P02643; P02630; P02631; P01500; P01501; P01502; P01381; P00094; P01648; P01647; P01454; P01453.)
7. DutchBat Officer Elco Koster, DutchBat Officer Lieutenant Johannes Rutten and journalists took some of the photographs.¹⁹ Other photographs were produced at crime scenes and showed human tissue and blood.²⁰ Photographs were introduced by both the Prosecution and Defence.²¹

Aerial Imagery

8. Aerial imagery depicted locations, routes and graves and destruction.²² (Exh. P01840 to P01843; P01846; P01848 to P01853; P01855; P01856; P01858; P01859; P01342; D00321; P01486; P01490; P00616; P01499; P01496; P00099; P02793; P02194; P01753; P02178; P02192; P01855; P01825; P00894; P01763; P00223; P01833; P01834; P01820; P01845; P01847; P01645; P01651; P01864 to P01873; P01876 - P01880; P01883 to P01892, P01894 to P01907.)
9. The Prosecution introduced the aerial images which were provided by the US Government pursuant to Rule 70.²³ The US Government refused to allow the Prosecution to discuss information which related to the technical or analytical sources, methods, or capabilities of those who collected, analysed or produced the imagery.²⁴ The aerial images are thought to be taken by unmanned aerial vehicles (UAVs) but the exact means of creation remained classified.²⁵

III.COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

Videos

10. Videos were used to find figures of killed individuals during the breakout and to determine, with the assistance of other forensic evidence and testimony, that their cause

¹⁸ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) fn 1181, 1217, 1317, 1452, 1845, 1866, 1960, [305]; *Prosecutor v Tolimir* (Prosecution Notice of Re-filing of Public Redacted Final Trial Brief) IT-05-88/2-T (28 November 2012) (TC) [741].

¹⁹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) fn 731, 1249, 1317, 1452.

²⁰ *Prosecutor v Tolimir* (Prosecution Notice of Re-filing of Public Redacted Final Trial Brief) IT-05-88/2-T (28 November 2012) (TC) [741].

²¹ *Prosecutor v Tolimir* (Prosecution Filing of Public Version of Pre-Trial Brief) IT-05-88/2-PT (29 September 2009) (TC I) (PTC) [66], [82], [90]; *Prosecutor v Tolimir* (Transcript) IT-05-88/2-T (25 March 2010) (TC I) (TC).

²² *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) fn 1336, 1622, 2912.

²³ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [68].

²⁴ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [68].

²⁵ *Prosecutor v Tolimir* (Prosecution Notice of Re-filing of Public Redacted Final Trial Brief) IT-05-88/2-T (28 November 2012) (TC) [498].

of death was unlikely to be due to combat, suicide or other.²⁶ The videos also depict killings and the aftermath of killings.²⁷

11. Videos also showed the presence and the use of weapons, VRS soldiers walking and celebrating through empty Srebrenica post-capture and threatening behaviour of Mladic in meetings between VRS and DutchBat.²⁸
12. In addition to these meetings, videos depicted the negotiations between the parties and arrangements regarding the “evacuation”. DutchBat were instructed to help with the evacuation as much as possible by the Dutch Foreign Ministry.²⁹ The Serbs giving out candy, water, and bread to the Bosnian Muslims, filmed by Serb camera crews as well as the commanders interacting with civilians on the buses.³⁰ Mladic willing to receive the wounded Bosnian Muslims for treatment.³¹
13. The videos also show the Accused accompanying Mladic during the Zepa evacuation illustrating the senior role of the Accused and his importance in the command in Srebrenica.³² Videos also illustrate the situation in Potocari, where there was civilian overcrowding and the location from where the Bosnian Muslims were collected by buses for transportation.³³
14. For the Pre-Trial, video footage was used to corroborate the accounts of survivors.³⁴ In the Appeal, the Prosecution speaks of the abundance of evidence which illustrates the Accused’s central role in Zepa, amongst which is a video recording.³⁵ [Please note: This use of the video was mentioned in the Appeals Judgement where a reference is made to the “Prosecutor v. Zdravko Tolimir, Case No. IT-05-88/2-A, Prosecution Response Brief, 16 October 2013 (confidential) (public redacted version filed on 10 March 2014).” - this document was unavailable upon search].
15. In the Appeal, the Accused challenged a video depicting a meeting with Mladic, which illustrated the Accused’s central role in Zepa, claiming it is not authentic.³⁶ The Defence challenged the authenticity of the video arguing that it contradicts the reasons of logic as it shows Tolimir in a civilian suit (which was like the suit he was wearing in Vienna and Dayton negotiations) while all others were in uniforms.

²⁶ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [495], [592].

²⁷ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [343], [504].

²⁸ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [209], [236], [246]-[247], [259], [1136].

²⁹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [248]-[254], [260], [276], [319], [617], [629], fn 2768, [977], [1133].

³⁰ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [276], [648].

³¹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [249].

³² *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [92], [641], [965].

³³ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [17] (Dissenting Opinions).

³⁴ *Prosecutor v Tolimir* (Prosecution Filing of Public Version of Pre-Trial Brief) IT-05-88/2-PT (29 September 2009) (TC I) (PTC) [65].

³⁵ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-A (8 April 2015) (AC) [370].

³⁶ *Prosecutor v Tolimir* (Public Redacted Version Of The Consolidated Appeal Brief) IT-05-88/2-A (28 February 2014) (AC) [321].

16. On Appeal, the Chamber held that Tolimir's challenge of the authenticity of the video of Zepa does not show how the Trial Chamber erred in relying on it, especially as it is corroborated by witness testimony and other evidence.³⁷ Therefore, the Appeals Chamber still considers that Tolimir was in charge in Zepa.³⁸

Intercepted Communications:

17. Intercepted communications were used to illustrate the communications between the parties and the preparatory acts before the attack on Srebrenica, during and after the killing, and surrounding events relating to the charges of the Accused.³⁹ For example, this includes the VRS attempting to have the Bosnian Muslims who had taken flight over the Drina River to Serbia handed to them by the Serbian authorities.⁴⁰
18. The Prosecution put forward that the 28 intercept operators and supervisors, and Stefanie Frease, all provided credible and detailed testimony establishing the reliability, accuracy and authenticity of hundreds of intercepts.⁴¹ Furthermore, the reliability of the intercepts can be derived from the uniform protocols and standards followed, the contemporaneous transcription and the fact the operators were not allowed to speculate, analyse and alter the intercepts showing that they have not been revised.⁴² Frease testified that there is a theoretical possibility that the intercepts were tampered with before coming into OTP possession.⁴³
19. This relates to a concern of Frease and her colleagues that intercepts may have been fabricated, however Frease also testified that the team dealing with the intercepts left "absolutely no stone unturned in validating the material".⁴⁴ In the Appeal, the Prosecution speaks of the abundance of evidence which illustrates the Accused's central role in Zepa, amongst which are intercepted communications.⁴⁵
20. The Defence opposed the intercepts which were admitted through judicial notice of adjudicated facts as the Prosecution spent a lot of court time to discussing the intercepts, included a large number of reports and introduced witnesses to testify for evidence already admitted into evidence under Rule 92*bis*. According to the Defence, this renders the purpose of the judicial notice senseless as the Chamber already had

³⁷ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-A (8 April 2015) (AC) [373].

³⁸ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-A (8 April 2015) (AC) [376].

³⁹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [270], [271], [274], [276], [320], [335], [338], [489], [530], [545], [556], [614], [640], [657], [790], [919], [960], [963], [966], [969], [971], [972], [978], [980], [997], [1103], [1140], [1168].

⁴⁰ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [675].

⁴¹ *Prosecutor v Tolimir* (Prosecution Notice of Re-filing of Public Redacted Final Trial Brief) IT-05-88/2-T (28 November 2012) (TC) [831].

⁴² *Prosecutor v Tolimir* (Prosecution Notice of Re-filing of Public Redacted Final Trial Brief) IT-05-88/2-T (28 November 2012) (TC) [832].

⁴³ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [66].

⁴⁴ *Prosecutor v Tolimir* (Transcript) IT-05-88/2-T (13 September 2010) (TC I) (TC) 5299, lines 2-11.

⁴⁵ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-A (8 April 2015) (AC) [370].

sufficient evidence based on which it can make a decision on their reliability and probative value.⁴⁶

21. The Defence also opposed the intercepts tendered through OTP investigator Stefanie Frease as she had not had previous training or experience with the processing of intercepts and the process she used was simply systematisation in Excel tables.⁴⁷ Furthermore, the OTP contacted the United States in order to obtain intercepts but at the time the OTP investigators could not verify the reliability of the intercepts.⁴⁸
22. The Defence also opposed the reliability of the intercepts due to the intercept operators lack of proper resources, professional equipment and professional training at the time of collecting the information, in addition to their inability to provide relevant information as to who intercepted particular communications and how they did so.⁴⁹ The Defence further opposed the reliability of the intercepts sent by the ABiH or SDB as they were sent years after being requested which suggests that they were selected materials (rather than all relevant evidence).⁵⁰
23. When intercepts are used in court proceedings as evidence, they need the approval of a relevant court, which allows the interceptions to be conducted.⁵¹ The Defence also argued that intercepts should not be relied on because it could be purposefully used to spread disinformation, and without other evidence such as video or audio recording it is deprived of context.⁵²
24. On Appeal, the Prosecution presented an intercepted communication showing the involvement of the Accused in the Zepa's command, which was challenged by the Defence as unreliable evidence, as it was unable to prove the events which occurred during and after the evacuation.⁵³ In general for all of the intercepts, the Defence put forward that the fact some intercepts were corroborated by other sources does not

⁴⁶ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [129].

⁴⁷ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [130]-[131].

⁴⁸ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [132].

⁴⁹ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [134]-[135].

⁵⁰ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [136].

⁵¹ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [139].

⁵² *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [140]-[141].

⁵³ *Prosecutor v Tolimir* (Public Redacted Version Of The Consolidated Appeal Brief) IT-05-88/2-A (28 February 2014) (AC) [321].

justify the Trial Chamber treating all intercepts as authentic and reliable.⁵⁴ This reliability was presumed by the judicial notice of the adjudicated facts.⁵⁵

25. The chamber was satisfied that the intercepts have a high degree of validity regarding the conversations recorded due to the overwhelming weight of other evidence which is in favour of the reliability and authenticity of the intercepts.⁵⁶ On Appeal, the Chamber, also found that Tolimir could not substantiate the claim that an intercept is unreliable.⁵⁷ Therefore, the Appeals Chamber maintained that Tolimir was in charge in Zepa.⁵⁸
26. The Appeal Chamber dismissed the Accused's appeal ground that the intercepts are unreliable based on factors such as they were corroborated by other independent sources, the procedures employed in producing the intercepts, methods promoting reliability such as the instructions issued to the intercept operators and the practices which they followed.⁵⁹ The Appeals Chamber also reaffirmed that the Trial Chamber can also rely on uncorroborated evidence if it wishes to, and given it assessed the intercepts based on the factors above, the Appeals Chamber agrees with the approach which the Trial Chamber has taken in assessing the reliability of intercepts.⁶⁰

Photographs

27. The photographs showed relevant infrastructure such as schools, bodies and location of bodies, killing sites and equipment as well as weapons and damage.⁶¹ Photographs were also used to corroborate survivor testimony.⁶²

Aerial Images:

28. Aerial imagery was used to show locations of gravesites and reburial sites and activities (primary and secondary graves).⁶³ Aerial imagery was also used to show the location of buildings and vehicles, location of large group of prisoners, as well as bodies.⁶⁴ Pairs and sets of aerial images document the emergence of 12 sites of disturbed earth along Cancari

⁵⁴ *Prosecutor v Tolimir* (Public Redacted Version Of The Consolidated Appeal Brief) IT-05-88/2-A (28 February 2014) (AC) [27].

⁵⁵ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-A (8 April 2015) (AC) [42].

⁵⁶ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [63], [66].

⁵⁷ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-A (8 April 2015) (AC) [373].

⁵⁸ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-A (8 April 2015) (AC) [376].

⁵⁹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-A (8 April 2015) (AC) [59], [61].

⁶⁰ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-A (8 April 2015) (AC) [59].

⁶¹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) fn 731, 1181, 1317, 1845, 1866, 1902, 1903, 1960, [206]; *Prosecutor v Tolimir* (Prosecution Filing of Public Version of Pre-Trial Brief) IT-05-88/2-PT (29 September 2009) (TC I) (PTC) [66], [112].

⁶² *Prosecutor v Tolimir* (Prosecution Filing of Public Version of Pre-Trial Brief) IT-05-88/2-PT (29 September 2009) (TC I) (PTC) [84], [90].

⁶³ *Prosecutor v Tolimir* (Prosecution Filing of Public Version of Pre-Trial Brief) IT-05-88/2-PT (29 September 2009) (TC I) (PTC) [126]-[127], [130], [133], [167].

⁶⁴ *Prosecutor v Tolimir* (Prosecution Notice of Re-filing of Public Redacted Final Trial Brief) IT-05-88/2-T (28 November 2012) (TC) [67], [741].

Road between 7 September 1995 and 2 October 1995.⁶⁵ Aerial images also showed disturbed earth in areas which were not the primary graves' location, leading to the discovery of secondary graves.⁶⁶

29. Dean Manning and Jean-René Ruez who are former OTP investigators testified about the use of aerial images and illustrated their authenticity and utility by locating the gravesites through the images.⁶⁷ An archeologist Richard Wright used them as well further illustrating their utility.⁶⁸ Aerial images also are used to corroborate survivor testimony and vehicle logs.⁶⁹
30. The Accused challenged the reliability of the aerial images due to lack of evidence of their origin, method of creation, manner of editing and how they should be interpreted or whether the Prosecution received them in their original form or whether they were modified.⁷⁰ The Prosecution did not specify if the images are satellite photographs, images taken by an unmanned aircraft or if they were taken by another means.⁷¹ According to the Defence, this therefore rendered the aerial images unreliable evidence.⁷²
31. The Trial Chamber acknowledged that there is a lack of evidence on the method of creation of the images, but they do not consider this to impair the credibility of the aerial images in general.⁷³ Aerial images helping to locate gravesites vouch for their authenticity and show their utility.⁷⁴ Interpretation and authenticity comes from witness corroboration. The Trial Chamber found that generally, the aerial images were reliable and of probative value.⁷⁵

Was the DDE admitted and/or relied upon?

32. Videos were admitted and considered in light of all other surrounding evidence.⁷⁶
33. **Intercepted Communications** 02936b and 02937b – were not admitted due to not being available in eCourt and no English translation provided making the Trial Chamber

⁶⁵ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) fn 2498.

⁶⁶ *Prosecutor v Tolimir* (Prosecution Notice of Re-filing of Public Redacted Final Trial Brief) IT-05-88/2-T (28 November 2012) (TC) fn 2493.

⁶⁷ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [70].

⁶⁸ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [70].

⁶⁹ *Prosecutor v Tolimir* (Prosecution Filing of Public Version of Pre-Trial Brief) IT-05-88/2-PT (29 September 2009) (TC I) (PTC) [65], [110].

⁷⁰ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [158]-[160].

⁷¹ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [158].

⁷² *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [160].

⁷³ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [70].

⁷⁴ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [70].

⁷⁵ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [70].

⁷⁶ *Prosecutor v Tolimir* (Transcript) IT-05-88/2-T (25 March 2010) (TC I) (TC) 852, 867.

unable to test their relevance.⁷⁷ Other intercepts admitted due to independent corroboration from other entities such as Croatian authorities and UNPROFOR.⁷⁸ Most intercepts were admitted.⁷⁹

34. **Photographs** Admitted and considered in light of all other surrounding evidence.⁸⁰ Multiple references to the findings of the Chamber and the “totality of evidence.”⁸¹
35. **Aerial imagery** Admitted and relied upon.⁸²
36. The majority of the above evidence has been admitted by the Chamber simply receiving them, during witness testimony or in motions, without referring to specific evidentiary considerations which have contributed to their admission.

General Legal Submissions on DDE

Videos

37. D00280 – the Chamber considered that the video should be treated with caution as it was made immediately after the fall of Srebrenica where information was still patchy, members of the column conveying the information of the killed only had the capacity to make rough estimates of the number of casualties.⁸³

Intercepted communications

38. Intercepts were used as circumstantial evidence which contributed to finding the intent for genocide.⁸⁴ In general, the intercepts were thought to be reliable and authentic enough to have a high degree of validity.⁸⁵ There was an overwhelming weight of evidence to support their reliability and authenticity.⁸⁶ Furthermore, the intercepts can be considered hearsay evidence but the fact they were presented with strong corroborative evidence increased their reliability.⁸⁷

⁷⁷ *Prosecutor v Tolimir* (Decision On Prosecution’s Motion For Admission Of 28 Intercepts From The Bar Table) IT-05-88/2-T (20 January 2012) (TC II) [13].

⁷⁸ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [65].

⁷⁹ *Prosecutor v Tolimir* (Transcripts) IT-05-88/2-T (7 and 8 September 2010) (TC I) (TC).

⁸⁰ *Prosecutor v Tolimir* (Transcript) IT-05-88/2-T (25 March 2010) (TC I) (TC) 849, 850.

⁸¹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [809], [827].

⁸² *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [70]; *Prosecutor v Tolimir*, (Transcript) IT-05-88/2-T (8 October 2010) (TC I) 6367; *Prosecutor v Tolimir* (Transcript) IT-05-88/2-T (17 May 2010) (TC I) (TC I) 1867, 1868.

⁸³ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [593].

⁸⁴ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [790].

⁸⁵ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [66].

⁸⁶ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [66]; *Prosecutor v Tolimir* (Decision On Prosecution Motion For Judicial Notice Of Adjudicated Facts Pursuant To Rule 94(B)) IT-05-88/2-T (17 December 2009) (TC I).

⁸⁷ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [63]-[66]. See also *Prosecutor v Tolimir* (Judgement) IT-05-88/2-A (8 April 2015) (AC) [58]-[59].

Photographs

39. Regarding Rutten's evidence, the dissenting judge held that the fact some of the photos which were part of Rutten's testimony were never developed and seen, makes Rutten's evidence questionable.⁸⁸ This shows the impact of photographs, which cannot be authenticated, on other evidence.

Aerial imagery

40. The fact there was lack of evidence illuminating the method by which the aerial images were created, did not impair their credibility.⁸⁹ Even without a clear chain of custody and the only corroborative witnesses being investigators from the OTP.⁹⁰ The Chamber found the aerial images to be generally reliable and of probative value.⁹¹
41. **Standard of Proof** The Trial Chamber makes a finding of guilt for alleged crimes once the conclusion is reached that all facts material to the elements of the crime have been proven beyond reasonable doubt by the Prosecution.⁹² Once an Adjudicated Fact has been proposed by the prosecution and accepted by the Court, the burden to produce evidence to dispute that fact falls on the Accused.⁹³ The burden to produce is based on producing credible and reliable evidence sufficient to bring the matter into dispute.⁹⁴ However, the burden to prove guilt beyond reasonable doubt, remains on the Prosecution.⁹⁵

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

42. Rule 89(C) RPE – “A Chamber may admit any relevant evidence which it deems to have probative value.”
43. Rule 89 (D) RPE – “A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”
44. Rule 70(C) RPE – Matters not subject to disclosure.⁹⁶

⁸⁸ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [97] (Dissenting Opinions).

⁸⁹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [69]-[70].

⁹⁰ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [69]-[70].

⁹¹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [70].

⁹² *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [30].

⁹³ *Prosecutor v Tolimir* (Decision On Prosecution Motion For Judicial Notice Of Adjudicated Facts Pursuant To Rule 94(B)) IT-05-88/2-T (17 December 2009) (TC I) (TC II) [10].

⁹⁴ *Prosecutor v Karemera et al* ([Decision on Prosecution's Interlocutory Appeal of Decision on Judicial Notice](#)) ICTR-98-44-AR73(C) (16 June 2006) (AC) [49].

⁹⁵ *Prosecutor v Tolimir* (Decision On Prosecution Motion For Judicial Notice Of Adjudicated Facts Pursuant To Rule 94(B)) IT-05-88/2-T (17 December 2009) (TC I) (TC II) [10].

⁹⁶ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [68].

45. Rule 94(B) RPE – “At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.”

Application of Rules of Evidence

Intercepted communications

46. Rule 89(C) and (D) and Articles 20(1) and 21(4)(b) – the Trial Chamber denied the admission of an intercept exhibit that had previously not been admitted due to its re-introduction, having implications on the Accused’s right to a fair trial, as there would not have been enough time to challenge the evidence.⁹⁷

47. Rule 94(B) – intercepts admitted through judicial notice on adjudicated facts.

Aerial imagery

48. Rule 70(C) was applied to aerial imagery stating that the Trial Chamber does not have the capacity to order the parties to produce additional evidence to the initial information provided by a person or an entity, neither can the Chamber summon said person or entity as a witness in order to obtain additional evidence. This relates to the fact the US Government refused to provide further information as to the sourcing of the aerial images.⁹⁸

49. Rule 94(B) – aerial images admitted through judicial notice on adjudicated facts.

Non-Specific DDE

50. The Trial Chamber admitted evidence based on relevance and probative value which must be demonstrated by the tendering party.⁹⁹ The admission of the evidence does not speak as to its weight, as findings of facts and weight are determined later, after considering factors such as authentication and proof of identity of the source.¹⁰⁰ Even if there are objections by either side as to the authenticity or reliability of the evidence, the evidence is admitted unless it is manifestly unreasonable to do so, and the weight is to

⁹⁷ *Prosecutor v Tolimir* (Consolidated Decision on Prosecution’s Bar Table Motion and the Accused’s Motion for Extensions of Time) IT-05-88/2-T (14 May 2012) (TC II) [33], [47].

⁹⁸ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [68].

⁹⁹ *Prosecutor v Tolimir* (Revised Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties during Trial) IT-05-88/2-T (4 February 2011) (TC I) (TC II) [15].

¹⁰⁰ *Prosecutor v Tolimir* (Revised Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties during Trial) IT-05-88/2-T (4 February 2011) (TC I) (TC II) [17].

be determined later.¹⁰¹ Evidence is still admitted even if the source does not appear as a witness.¹⁰²

V. EXTRAPOLATIONS

Videos

51. Videos may be found to be more reliable if they are corroborated by witness testimony and other evidence.¹⁰³

52. Videos are admitted in light of all other surrounding evidence.¹⁰⁴

53. Videos should be authentic.¹⁰⁵

Intercepted Communications

54. Reliability and authenticity of intercepts may be amplified by the overwhelming weight of other corroborative evidence.¹⁰⁶ Such corroboration is even more significant when it is sourced from independent sources.¹⁰⁷

55. Relevance of intercepts may not be tested when there is no relevant translation, and this may affect the admission.¹⁰⁸

56. Independent corroboration and overwhelming weight of other evidence may facilitate the admission of intercepts and support their reliability and authenticity.¹⁰⁹

57. Following the specific instructions and practices in intercepting and recording communications increases intercepts' reliability.¹¹⁰

¹⁰¹ *Prosecutor v Tolimir* (Revised Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties during Trial) IT-05-88/2-T (4 February 2011) (TC I) (TC II) [18].

¹⁰² *Prosecutor v Tolimir* (Revised Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties during Trial) IT-05-88/2-T (4 February 2011) (TC I) (TC II) [19].

¹⁰³ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-A (8 April 2015) (AC) [373].

¹⁰⁴ *Prosecutor v Tolimir* (Transcript) IT-05-88/2-T (25 March 2010) (TC I) (TC) 852, 867.

¹⁰⁵ *Prosecutor v Tolimir* (Public Redacted Version Of The Consolidated Appeal Brief) IT-05-88/2-A (28 February 2014) (AC) [321].

¹⁰⁶ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [63], [66].

¹⁰⁷ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-A (8 April 2015) (AC) [59], [61].

¹⁰⁸ *Prosecutor v Tolimir* (Decision On Prosecution's Motion For Admission Of 28 Intercepts From The Bar Table) IT-05-88/2-T (20 January 2012) (TC II) [13].

¹⁰⁹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [64]-[66].

¹¹⁰ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [64].

58. The intercepts can be considered hearsay evidence, but their reliability can be increased if they are presented with strong corroborative evidence and accompanied with a chain of custody.¹¹¹
59. Admission of an intercept may be denied when there is not enough time for the other party to challenge it, which can have implications for the Accused's fair trial rights.¹¹² (Also, when there is no English translation provided and available in eCourt, the Court is unable to test the intercepts' relevance.¹¹³)

Photographs

60. Photographs are admitted in light of all other surrounding evidence.¹¹⁴

Aerial Imagery

61. Aerial images should be reliable and of probative value.¹¹⁵
62. Lack of information regarding the method of creation does not impair the credibility of aerial images.¹¹⁶
63. When the actual subjects depicted on the aerial images are found/located, this vouches for the images' authenticity and utility.¹¹⁷
64. Interpretation and authentication of aerial and satellite imagery can be derived from witness corroboration.¹¹⁸

General DDE

65. The Chamber makes determinations as to the weight and credibility of evidence but does not explain the reasoning behind these determinations for each piece of evidence separately and individually.¹¹⁹ All evidence is analysed in light of the entire body of evidence.¹²⁰ The Trial Chamber prefers that evidence is introduced through a witness on the stand and requires there be a nexus between the witness and the evidence.¹²¹

¹¹¹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [64].

¹¹² *Prosecutor v Tolimir* (Consolidated Decision on Prosecution's Bar Table Motion and the Accused's Motion for Extensions of Time) IT-05-88/2-T (14 May 2012) (TC II) [33], [47].

¹¹³ *Prosecutor v Tolimir* (Decision On Prosecution's Motion For Admission Of 28 Intercepts From The Bar Table) IT-05-88/2-T (20 January 2012) (TC II) [13].

¹¹⁴ *Prosecutor v Tolimir* (Transcript) IT-05-88/2-T (25 March 2010) (TC I) (TC) 849, 850.

¹¹⁵ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [70].

¹¹⁶ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [70].

¹¹⁷ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [70].

¹¹⁸ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [70].

¹¹⁹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [31].

¹²⁰ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [33].

¹²¹ *Prosecutor v Tolimir* (Revised Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties during Trial) IT-05-88/2-T (4 February 2011) (TC I) (TC II) [20].

Intercepted Communications

66. Credible and detailed testimony establishes the reliability, accuracy and authenticity of intercepts.¹²²
67. Important to show that the intercepts have not been revised by having the operators follow uniform protocols and standards during contemporaneous transcription, to discourage speculation and altering of intercepts.¹²³
68. The Prosecution should not spend much Court time discussing evidence which was already admitted through judicial notice as it renders the judicial notice senseless.¹²⁴ Intercepts should not be admitted when the witness through who they are tendered has no training or experience in processing intercepts.¹²⁵ (Please note that the Tribunal admitted the intercepts and decided they have a high degree of validity despite this argumentation).¹²⁶
69. Intercept operators are not reliable when they lack relevant training, equipment, and the ability to communicate the relevant method of intercepting.¹²⁷ Inability to provide relevant information as to who intercepted particular communications and how they did so may also render the intercepts unreliable.¹²⁸ (Please note that the Tribunal admitted the intercepts and decided they have a high degree of validity despite this argumentation).¹²⁹
70. The reliability of intercepts is compromised when they are obtained too long after their recording.¹³⁰ (please note that the Tribunal admitted the intercepts and decided they have a high degree of validity despite this argumentation)¹³¹
71. The intercepts may be purposefully used to spread disinformation.¹³²

¹²² *Prosecutor v Tolimir* (Prosecution Notice of Re-filing of Public Redacted Final Trial Brief) IT-05-88/2-T (28 November 2012) [851].

¹²³ *Prosecutor v Tolimir* (Prosecution Notice of Re-filing of Public Redacted Final Trial Brief) IT-05-88/2-T (28 November 2012) (TC) [852].

¹²⁴ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [129].

¹²⁵ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [130]-[131].

¹²⁶ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [66].

¹²⁷ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [134]-[135].

¹²⁸ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [134]-[135].

¹²⁹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [66].

¹³⁰ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [136].

¹³¹ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [66].

¹³² *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [140]-[141].

72. When intercepts are used in court proceedings as evidence, they need the approval of a relevant court which allows the interceptions to be conducted.¹³³
73. The intercepts may not be reliable unless there is other evidence such as video or audio recording to provide context.¹³⁴ Intercepts are deprived of context unless are provided with corroborating evidence.¹³⁵ The corroboration of only some intercepts does not justify the authenticity and reliability of all intercepts.¹³⁶
74. Judicial notice of adjudicated facts may provide a presumed reliability.¹³⁷

Aerial Imagery

75. Locating the actual subjects of aerial imageries illustrates their authenticity and utility.¹³⁸
76. Lack of origin, original form and presence of modification, method of creation, manner of editing and guidance on how they should be interpreted, challenge the reliability of aerial images.¹³⁹
77. The reliability of aerial images can also be challenged based on lack of information on the means of their capturing.¹⁴⁰

VI. CITATIONS

Prosecutor v Tolimir (Decision On Prosecution Motion For Judicial Notice Of Adjudicated Facts Pursuant To Rule 94(B)) IT-05-88/2-T (17 December 2009) (TC II) <https://www.icty.org/x/cases/tolimir/tdec/en/091217.pdf>;

Prosecutor v Tolimir (Transcript) IT-05-88/2-T (25 March 2010) (TC II) <https://www.icty.org/x/cases/tolimir/trans/en/100325IT.htm>;

Prosecutor v Tolimir (Transcript) IT-05-88/2-T (17 May 2010) (TC II) <https://www.icty.org/x/cases/tolimir/trans/en/100517IT.htm>;

¹³³ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [139]. **NB:** Since neither the Parties nor the Trial Chamber raised any evidentiary considerations for the video clips and the photographs on Facebook, extrapolation for guidelines was not possible.

¹³⁴ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [140]-[141].

¹³⁵ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [140]-[141].

¹³⁶ *Prosecutor v Tolimir* (Public Redacted Version Of The Consolidated Appeal Brief) IT-05-88/2-A (28 February 2014) (AC) [27].

¹³⁷ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-A (8 April 2015) (AC) [42].

¹³⁸ *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012) (TC II) [70].

¹³⁹ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [158]-[160].

¹⁴⁰ *Prosecutor v Tolimir* (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) [158]-[160].

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<https://www.icty.org/x/cases/tolimir/trans/en/100908IT.htm>;

Prosecutor v Tolimir (Transcript) IT-05-88/2-T (10 September 2010) (TC II)
<https://www.icty.org/x/cases/tolimir/trans/en/100910ED.htm>;

Prosecutor v Tolimir (Transcript) IT-05-88/2-T (13 September 2010) (TC II)
<https://www.icty.org/x/cases/tolimir/trans/en/100913IT.htm>;

Prosecutor v Tolimir (Transcript) IT-05-88/2-T (8 October 2010) (TC II)
<https://www.icty.org/x/cases/tolimir/trans/en/101008IT.htm>;

Prosecutor v Tolimir (Revised Order Concerning Guidelines on the Presentation of Evidence and Conduct of Parties during Trial) IT-05-88/2-T (4 February 2011) (TC II).
(<https://www.icty.org/x/cases/tolimir/tord/en/110204.pdf>);

Prosecutor v Tolimir (Decision On Prosecution's Motion For Admission Of 28 Intercepts From The Bar Table) IT-05-88/2-T (20 January 2012) (TC II).
<https://www.icty.org/x/cases/tolimir/tdec/en/120120.pdf>;

Prosecutor v Tolimir (Consolidated Decision on Prosecution's Bar Table Motion and the Accused's Motion for Extensions of Time) IT-05-88/2-T (14 May 2012) (TC II).
<https://www.icty.org/x/cases/tolimir/tdec/en/120514.pdf>;

Prosecutor v Tolimir (Judgement) IT-05-88/2-T (12 December 2012) (TC II)
<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>;

Prosecutor v Tolimir (Prosecution Filing of Public Version of Pre-Trial Brief) IT-05-88/2-PT (29 September 2009) (PTC) <https://www.icty.org/x/cases/tolimir/custom3/en/090929.pdf>

Prosecutor v Tolimir (Zdravko Tolimir's Submission With A Pre-Trial Brief Pursuant To Rule 65 Ter (F) And Notification Of The Defence Of Alibi In Respect Of Some Charges) IT-05-88/2-PT (28 October 2009) (PTC)
<https://www.icty.org/x/cases/tolimir/custom3/en/090930.pdf>;

Prosecutor v Tolimir (Prosecution Notice of Re-filing of Public Redacted Final Trial Brief) IT-05-88/2-T (28 November 2012) (TC II)
<https://www.icty.org/x/cases/tolimir/custom5/en/121128.pdf>;

Prosecutor v Tolimir (Public Redacted Version of Defence Final Trial Brief) IT-05-88/2-T (1 October 2012) (TC II) <https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>;

Prosecutor v Tolimir (Public Redacted Version Of The Consolidated Appeal Brief) IT-05-88/2-A (28 February 2014) (AC) <https://www.icty.org/x/cases/tolimir/custom6/en/140228.pdf>;

Prosecutor v Tolimir (Judgement) IT-05-88/2-A (8 April 2015) (AC)
https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf.

Prosecutor v Charles Ghankay Taylor (SCSL-03-01)

I. CASE DETAILS

- **Case name:** *Prosecutor v Charles Ghankay Taylor* (SCSL-03-01)
- **Tribunal/Court:** Special Court for Sierra Leone (“SCSL”)
- **Offence charged:** 5 counts of war crimes (terrorizing civilians, murder, outrages on personal dignity, cruel treatment, looting); 5 counts of crimes against humanity (murder, rape, sexual slavery, mutilating and beating, enslavement) and 1 count of other serious violations of international humanitarian law (recruiting and using child soldiers). Found guilty by Trial Chamber on 18 May 2012 on all counts and sentenced to 50 years imprisonment. Conviction upheld by the Appeals Chamber on 26 September 2013.
- **Stage of the proceedings:** Trial and Appeal
- **Keywords:** Authenticity, Corroboration, Prejudice, Admissibility

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

1. **BBC Radio Broadcasts**¹ (audio clips provided on a CD accompanying the Prosecution’s motion) – [Due to the large number of audio clips, they are treated as a single category for the purposes of this case summary. Please, note that the Trial Chamber in its Decision (25 February 2009) addressed the admissibility of these audio clips in a collective manner. Therefore, this case summary mirrors the approach of the Trial Chamber of grouping the audio clips in a single category. Information as to the date and time of each broadcast, the length of each clip, a summary of the contents of each clip, and the relevance of each clip can be found within Annex A of the Prosecution’s Motion for admission of these audio clips]. In addition, the Prosecution requested that the Trial Chamber admits into evidence the accompanying unofficial typed transcript of these audio clips. The transcripts were prepared by the Prosecution and provided in Annex B.²
 - a. The Prosecution sought their admission, noting that they ‘were taken from the radio programme “Focus on Africa”, which ‘originates from the BBC and was aired publicly’.³

¹ *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 10 (Annex A). A total of 29 audio clips were submitted for admission.

² *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (TC) [1] [7]

³ *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 4, [9].

2. **Photographs**⁴ – [Due to the large number of photographs, they are treated as a single category for the purposes of this case summary. Also, note that the Trial Chamber did not specifically assess the photographs, but instead made a collective assessment of all the evidence.]
 - a. For the photographs sought to be admitted by the Defence, they ‘were introduced through the Accused during his examination-in-chief and marked for identification’.⁵ No information as to where the photographs were obtained. For the photographs sought to be admitted by the Prosecution, they ‘were introduced during cross-examination of the Accused and marked for identification’.⁶ The photographs are of ‘pages of a photo album seized from the ACCUSED’s office at White Flower’.⁷
3. **Video clip of ABC News depicting Naomi Campbell during an interview (P-558)**⁸ - introduced by the Prosecution.⁹ The Prosecution did not discuss by who and where the video clip was obtained.
4. **Two video clips of ABC News depicting Mia Farrow (D-429; D-430)**¹⁰ - – introduced by the Defence.¹¹ The Defence did not discuss by who and where the video clips were obtained.
5. **Photographs on Facebook page**¹² - [Though the transcript is not very clear, the author of this case summary understands these as being photographs (perhaps screenshots) of photographs on a Facebook page. Please, note that the Defence did not seek their admission as evidence but only that they be marked for identification – marked as MFI-13A, B and C].¹³ The Defence introduced them during the cross-examination of Prosecution Witness Carole White, noting that they were from ‘Annie Wilshire’s Facebook page’.¹⁴ The Defence did not discuss by who they were obtained.
6. **E-mail**¹⁵ [no evidence code since the Defence motion was ultimately dismissed]. The Defence sought its admission noting that it is an ‘e-mail dated 11 May 2012 from Justice Sow to all Justices of the Special Court, except Justice Julia Sebutinde, copying the Prosecutor and lead trial Defence

⁴ *Prosecutor v Taylor* (Decision on Public with Annexes A and B Defence Motion for Admission into Evidence of 301 Documents and Photographs Marked for Identification During the Evidence-in-Chief of the Accused and on Prosecution List of Documents Marked for Identification During the Testimony of Charles Taylor Sought to be Admitted into Evidence) SCSL-03-01-T-929 (18 March 2010) (TC I) (TC II), for the list of admitted photographs see Annex therein; For the photographs introduced by the Prosecution, see *Prosecutor v Taylor* (Prosecution List of Documents Marked for Identification During the Testimony of Charles Taylor Sought to be Admitted into Evidence) SCSL-03-01-T-911 (19 February 2010) (TC I) (TC II) 90 (Annex 1); for the photographs introduced by the Defence, see *Prosecutor v Taylor* (Defence Motion for the Admission into Evidence of 301 Documents and Photographs Marked for Identification During the Evidence-In-Chief of the Accused) SCSL-03-01-T-909 (19 February 2010) (TC I) (TC II) annex A.

⁵ *Prosecutor v Taylor* (Decision on Public with Annexes A and B Defence Motion for Admission into Evidence of 301 Documents and Photographs Marked for Identification During the Evidence-in-Chief of the Accused and on Prosecution List of Documents Marked for Identification During the Testimony of Charles Taylor Sought to be Admitted into Evidence) SCSL-03-01-T-929 (18 March 2010) (TC I) (TC II) 9, [21].

⁶ *Prosecutor v Taylor* (Decision on Public with Annexes A and B Defence Motion for Admission into Evidence of 301 Documents and Photographs Marked for Identification During the Evidence-in-Chief of the Accused and on Prosecution List of Documents Marked for Identification During the Testimony of Charles Taylor Sought to be Admitted into Evidence) SCSL-03-01-T-929 (18 March 2010) (TC I) (TC II) 10, [24].

⁷ *Prosecutor v Taylor* (Prosecution List of Documents Marked for Identification During the Testimony of Charles Taylor Sought to be Admitted into Evidence) SCSL-03-01-T-911 (19 February 2010) (TC I) (TC II) 90 (Annex 1).

⁸ *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45656-45657.

⁹ *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45750, line 18.

¹⁰ *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45722-45723, 45731-45732.

¹¹ *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45735-45736.

¹² *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45783, 45786-45790, 45795.

¹³ *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45795, lines 19-28.

¹⁴ *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45783, lines 11-12.

¹⁵ *Prosecutor v Taylor* (Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1352 (30 November 2012) (AC) 4, [8].

counsel'.¹⁶ The Defence did not discuss by who and where it was obtained. Information is also unavailable because the e-mail was appended in a confidential annex.¹⁷

III. COURT ANALYSIS & LEGAL ARGUMENTS

BBC Radio Broadcasts

7. The Prosecution argued that the clips were relevant since they relate to '(i) the chapeau requirements of the crimes charged; (ii) the several forms of liability alleged by the Prosecution in this case; (iii) the crime base, and (iv) evidence of a consistent pattern of conduct admissible under Rule 93'.¹⁸ It also argued that they were relevant 'as they establish the notoriety of the crimes and, therefore, are evidence of intent, knowledge, awareness or reasonable foreseeability of the crimes' and because 'they corroborate and so lend weight to evidence on record'.¹⁹ The Prosecution also argued that since they originate from the BBC and were aired publicly, they did not 'impact adversely and unfairly upon the integrity of the proceedings', nor were 'of such a nature that [their] admission would bring the administration of justice into serious disrepute'.²⁰
8. In addition, it argued that 'no undue prejudice to the Accused arises from the fact that an audio-recording and a transcript thereof are produced without calling a witness'.²¹ In relation to authenticity, the Prosecution argued that '[w]hile authenticity has no bearing on the admissibility of evidence at the SCSL but rather goes to the weight to be accorded to it, the authenticity of the BBC Clips can be sufficiently established by the content of the Clips themselves'.²² Further, it argued that 'the CDs from which the BBC Clips were taken have sufficient indicia of authenticity as well' since the 'original CDs also indicate the date of the Broadcast' and 'are available for inspection and for production to the Trial Chamber if required'.²³
9. The Defence challenged their admission, arguing that '[t]he Prosecution cannot use Rules 89(C) and 92*bis* to seek to admit evidence that is material to the command responsibility or joint criminal enterprise allegations in the Indictment, which go to a "critical element" of the Prosecution's case and is therefore "proximate" to the accused, without giving the Defence a genuine opportunity for cross-examination of the evidence'.²⁴ Further, the Defence argued that 'if the documents were

¹⁶ *Prosecutor v Taylor* (Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1352 (30 November 2012) (AC) 4-5, [8].

¹⁷ *Prosecutor v Taylor* (Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1352 (30 November 2012) (AC) 5, [8], fn 27.

¹⁸ *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 4, [8].

¹⁹ *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 4, [8].

²⁰ *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 4, [8].

²¹ *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 5, [10].

²² *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 5, [11].

²³ *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 5, [11].

²⁴ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 3-4, [6].

admitted it would be essential to have available someone who could speak to the contents and relevance of the documents' because otherwise 'the Trial Chamber may not be able to decipher the context of the documents and thus determine their usefulness to the proceedings'.²⁵ According to the Defence, '[a] lack of context can render documents inadmissible as lacking sufficient indicia of reliability' and therefore '[a]s a precondition to admission, the Prosecution should have produced a witness to decipher, explain and provide context to the Documents.'²⁶ The Defence also argued that their probative value 'would be outweighed by [their] prejudicial effect' since '[t]he probative value of media reports is diminished during a conflict where the media is manipulated for purposes of propaganda.'²⁷

10. Furthermore, the Defence argued that several audio clips 'refer to crime-based evidence, which is arguably of insufficient significance at this stage of the trial' and that '[m]any other documents refer to events outside the scope of the Indictment, which is also of insufficient significance.'²⁸ In addition, the Defence argued that some audio clips 'refer to matters which have already been spoken to by numerous witnesses and in documentary evidence before the Court' and are thus 'cumulative and should be excluded'.²⁹ Finally, the Defence argued that all but four transcripts in the BBC Material 'are based on anonymous or hearsay sources, which are incapable of being tested in cross-examination and should therefore be excluded'.³⁰
11. The Trial Chamber held that the Prosecution's application under Rule 89(C) must fail since the 'documents were tendered in lieu of oral testimony and therefore should have been tendered under Rule 92bis'.³¹ The Trial Chamber then examined the Prosecution's alternative application under Rule 92bis.³²

Photographs

12. Please note that the following Counsels' arguments concern the totality of the evidence that were sought to be introduced, and not the photographs specifically.
13. Defence Motion: The Defence argued that 'all of the 301 documents and photographs marked for identification during the evidence-in-chief of the Accused should be admitted into evidence' because

²⁵ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 4, [8]-[9].

²⁶ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 4, [9].

²⁷ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 5, [12].

²⁸ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 6-7, [18].

²⁹ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 7, [19].

³⁰ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 7, [20].

³¹ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 6-7, [17].

³² *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 7, [18].

they are relevant.³³ It noted that '[f]or the purposes of a criminal trial, evidence is relevant if its effect is to make more or less probable the existence of any fact which is in issue, that is, upon which guilt or innocence depends.'³⁴ The Prosecution did not put forward any objections with regard to photographs.

14. Prosecution Motion: The **Prosecution** sought the admission of photographs (MFI 403 A-E) arguing that they impeach the Accused's testimony.³⁵ / The **Defence** did not put forward any objections with regard to photographs.
15. The Trial Chamber did not examine each photograph individually, but instead made a collective assessment of the evidence.

Video clip of ABC News depicting Naomi Campbell during an interview

16. The Parties did not raise any evidentiary considerations in relation to this video clip. The Defence raised no objections.³⁶
17. The Trial Chamber did not raise any evidentiary considerations in relation to this video clip.

Two video clips of ABC News depicting Mia Farrow

18. The Parties did not raise any evidentiary considerations in relation to these video clips. The Prosecution raised no objections.³⁷
19. The Trial Chamber did not raise any evidentiary considerations in relation to these video clips.

Photographs on Facebook page

20. The Parties did not raise any evidentiary considerations in relation to these photographs.
21. The Trial Chamber did not raise any evidentiary considerations in relation to these photographs [also, note that their admission as evidence was not sought].

E-mail

22. The Defence did not articulate specific arguments in relation to the e-mail, besides that it 'was transmitted on 11 May 2012 and was therefore unavailable at trial',³⁸ and that the 'failure to copy Justice Sebutinde on that e-mail was [...] deliberate and buttresses views he expressed in the New

³³ *Prosecutor v Taylor* (Defence Motion for the Admission into Evidence of 301 Documents and Photographs Marked for Identification During the Evidence-In-Chief of the Accused) SCSL-03-01-T-909 (19 February 2010) (TC I) (TC II) 3, [6].

³⁴ *Prosecutor v Taylor* (Defence Motion for the Admission into Evidence of 301 Documents and Photographs Marked for Identification During the Evidence-In-Chief of the Accused) SCSL-03-01-T-909 (19 February 2010) (TC I) (TC II) 2, [4].

³⁵ *Prosecutor v Taylor* (Prosecution List of Documents Marked for Identification During the Testimony of Charles Taylor Sought to be Admitted into Evidence) SCSL-03-01-T-911 (19 February 2010) (TC I) (TC II) 90 (Annex 1).

³⁶ *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45750, lines 25-26.

³⁷ *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45750, line 20.

³⁸ *Prosecutor v Taylor* (Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1352 (30 November 2012) (AC) 6, [11].

African Interview regarding the propriety of the constitution of the Trial Chamber during the relevant period'.³⁹ In general, the Defence argued that '[t]he additional evidence being proffered is credible, relevant to issues which are material to the Judgement, and have the ability to demonstrate that Mr. Taylor's conviction is unsafe.'⁴⁰

23. The Prosecution argued that '[t]he Defence hypothesis as to why Justice Sow failed to copy Justice Sebutinde on an email, is speculative at best and, even if correct, would not render the email admissible' because '[n]one of the proffered evidence relating to Justice Sow raises a realistic possibility that Mr. Taylor's conviction might have been different if Justice Sow's evidence was admitted since, as an Alternate Judge, he had no vote on Mr. Taylor's conviction.'⁴¹ In general, the Prosecution did not contest the credibility of the proffered evidence but argued that the Defence failed 'to establish that any of the proffered evidence [was] relevant'.⁴²
24. The Appeals Chamber noted that the Defence motion cannot succeed because it 'fails to identify the "specific finding of fact made by the Trial Chamber to which the additional evidence is directed"', and because the 'evidence proposed therein do not relate to a fact litigated at trial or a factual finding made by the Trial Chamber'.⁴³ [Please, note that the Appeals Chamber did not raise any evidentiary considerations in relation to the e-mail specifically].

Was the DDE admitted and/or relied upon?

BBC Radio Broadcasts

25. The Trial Chamber held that the following BBC Clips were not admissible under Rule 92*bis* because they went to the acts and conduct of the Accused: Clip 1 – BBC Clip D0000533 and Related Transcript;⁴⁴ Clip 7 – BBC Clip D0000525 and Related Transcript;⁴⁵ Clip 10 – BBC Clip D0000550 and Related Transcript;⁴⁶ Clip 18 – BBC Clip D0000555 and Related Transcript;⁴⁷ Clip 22 – BBC Clip D000522 and Related Transcript⁴⁸, and Clip 27 – BBC Clip D0000519 and Related Transcript.⁴⁹ Furthermore, Clip 16 (BBC Clip D0000514 and Related Transcript) was not admissible since it 'has already been admitted into evidence' and the 'Prosecution has consequently

³⁹ *Prosecutor v Taylor* (Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1352 (30 November 2012) (AC) 7-8, [16].

⁴⁰ *Prosecutor v Taylor* (Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1352 (30 November 2012) (AC) 7, [13].

⁴¹ *Prosecutor v Taylor* (Prosecution Response to Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1366 (7 December 2012) (AC) 8, [23]-[25].

⁴² *Prosecutor v Taylor* (Prosecution Response to Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1366 (7 December 2012) (AC) 7, [19].

⁴³ *Prosecutor v Taylor* (Decision on Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1376 (18 January 2013) (AC) 6, [11].

⁴⁴ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 7, [20].

⁴⁵ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 7, [21].

⁴⁶ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 7, [22].

⁴⁷ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 7, [23].

⁴⁸ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) at 8, [24].

⁴⁹ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 8, [25].

withdrawn its tender'.⁵⁰ Finally, Clip 14 (BBC Clip D0000528 and Related Transcript) was partially admitted: the Trial Chamber held that 'cumulative evidence is not excluded by Rule 92bis and that the Defence objection regarding sources goes to weight not admissibility' but some parts consisted of 'the reporter's own opinions rather than facts' and '[s]uch opinion evidence is not admissible, although the remainder of the information in the Clip is relevant'.⁵¹

26. The Trial Chamber admitted the remaining BBC Clips and Related Transcripts (2-6, 8-9, 11-15, 17, 19-21, 23-26, 28-29) because they met the 'three-fold test for admission under Rule 92bis, in that it is relevant, its reliability is susceptible of confirmation in due course, and it does not go to proof of the acts and conduct of the Accused'.⁵²

Photographs

27. Please, note that the Trial Chamber did not articulate evidentiary considerations for the photographs specifically, but instead made a collective assessment of all the evidence. Since there were no objections between the Parties with regard to photographs, all of the photographs sought to be admitted by the Parties were admitted – they are mentioned in the Annex of the Trial Chamber's Decision.⁵³ / In general, the Trial Chamber found that 'the 121 documents tendered by the Prosecution and not objected to by the Defence are relevant and do not contain material that goes to proof of the guilt of the Accused' and were thus admitted pursuant to Rule 89(C).⁵⁴ Also, it found that 'all of the documents listed in Annex 2 of the Prosecution Response, are relevant' and were thus admitted pursuant to Rule 89(C).⁵⁵
28. **Video clip of ABC News depicting Naomi Campbell during an interview** (P-558) – used by the Prosecution for the examination-in-chief of Prosecution Witness Mia Farrow.⁵⁶ The Trial Chamber did not raise any evidentiary considerations for this video clip, neither within the relevant transcript, nor within the judgment. The evidence was admitted.⁵⁷
29. **Two video clips of ABC News depicting Mia Farrow** (D-429; D-430) – used by the Defence for the cross-examination of Prosecution Witness Mia Farrow.⁵⁸ the Trial Chamber did not raise evidentiary considerations for these video clips, neither within the relevant transcript, nor within the judgment. Both portions of evidence were admitted.⁵⁹

⁵⁰ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 8, [26].

⁵¹ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 8, [27].

⁵² *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 8-9, [28].

⁵³ *Prosecutor v Taylor* (Decision on Public with Annexes A and B Defence Motion for Admission into Evidence of 301 Documents and Photographs Marked for Identification During the Evidence-in-Chief of the Accused and on Prosecution List of Documents Marked for Identification During the Testimony of Charles Taylor Sought to be Admitted into Evidence) SCSL-03-01-T-929 (18 March 2010) (TC I) (TC II) (Annex).

⁵⁴ *Prosecutor v Taylor* (Decision on Public with Annexes A and B Defence Motion for Admission into Evidence of 301 Documents and Photographs Marked for Identification During the Evidence-in-Chief of the Accused and on Prosecution List of Documents Marked for Identification During the Testimony of Charles Taylor Sought to be Admitted into Evidence) SCSL-03-01-T-929 (18 March 2010) (TC I) (TC II) 10, [26].

⁵⁵ *Prosecutor v Taylor* (Decision on Public with Annexes A and B Defence Motion for Admission into Evidence of 301 Documents and Photographs Marked for Identification During the Evidence-in-Chief of the Accused and on Prosecution List of Documents Marked for Identification During the Testimony of Charles Taylor Sought to be Admitted into Evidence) SCSL-03-01-T-929 (18 March 2010) (TC I) (TC II) 9, [22].

⁵⁶ *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45649-45657.

⁵⁷ *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45751, lines 3-4.

⁵⁸ *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45722-45723, 45731.

⁵⁹ *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45751, lines 21-22, 23-26.

30. **Photographs on Facebook page** – used by the Defence for the cross-examination of Prosecution Witness Carole White.⁶⁰ The Trial Chamber did not raise any evidentiary considerations in relation to these photographs [also, note that their admission as evidence was not sought].
31. **E-mail** – used by the Defence to support the claim that Mr. Taylor’s conviction was unsafe.⁶¹ The Appeals Chamber did not raise evidentiary considerations in relation to the e-mail specifically. The evidence was not admitted since the motion was dismissed.⁶²

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

32. Rule 89(C) of the Rules of Procedure and Evidence which is the ‘general principle of admissibility’ providing that ‘[a] Chamber may admit any relevant evidence’.⁶³ In its judgment, the Trial Chamber referred to a previous decision of the Appeals Chamber which had ‘made it clear that this provision favours the admission of all relevant evidence, the probative value and weight of which are only to be assessed at the end of the trial and in the context of the entire record’.⁶⁴
33. Rule 92*bis* of the Rules of Procedure and Evidence which is the ‘specific rule relating to alternative proof of facts, that is, proof of facts other than by oral evidence’.⁶⁵ Rule 92*bis* (A) provides that ‘a Chamber may, in lieu of oral testimony, admit as evidence in whole or in part, information including written statements and transcripts, that do not go to proof of the acts and conduct of the accused’.⁶⁶
34. Rule 115(A) of the Rules of Procedure and Evidence which provides that ‘[a] party may apply by motion to the Pre-Hearing Judge to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed. The motion shall also set out in full the reasons and supporting evidence on which the party relies to establish that the proposed additional evidence was not available to it at trial. The motion shall be served on the other party and filed with the Registrar not later than the deadline for filing the submission in reply.
35. Rebuttal material may be presented by any party affected by the motion.⁶⁷ According to the Appeals Chamber decision, ‘Rule 115 serves to address potential situations where a factual

⁶⁰ *Prosecutor v Taylor* (Transcript) SCSL-2003-01-T (9 August 2010) (TC I) (TC II) 45783-45790.

⁶¹ *Prosecutor v Taylor* (Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1352 (30 November 2012) (AC) 7, [13].

⁶² *Prosecutor v Taylor* (Decision on Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1376 (18 January 2013) (AC) 9, [16].

⁶³ *Prosecutor v Taylor* (Judgement) SCSL-03-01-T-1283 (18 May 2012) (TC II) 67, [160].

⁶⁴ *Prosecutor v Taylor* (Judgement) SCSL-03-01-T-1283 (18 May 2012) (TC II) 67, [160].

⁶⁵ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 5, [10].

⁶⁶ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 5, [10].

⁶⁷ *Prosecutor v Taylor* (Decision on Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1376 (18 January 2013) (AC) 3, [5].

determination made by the Trial Chamber is objectively incorrect because the Trial Chamber did not have before it the evidence that is later discovered'.⁶⁸

V. EXTRAPOLATIONS

36. To be admitted, the DDE must be relevant⁶⁹
37. **Audio clips of radio broadcasts must have:**
 - a. Relevance;⁷⁰
 - b. No unfair and adverse impact upon the integrity of the proceedings;⁷¹
 - c. No undue prejudice to the accused arises from the fact that an audio-recording and a transcript thereof are produced without calling a witness;⁷²
 - d. Authenticity: Authenticity has no bearing on the admissibility of evidence at the SCSL but rather goes to the weight to be accorded to it;⁷³
 - e. Authenticity as this can be established by the context of the audio clips themselves;⁷⁴
 - f. Sufficient indicia of authenticity (date of the broadcast, availability for inspection and for production).⁷⁵
38. Lack of context can render documents inadmissible as lacking sufficient indicia of reliability;⁷⁶
39. There should be a genuine opportunity to cross-examine the evidence;⁷⁷
40. A witness should decipher, explain, and provide context to them;⁷⁸

⁶⁸ *Prosecutor v Taylor* (Decision on Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1376 (18 January 2013) (AC) 5, [9].

⁶⁹ *Prosecutor v Taylor* (Judgement) SCSL-03-01-T-1283 (18 May 2012) (TC II) 67, [160].

⁷⁰ *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 4, [8].

⁷¹ *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 4, [8].

⁷² *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 5, [10].

⁷³ *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 5, [11].

⁷⁴ *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 5, [11].

⁷⁵ *Prosecutor v Taylor* (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP) 5, [11].

⁷⁶ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 4, [9].

⁷⁷ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 3-4, [6].

⁷⁸ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 4, [9].

41. Probative value of media reports is diminished during a conflict where the media is manipulated for purposes of propaganda;⁷⁹
42. Audio clips of radio broadcasts should refer to events within the scope of the indictment and be of sufficient significance;⁸⁰
43. Audio clips of radio broadcasts should not be cumulative, i.e., refer to matters which have already been spoken to by numerous witnesses and in documentary evidence before the Court;⁸¹ [please, note that this consideration might relate to the specific context of the SCSL and may not apply in other contexts].
44. Audio clips of radio broadcasts should not be based on anonymous or hearsay sources, which are incapable of being tested in cross-examination;⁸²
45. The probative value of Audio clips of radio broadcasts should not be outweighed by their prejudicial effect.⁸³
46. Reliability of audio clips of radio broadcasts is susceptible to confirmation in due course⁸⁴
47. Opinion evidence contained therein (*e.g.*, the reporter's own opinions rather than facts) is inadmissible;⁸⁵ [please note that this is context specific].
48. The fact that a radio broadcast may originate from a contested source will not necessarily effect its admissibility but may affect the weight given on it by the Court;⁸⁶ [please, note that this consideration is specific to Rule 92*bis* of the Court and may not apply in other contexts].

⁷⁹ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 5, [12].

⁸⁰ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 6-7, [18].

⁸¹ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 7, [19].

⁸² *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 7, [20].

⁸³ *Prosecutor v Taylor* (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC I) (TC II) 5, 12.

⁸⁴ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 8-9, [28].

⁸⁵ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 8, [27].

⁸⁶ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 8, [27].

49. Audio clips of radio broadcasts should not go to proof of the acts and conduct of the accused.⁸⁷ [please, note that this consideration is specific to Rule 92*bis* of the Court and may not apply in other contexts].
50. **E-mails** should be relevant.⁸⁸
51. Emails should be credible and relevant to issues which are material to the judgement and have the ability to demonstrate that the accused's conviction is unsafe.⁸⁹ [please, note that this consideration is specific to Rule 115(A) of the Court and may not apply in other contexts].
52. Emails should relate to a fact litigated at trial or a factual finding made by the Trial Chamber.⁹⁰ [please, note that this consideration is specific to Rule 115(A) of the Court and may not apply in other contexts].
53. **Photographs** must be relevant⁹¹
54. Since neither the Parties nor the Trial Chamber raised any evidentiary considerations for the video clips and the photographs on Facebook, extrapolation for guidelines was not possible.

VI. CITATIONS

Prosecutor v Taylor (Decision on Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1376 (18 January 2013) (AC) <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1376/SCSL-03-01-A-1376.pdf>;

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Prosecutor v Taylor (Decision on Public with Annexes A and B Defence Motion for Admission into Evidence of 301 Documents and Photographs Marked for Identification During the Evidence-in-Chief of the Accused and on Prosecution List of Documents Marked for Identification During the Testimony of Charles Taylor Sought to be Admitted into Evidence) SCSL-03-01-T-929 (18 March 2010) (TC II) <http://www.rscsl.org/Documents/Decisions/Taylor/929/SCSL-03-01-T-929.PDF>;

⁸⁷ *Prosecutor v Taylor* (Decision on Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-745 (25 February 2009) (TC I) (TC II) 8-9, [28].

⁸⁸ *Prosecutor v Taylor* (Prosecution Response to Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1366 (7 December 2012) (AC) 7, [19].

⁸⁹ *Prosecutor v Taylor* (Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1352 (30 November 2012) (AC) 7, [13].

⁹⁰ *Prosecutor v Taylor* (Decision on Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1376 (18 January 2013) (AC) 6, [11].

⁹¹ *Prosecutor v Taylor* (Defence Motion for the Admission into Evidence of 301 Documents and Photographs Marked for Identification During the Evidence-In-Chief of the Accused) SCSL-03-01-T-909 (19 February 2010) (TC I) (TC II) 3, [6]; *Prosecutor v Taylor* (Decision on Public with Annexes A and B Defence Motion for Admission into Evidence of 301 Documents and Photographs Marked for Identification During the Evidence-in-Chief of the Accused and on Prosecution List of Documents Marked for Identification During the Testimony of Charles Taylor Sought to be Admitted into Evidence) SCSL-03-01-T-929 (18 March 2010) (TC I) (TC II) 10, [26].

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<http://www.rscsl.org/Documents/Transcripts/Taylor/9August2010.pdf>;

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<http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf>;

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<http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1376/SCSL-03-01-A-1352.PDF>;

Prosecutor v Taylor (Defence Response to Prosecution Motion for Admission of Documents of BBC Radio Broadcast) SCSL-03-01-T-703 (5 January 2009) (TC II)
<http://www.rscsl.org/Documents/Decisions/Taylor/745/SCSL-03-01-T-703.pdf>;

Prosecutor v Taylor (Defence Motion for the Admission into Evidence of 301 Documents and Photographs Marked for Identification During the Evidence-In-Chief of the Accused) SCSL-03-01-T-909 (19 February 2010) (TC II)
<http://www.rscsl.org/Documents/Decisions/Taylor/929/SCSL-03-01-T-909.pdf>;

Prosecutor v Taylor (Prosecution Response to Defence Motion to Present Additional Evidence Pursuant to Rule 115) SCSL-03-01-A-1366 (7 December 2012) (AC)
<http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1376/SCSL-03-01-A-1366.pdf>;

Prosecutor v Taylor (Prosecution Motion for Admission of BBC Radio Broadcasts) SCSL-03-01-T-689 (12 December 2008) (OTP)
<http://www.rscsl.org/Documents/Decisions/Taylor/745/SCSL-03-01-T-698.pdf>

Prosecutor v Taylor (Prosecution List of Documents Marked for Identification During the Testimony of Charles Taylor Sought to be Admitted into Evidence) SCSL-03-01-T-911 (19 February 2010) (TC II) <http://www.rscsl.org/Documents/Decisions/Taylor/929/SCSL-03-01-T-911.pdf>.

Prosecutor v Nzabonimpa et al (MICT-18-116)

I. CASE DETAILS

- **Case name:** *Prosecutor v Nzabonimpa et al* (MICT-18-116)
- **Tribunal/Court:** International Residual Mechanism for Criminal Tribunals (“IRMCT”)
- **Offence charged:**
 - Anselme Nzabonimpa, Jean de Dieu Ndagijimana, and Marie Rose Fatuma¹
Count 1: Contempt of the ICTR and the IRMCT: witness interference.
Count 2: Incitement to commit contempt of the ICTR and the IRMCT: witness interference.
 - Dick Prudence Munyeshuli²
Count 3: Contempt of the ICTR and the IRMCT: knowing violation of and failure to comply with Court Orders.
 - Augustin Ngirabatware³
Count 1: Contempt of the ICTR and the IRMCT: witness interference.
Count 2: Incitement to commit contempt of the ICTR and the IRMCT: witness interference.
Count 3: Contempt of the ICTR and the IRMCT: knowing violation of and failure to comply with Court Orders.
- **Stage of the proceedings:** Trial
- **Keywords:** Authenticity, Reliability, Authentication, Prejudice, Disclosure, Search and seizure, Probative, Prejudice, Corroboration

II. DIGITALLY DERIVED EVIDENCE (DDE)

Emails

1. Emails were extracted from phones seized from the accused.⁴
2. The emails were from devices seized incident to the arrest of some accused in Rwanda or from devices seized at the UN Detention Facility in Tanzania.⁵
3. The emails were extracted from the devices by the Netherlands Forensic Institute or CCL-Forensic Limited.⁶

¹ *Prosecutor v Turinabo et al* (Indictment) MICT-18-116 (5 June 2018) (Duty Judge) (5 June 2018).

² *Prosecutor v Turinabo et al* (Indictment) MICT-18-116 (5 June 2018) (Duty Judge) (5 June 2018).

³ *Prosecutor v Ngirabatware* (Indictment) MICT-19-121-I (10 October 2019) (Duty Judge) (10 October 2019).

⁴ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [23]; *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [100].

⁵ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [23].

⁶ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [24].

4. The emails were used to show that the accused instructed others and executed their plan to interfere with witnesses.⁷ They were also used to demonstrate that one of the accused who was an investigator knew that another accused in detention had internet access, contrary to the UN Detention Facility Communications Regulation.⁸

Intercepted Communications

5. 464 audio recordings/transcripts of telephone calls and 456 SMS text messages.⁹
6. The intercepted communications occurred between persons in Arusha, Tanzania, and Rwanda.
7. The communications were intercepted by the Rwanda Criminal Investigation Bureau (now the Rwanda Investigation Bureau or RIB).¹⁰
8. The intercepts were used to support allegations that the accused directly or through others pressured or induced witnesses to recant their trial testimonies and cooperate with the Defence, directed them on what to say when requested to meet with the Prosecution or during interviews with the Defence counsel, and offered or paid them money in exchange for their cooperation and to influence their prospective evidence.¹¹ They were also used to support allegations that an accused repeatedly had prohibited indirect contact in knowing violation of protective measures with protected witnesses.¹²

Call Data Records

9. Type of DDE: call logs and subscriber data.¹³
10. The communications occurred between persons in Arusha, Tanzania, and Rwanda.
11. The records were provided by the telecommunications company, MTN.
12. The Prosecution cited call data records in one instance to show that an accused called a witness.¹⁴ The Defence sought to use the call data records to discount the reliability of the intercepted communications.¹⁵

⁷ *Prosecutor v Nzabonimpa et al* (Prosecution Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [24], [107].

⁸ *Prosecutor v Nzabonimpa et al* (Prosecution Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [24], fn 78.

⁹ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [41]; *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [62].

¹⁰ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [41].

¹¹ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [87], [181], [256], [284]-[285], [306].

¹² *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [343], [369].

¹³ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [41]; *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [90].

¹⁴ *Prosecutor v Nzabonimpa et al* (Prosecution Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [72], fn 277.

¹⁵ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [43], fn 145.

Evidentiary Considerations

Emails

13. **Competing Considerations on the Scope of Digital Searches:** On the one hand, digital information can be modified in ways most physical evidence cannot and hidden in electronic storage devices that can contain boundless amounts and types of information, such that an effective digital search for evidence should reasonably allow for the investigating authorities to conduct an expansive search in the device that might not otherwise be appropriate in a physical space.
14. On the other hand, allowing a broad search in digital space does not mean that non-responsive documents or information should be returned for review and disclosure as personal digital devices are also locations where individuals frequently guard their most sensitive and private information, such that restricting the disclosure and subsequent use of information that was not the target of a warrant authorising the search and seizure is essential to ensuring that the intrusion caused by searches of digital devices is ultimately reasonable.¹⁶ The need to conduct a broad search cannot swallow the rule that the intrusion caused by the search be proportionate, legal, and necessary.¹⁷ This goes beyond the protection of material subject to attorney-client privilege: the Prosecution had to demonstrate that the search was proportionate, legal, and necessary.¹⁸
15. **The Accused's Access to Seized Devices:** It may be in the interests of justice to temporarily limit the return to the accused any devices seized from him if the Prosecution demonstrates that returning the devices may adversely impact the preservation of information and/or evidence that is highly relevant to the case.¹⁹ However, a copy of the contents of the devices should be provided to the Defence to facilitate his defence preparations.²⁰
16. **Access of National Enforcement to Devices:** Unless provided for, the RIB should not retain copies of seized materials, and to the extent that the information cannot be destroyed, the RIB must maintain the confidentiality of such information.²¹ Nonetheless, it would not be easy to demonstrate that it was irresponsible to task the RIB with the search and seizure. The Mechanism has no direct enforcement abilities and must act through national authorities.

¹⁶ *Prosecutor v Turinabo et al* (Decision Regarding an Item Extracted from Augustin Ngirabatware's Laptop) MICT-18-116-PT (24 July 2020) (Single Judge) [10]-[11].

¹⁷ *Prosecutor v Turinabo et al* (Decision Regarding an Item Extracted from Augustin Ngirabatware's Laptop) MICT-18-116-PT (24 July 2020) (Single Judge) [12]; *Prosecutor v Turinabo et al* (Decision on Prosecution Motion to Reconsider or Certify to Appeal the Decision Related to Material Seized from Dick Prudence Munyeshuli) MICT-18-116-PT (5 May 2020) (Single Judge) [17]; *Prosecutor v Turinabo et al* (Decision in Relation to Material Seized from Dick Prudence Munyeshuli) MICT-18-116-PT (24 February 2020) (Single Judge) [18].

¹⁸ *Prosecutor v Turinabo et al* (Decision on Prosecution Motions related to Augustin Ngirabatware's Laptops) MICT-18-116-PT, MICT-12-29-R (20 December 2019) (Single Judge) [12].

¹⁹ *Prosecutor v Turinabo et al* (Decision on the Prosecution's Urgent Request to Stay the Decision of 5 July 2019) MICT-18-116-PT, MICT-12-29-R (9 July 2019) (Single Judge).

²⁰ *Prosecutor v Turinabo et al* (Decision on Dick Prudence Munyeshuli's Motion Regarding Mirror Image of Laptop Hard Drive) MICT-18-116-PT (11 April 2019) (Single Judge) 2.

²¹ *Prosecutor v Turinabo et al* (Decision in Relation to Material Seized from Dick Prudence Munyeshuli) MICT-18-116-PT (18 February 2019) (Single Judge) [16].

There is no reason to believe that the RIB was unaware of the need to ensure witness protection and to cooperate fully with investigations.²²

17. **Request for Specific Technical System Information:** The Prosecution filed a motion requesting that the Registrar or forensic examiner provide specific technical system information from seized devices and information with regard to specific dates of possible internet connectivity of the devices. The Single Judge dismissed the motion as the information should have been of obvious relevance and the Prosecution had not provided any explanation for the delay in seeking the information, and the Prosecution could not provide assurances that the information could be obtained with full respect of the rights of the accused in an expeditious manner that would not unduly delay the proceedings. Thus, while the information was relevant to the Prosecution's case, its eleventh-hour submission was not sufficiently compelling when weighed against the inevitable delay it would cause to the closure of the Prosecution case and does not justify granting the request.²³
18. **Prosecution Disclosure Obligation: Format of Extracted Files:** The Prosecution has met its disclosure obligations where it has disclosed all extracted files in the same format as provided to it by the organisation that extracted the data, together with the required software, which was the same one it had used to download and review material, and user instructions. It was impractical and unnecessary for the Prosecution to extract all data individually in a format accessible without the use of any special software, since the required software, user instructions, and technical assistance were duly provided.²⁴

Intercepted Communications

19. **Admissibility of Evidence from the Bar Table:** Exhibits can be tendered from the bar table rather than through a witness, but this requires the tendering party to provide greater clarity and specificity in explaining each document's relevance to the case.²⁵ The admission of evidence from the bar table does not require definitive proof of reliability or credibility of the evidence, but the showing of *prima facie* reliability and credibility on the basis of sufficient indicia.²⁶ Rule 105(D) of the IRMCT Rules of Procedure and Evidence also applies and provides that a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.²⁷ As the admission of evidence does not require definitive proof of reliability or credibility, the parties may continue to raise issues with respect

²² *Prosecutor v Turinabo et al* (Decision in Relation to Material Seized from Dick Prudence Munyeshuli) MICT-18-116-PT (18 February 2019) (Single Judge) [13]-[15].

²³ *Prosecutor v Turinabo et al* (Decision on Prosecution Request for Information from Forensic Data Copies of Augustin Ngirabatware's Laptops) MICT-18-116-T (11 November 2020) (Single Judge) 3.

²⁴ *Prosecutor v Turinabo et al* (Decision on Defence Motion for Disclosure of Material Seized from the Accused in September 2018) MICT-18-116-PT (20 September 2019) (Single Judge) 2.

²⁵ *Prosecutor v Turinabo et al* (Decision on Prosecution Second Motion for Admission of Evidence from the Bar Table (Material Obtained from Registry and Seizures from Augustin Ngirabatware at the UNDF)) MICT-18-116-T (15 January 2021) (Single Judge) 3.

²⁶ *Prosecutor v Nzabonimpa et al* (Decision on Augustin Ngirabatware's First Motion for Admission of Evidence from the Bar Table (Intercepted and Downloaded Communications)) MICT-18-116-T (29 April 2021) (Single Judge) 2-3.

²⁷ *Prosecutor v Nzabonimpa et al* (Decision on Augustin Ngirabatware's First Motion for Admission of Evidence from the Bar Table (Intercepted and Downloaded Communications)) MICT-18-116-T (29 April 2021) (Single Judge) 2; *Prosecutor v Turinabo et al* (Decision on Prosecution Second Motion for Admission of Evidence from the Bar Table (Material Obtained from Registry and Seizures from Augustin Ngirabatware at the UNDF)) MICT-18-116-T (15 January 2021) (Single Judge) 3.

to the evidence and the Chamber can reserve its decision on the ultimate weight and probative value to accord to any evidence when reaching a final judgment.²⁸

20. **Addition of Evidence to Exhibit List:** The Single Judge reiterated that there was a difference between the addition of an item to a list of potential exhibits and its admission at trial: in granting leave to add a particular item to an exhibit list, the Single Judge need not assess its authenticity, relevance, and probative value in the same way as when determining its admission at trial. On the facts, the source and manner in which the Prosecution obtained the intercepted communications, the time-frame of these communications, and that they appeared to relate to the accused named in the indictments in the case indicated that they appeared sufficiently reliable, important and relevance for purposes of allowing them to be included on the exhibit list. He noted that some of the proposed exhibits duplicated in substance evidence from other sources and could serve to authenticate other evidence.
21. Finally, the parties still had the opportunity to raise objections at the time admission is sought and would not be prejudiced by their addition to the exhibit list. Considerations of judicial economy and justice also contributed to the decision.²⁹ However, if the Prosecution had not yet reviewed the intercepted communications and consequently had not determined whether it intended to rely upon them at trial, general submissions as to the intercepted communications relevance, probative nature, and importance to the case would not be sufficient to demonstrate that the addition of the evidence to the exhibit list would be in the interests of justice.³⁰
22. **Compulsion of an Interview with a Prosecution Investigator:** Where an investigator is a singularly unique source of information given his extensive role in the collection of information from various sources that the Prosecution seeks to introduce as evidence against the accused and the Defence has established a legitimate forensic purpose for the interview, and where the information the investigator might be able to provide may not be available from any other source, the conditions for the issuance of a subpoena under Rule 55 of the Rules of Procedure and Evidence were met and the investigator was to submit to an interview with the Defence.³¹ The subpoena would not extend to the production of any documents not otherwise independently required to be disclosed by the Prosecution in light of its disclosure obligations under the Rules of Procedure and Evidence.³²

²⁸ *Prosecutor v Nzabonimpa et al* (Decision on Augustin Ngirabatware's First Motion for Admission of Evidence from the Bar Table (Intercepted and Downloaded Communications)) MICT-18-116-T (29 April 2021) (Single Judge) 3, fn 13.

²⁹ *Prosecutor v Turinabo et al* (Decision on Prosecution Motion to Amend its Rule 70(E)(iii) Exhibit List to Include Additional Wiretaps) MICT-18-116-PT (22 September 2020) (Single Judge) 5-6.

³⁰ *Prosecutor v Turinabo et al* (Decision on Motions related to the Proposed Amendment of the Prosecution Rule 70(E)(iii) Exhibit List) MICT-18-116-PT (27 February 2020) (Single Judge) 2.

³¹ *Prosecutor v Turinabo et al* (Decision on Motion to Compel an Interview with a Prosecution Investigator and for the Production of Documents) MICT-18-116-PT (30 September 2019) (Single Judge) 3.

³² *Prosecutor v Turinabo et al* (Decision on Motion to Compel an Interview with a Prosecution Investigator and for the Production of Documents) MICT-18-116-PT (30 September 2019) (Single Judge) 4.

Call Data Records

23. **Scope of Material Subject to Prosecution Disclosure:** The following were within the scope of disclosure under Rules 71(B) and 73 of the Rules of Procedure and Evidence: correspondence with the Rwandan authorities in relation to the identification and transmission of intercepts, including requests for assistance from the Rwandan authorities, written follow-ups, the responses thereto, and the clearance letter through which the Rwandan authorities consented to the disclosure of the call logs, as these documents could be relevant to the Defence's investigation regarding the origin, nature, or the timing of the call logs and thus assist their preparation.³³
24. The Prosecution is not required to disclose materials it has not yet extracted, nor is it required to certify that it has permitted an accused to inspect all relevant items in its custody or control, though they are urged to take all reasonable measures to ensure the expeditious completion of the outstanding extractions.³⁴ Redactions were unwarranted even where the correspondence purportedly concerned 'internal strategies' and the 'contemporaneous' assessment of information received, unless the Prosecution has sought to relieve itself of its disclosure obligations in accordance with Rule 71(C) of the Rules of Procedure and Evidence.³⁵ The following were *not* within the scope of disclosure per Rule 76(A) of the Rules of Procedure and Evidence: internal notes and mission reports concerning the intercepted communications, where the Defence has not demonstrated that any of the information sought might *prima facie* be exculpatory.³⁶
25. **Format of CDRs:** The Prosecution is not required to prepare and disclose call data records in a harmonised, searchable, or analysed format. It is only required to provide the entirety of the CDRs in its custody, in the formats that it received from the Rwandan authorities, and only where available, in the Excel format created as part of its analysis of the original raw CDRs.³⁷ The Single Judge distinguished the *Karempera et al*³⁸ and *Mladić*³⁹ cases, where the Prosecution was required to provide 'descriptive indices' beyond making available the entirety of the evidence, from the instant case, as those cases concerned the disclosure of exculpatory material under Rule 68 of the ICTR and ICTY Rules of Procedure and Evidence, whereas the Defence in the instant case has not demonstrated that the material sought is *prima facie* exculpatory.

³³ *Prosecutor v Turinabo et al* (Decision on Requests for Disclosure of Information Arising from Interviews with Investigator Tomasz Blaszczyk) MICT-18-116-PT (7 May 2020) (Single Judge) 4-5, 7.

³⁴ *Prosecutor v Turinabo et al* (Decision on Motion to Compel the Prosecution to Disclose Items Obtained from Maximilien Turinabo) MICT-18-116-PT (17 July 2019) (Single Judge) 2.

³⁵ *Prosecutor v Turinabo et al* (Decision on Anselme Nzabonimpa's Request for Further Order of Disclosure of Telecommunication-Related Material) MICT-18-116-PT (2 September 2019) (Single Judge) 2.

³⁶ *Prosecutor v Turinabo et al* (Decision on Requests for Disclosure of Information Arising from Interviews with Investigator Tomasz Blaszczyk) MICT-18-116-PT (7 May 2020) (Single Judge) 6.

³⁷ *Prosecutor v Turinabo et al* (Decision on Jean de Dieu Ndagijimana's Urgent Motion for Disclosure of Harmonised Call Data Records) MICT-18-116-PT (2 September 2019) (Single Judge) 2.

³⁸ *Prosecutor v Karempera et al* ([Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations](#)) ICTR-98-44-AR73.7 (30 June 2006) (AC) [10], [15].

³⁹ *Prosecutor v Mladić* ([Decision on Defence interlocutory appeal against the Trial Chamber's decision on EDS disclosure methods](#)) IT-09-92-AR73.2 (28 November 2013) (AC) [27].

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

Emails

26. The Prosecution presented evidence to authenticate the seizure of the electronic devices, the chain of custody, and the extraction process, including witness evidence and expert evidence. It stressed that the Defence relied extensively on the evidence, that none of the accused disputed the authenticity of any single document or communication, and that the allegation that the Rwandan authorities might have deliberately tampered with documents extracted from the devices was rank speculation in light of the expert evidence.⁴⁰
27. **Authenticity and Reliability:** The Defence⁴¹ contended that the Rwandan authorities undertook a variety of forensically unsound actions when conducting the initial analysis of the seized devices, thus diminishing the weight that should be accorded to them.⁴² These included connecting the phone to the network at various times by taking it off flight mode, making and receiving calls, connecting the phone to the internet, leaving the devices in a powered state, and failing to record and provide contemporaneous notes of the examination.⁴³
28. The Defence also raised shortcomings in the expert's testimony, including that he never had access to the original devices from which the extractions were performed, which was not his normal way of working,⁴⁴ and lack of knowledge of gaps in the chain of custody.⁴⁵
29. **Legal Basis of Seizure:** The Defence asserted that the Prosecution did not provide any evidence or explanation as to the legal basis for the Rwandan authorities retaining and examining the extracted evidence,⁴⁶ such that caution had to be exercised when relying on the evidence.⁴⁷
30. The Court's response. The Single Judge recalled that none of the evidence admitted at trial derived from digital extractions performed by the RIB, that the seizure forms prepared by the RIB and signed by the accused were admitted and were not challenged, and that the chain of custody of the electronic devices was well-documented.⁴⁸ The Single Judge accepted the

⁴⁰ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [24].

⁴¹ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [25].

⁴² *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [104].

⁴³ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [104], fn 265.

⁴⁴ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [105].

⁴⁵ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [106].

⁴⁶ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [102].

⁴⁷ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [103].

⁴⁸ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [38].

Prosecution expert evidence that, while forensically unsound prior extractions might potentially have left traces on the device, the practices had not likely affected any of the original user data, such that the Defence submissions were insufficient to raise a doubt as to the general authenticity and reliability of the electronic evidence.⁴⁹

31. The DDE was admitted⁵⁰ and the emails were relied upon.⁵¹

Intercepted Communications

32. The Prosecution⁵² tendered evidence to establish the authenticity and reliability of the communications evidence, including evidence from witnesses.⁵³ One witness supervised and coordinated the interception of telecommunications;⁵⁴ another, an investigator, was involved in selecting the telephone numbers targeted.⁵⁵ The Prosecution underlined that at least one of the accused was a participant in the vast majority of the intercepted communications and that the Defence did not dispute the authenticity of any single communications.⁵⁶

33. **Lack of Probative Value and Limited Weight:** The Defence⁵⁷ argued that the intercepts did not bear any indicia of authentication to allow the Single Judge to independently corroborate the reliability of the individual files.⁵⁸ The audio files were not themselves marked with the date and time of the communication, the telephone numbers intercepted, or the identities of the interlocutors captured on the intercept, nor was this information apparent from the call: metadata relating to these details were not tendered into evidence by the Prosecution and in any case the source or origin of the metadata was unknown.⁵⁹

34. Similarly, the origins of the metadata attached to the intercepted text messages was also unknown.⁶⁰ The Defence also stressed that the witness who supervised and coordinated the interception refused to provide technical details about the collection process⁶¹ and could not

⁴⁹ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [39].

⁵⁰ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [39].

⁵¹ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge): to establish that the accused coordinated the transfer of money to witnesses: [84], [112], [165]; to establish that the accused coordinated and executed the witness interference: [229], [318], [350], [351], [354], [380], [383]; to establish that one accused was only acting on the instructions of another accused: [365].

⁵² *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [42].

⁵³ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [42].

⁵⁴ TNN9: *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [45].

⁵⁵ Blaszczyk: *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [51].

⁵⁶ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [42].

⁵⁷ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [43].

⁵⁸ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [71].

⁵⁹ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [63].

⁶⁰ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [64].

⁶¹ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [43], *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [70].

personally authenticate the individual intercepted files⁶² or testify as to the source of the included metadata.⁶³

35. **Prejudice:** The Defence challenged the lack of neutrality and transparency of the RIB in executing the requests for interceptions,⁶⁴ noting that the intercepts were conducted during a period of significant reforms to the Rwandan law enforcement structure such that they could not be considered to have been created by a neutral organ.⁶⁵ Further, the Defence suggested that the collection of the intercepts was incomplete and that missing conversations undoubtedly contained exculpatory material, which prevented any adverse finding based on the partial evidence.⁶⁶
36. **Authentication:** The Single Judge was satisfied that the evidence of the witnesses sufficiently authenticated the intercepted communications.⁶⁷
37. **Prejudice:** Although the Single Judge was aware that some aspects of the collection of the evidence might raise concerns, including the late disclosure of most original intercepts and the fact that some data might have been missing, the Defence's general contentions related to the neutrality of the investigation failed to demonstrate that any of the existing evidence had been tampered with.⁶⁸ The Defence had not shown that the purported incompleteness of the intercepts rendered them wholly unreliable or demonstrated any violation of the Prosecution's obligation to provide exculpatory material.⁶⁹
38. The intercept DDE were admitted⁷⁰ and intercepts were relied upon.⁷¹

Call Data Records

39. **Cannot Corroborate Intercepts Evidence:** The Defence argued that the absence of indicia of authenticity meant that the call logs could not be used to corroborate the time and date or telephone numbers of intercepted communications.⁷² In particular, the Defence contended that there was a real likelihood that the very same call logs used to corroborate the intercepted communications as part of an independent assessment were the very source of the metadata

⁶² *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [66]-[67].

⁶³ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [68]-[69].

⁶⁴ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [43].

⁶⁵ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [62].

⁶⁶ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [43].

⁶⁷ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [56].

⁶⁸ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [57].

⁶⁹ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [58].

⁷⁰ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [56].

⁷¹ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge): to establish that the witnesses were instructed to recant: [92]; to establish that the accused planned, coordinated, and carried out witness interference: [134]-[151], [228]-[229], [232]-[234], [271]-[276], [296]-[297], [299], [311]-[327]; to establish that there had been prohibited contact with protected witnesses: [349]-[354], [371]-[383].

⁷² *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [73].

used.⁷³ It highlighted that the collection and insertion of metadata was not conducted contemporaneously in the case of some intercepted communications.⁷⁴

40. **Reliability of Call Logs:** The Defence argued that it was impossible to independently ascertain or verify the dates and times recorded in the call logs by merely comparing the recorded intercept to the call logs due to discrepancies between the duration of the intercepted calls and the purported call log entry, suggesting that either (i) the purported call log matched to the intercept was incorrect, (ii) the duration on either the call log or recorded intercept was inaccurate, or (iii) the recorded intercept had been technically manipulated, or where the intercept duration was shorter than the call log, the content was either not fully recorded or not fully transferred.⁷⁵ This ‘matching’ exercise was further hampered by the fact that there was a significant discrepancy between the number of recorded intercepts and the call logs.⁷⁶
41. The Single Judge accepted the explanations of witnesses about how some of the call logs were initially identified as missing and later provided and accepted that the differences in call duration between the intercepts and call data could be due to the recording method.⁷⁷
42. The CDR DDE was admitted.⁷⁸ Intercepts, supported by the call logs, were relied upon.⁷⁹

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

43. These rules together govern the admission of evidence.
 - a. Rule 105(C) A Chamber may admit any relevant evidence which it deems to have probative value.
 - b. Rule 105(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

⁷³ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [74].

⁷⁴ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [74].

⁷⁵ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [75].

⁷⁶ *Prosecutor v Nzabonimpa et al* (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) [76].

⁷⁷ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [57].

⁷⁸ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [56].

⁷⁹ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge): to establish that the witnesses were instructed to recant: [92]; to establish that the accused planned, coordinated, and carried out witness interference: [134]-[151], [228]-[229], [232]-[234], [271]-[276], [296]-[297], [299], [311]-[327]; to establish that there had been prohibited contact with protected witnesses: [349]-[354], [371]-[383].

- c. Rule 117 No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Prosecution Disclosure

44. This rule is the basis for the disclosure of evidence by the Prosecution. The list of items subject to disclosure governs the scope of the disclosure obligation.
 - a. Rule 71(B) The Prosecutor shall, on request, permit the Defence to inspect any books, documents, photographs, and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

V. EXTRAPOLATIONS

Emails

45. Digital searches must be proportionate, legal, and necessary.⁸⁰
46. The Prosecution has complied with its disclosure obligation if it has disclosed the entirety of the evidence in its custody or control in a reasonably accessible format.⁸¹
47. Forensically unsound practices are not in themselves sufficient to raise a doubt as to the general authenticity and reliability of the electronic evidence if they are not likely to have affected the original user data.⁸²

Intercepted Communications

48. An investigator can be compelled to submit to an interview with the Defence if he or she is a singularly unique source of information.⁸³
49. Mere purported incompleteness of intercepted communications will not render them wholly unreliable.⁸⁴

Call Data Records

⁸⁰ *Prosecutor v Turinabo et al* (Decision Regarding an Item Extracted from Augustin Ngirabatware's Laptop) MICT-18-116-PT (24 July 2020) (Single Judge) [12]; *Prosecutor v Turinabo et al* (Decision on Prosecution Motion to Reconsider or Certify to Appeal the Decision Related to Material Seized from Dick Prudence Munyeshuli) MICT-18-116-PT (5 May 2020) (Single Judge) [17]; *Prosecutor v Turinabo et al* (Decision in Relation to Material Seized from Dick Prudence Munyeshuli) MICT-18-116-PT (24 February 2020) (Single Judge) [18].

⁸¹ *Prosecutor v Turinabo et al* (Decision on Defence Motion for Disclosure of Material Seized from the Accused in September 2018) MICT-18-116-PT (20 September 2019) (Single Judge) 2.

⁸² *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [39].

⁸³ *Prosecutor v Turinabo et al* (Decision on Motion to Compel an Interview with a Prosecution Investigator and for the Production of Documents) MICT-18-116-PT (30 September 2019) (Single Judge) 3.

⁸⁴ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [58].

50. The Prosecution has complied with its disclosure obligations if it has disclosed the CDRs it possesses in the format it possesses the evidence and related correspondence.⁸⁵
51. Minor discrepancies in call duration between intercepted phone calls and CDRs may be due to the recording method.⁸⁶

VI. CITATIONS

Prosecutor v Nzabonimpa et al (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/MICT-18-116/JUD288R0000638906.pdf>;

Prosecutor v Nzabonimpa et al (Prosecution Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Submission/NotIndexable/MICT-18-116/MRA26606R0000639006.pdf>;

Prosecutor v Nzabonimpa et al (Public Redacted Version of Nzabonimpa Defence Final Trial Brief) MICT-18-116-T (31 May 2021) (Single Judge) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Submission/NotIndexable/MICT-18-116/MRA26607R0000639076.pdf>;

Prosecutor v Nzabonimpa et al (Decision on Augustin Ngirabatware's First Motion for Admission of Evidence from the Bar Table (Intercepted and Downloaded Communications)) MICT-18-116-T (29 April 2021) (Single Judge) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MRA26573R0000638161.pdf>;

Prosecutor v Turinabo et al (Decision on Prosecution Second Motion for Admission of Evidence from the Bar Table (Material Obtained from Registry and Seizures from Augustin Ngirabatware at the UNDF)) MICT-18-116-T (15 January 2021) (Single Judge) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MRA26437R0000637086.pdf>;

Prosecutor v Turinabo et al (Decision on Prosecution Request for Information from Forensic Data Copies of Augustin Ngirabatware's Laptops) MICT-18-116-T (11 November 2020) (Single Judge) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MRA26373R0000636642.pdf>;

Prosecutor v Turinabo et al (Decision on Prosecution Motion to Amend its Rule 70(E)(iii) Exhibit List to Include Additional Wiretaps) MICT-18-116-PT (22 September 2020) (Single Judge) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MRA26287R0000636142.pdf>;

Prosecutor v Turinabo et al (Decision Regarding an Item Extracted from Augustin Ngirabatware's Laptop) MICT-18-116-PT (24 July 2020) (Single Judge)

⁸⁵ *Prosecutor v Turinabo et al* (Decision on Requests for Disclosure of Information Arising from Interviews with Investigator Tomasz Blaszczyk) MICT-18-116-PT (7 May 2020) (Single Judge) 4-5.

⁸⁶ *Prosecutor v Nzabonimpa et al* (Judgement) MICT-18-116-T (25 June 2021) (Single Judge) [57].

<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MS9552R0000635772.pdf>;

Prosecutor v Turinabo et al (Decision on Requests for Disclosure of Information Arising from Interviews with Investigator Tomasz Blaszczyk) MICT-18-116-PT (7 May 2020) (Single Judge)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MRA26179R0000635230.pdf>

Prosecutor v Turinabo et al (Decision on Prosecution Motion to Reconsider or Certify to Appeal the Decision Related to Material Seized from Dick Prudence Munyeshuli) MICT-18-116-PT (5 May 2020) (Single Judge)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MRA26177R0000635204.pdf>;

Prosecutor v Turinabo et al (Decision on Motions related to the Proposed Amendment of the Prosecution Rule 70(E)(iii) Exhibit List) MICT-18-116-PT (27 February 2020) (Single Judge)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MRA26113R0000634668.pdf>;

Prosecutor v Turinabo et al (Decision in Relation to Material Seized from Dick Prudence Munyeshuli) MICT-18-116-PT (24 February 2020) (Single Judge)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MRA26106R0000634627.pdf>;

Prosecutor v Turinabo et al (Decision on Prosecution Motions related to Augustin Ngirabatware's Laptops) MICT-18-116-PT, MICT-12-29-R (20 December 2019) (Single Judge)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MS9552R0000634040.pdf>;

Prosecutor v Turinabo et al (Decision on Motion to Compel an Interview with a Prosecution Investigator and for the Production of Documents) MICT-18-116-PT (30 September 2019) (Single Judge)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MRA25900R0000526310.pdf>;

Prosecutor v Turinabo et al (Decision on Defence Motion for Disclosure of Material Seized from the Accused in September 2018) MICT-18-116-PT (20 September 2019) (Single Judge)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MRA25884R0000526212.pdf>;

Prosecutor v Turinabo et al (Decision on Anselme Nzabonimpa's Request for Further Order of Disclosure of Telecommunication-Related Material) MICT-18-116-PT (2 September 2019) (Single Judge)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MS9552R0000525291.pdf>;

Prosecutor v Turinabo et al (Decision on Jean de Dieu Ndagijimana's Urgent Motion for Disclosure of Harmonised Call Data Records) MICT-18-116-PT (2 September 2019) (Single Judge)
<https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MS9552R0000525293.pdf>;

Prosecutor v Turinabo et al (Decision on Motion to Compel the Prosecution to Disclose Items Obtained from Maximilien Turinabo) MICT-18-116-PT (17 July 2019) (Single Judge) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MSC9552R0000524862.PDF>;

Prosecutor v Turinabo et al (Decision on the Prosecution's Urgent Request to Stay the Decision of 5 July 2019) MICT-18-116-PT, MICT-12-29-R (9 July 2019) (Single Judge) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MRA25742R0000524711.PDF>;

Prosecutor v Turinabo et al (Decision on Dick Prudence Munyeshuli's Motion Regarding Mirror Image of Laptop Hard Drive) MICT-18-116-PT (11 April 2019) (Single Judge) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MSC9552R0000522501.PDF>;

Prosecutor v Turinabo et al (Decision in Relation to Material Seized from Dick Prudence Munyeshuli) MICT-18-116-PT (18 February 2019) (Single Judge) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/MICT-18-116/MSC9552R0000522187.PDF>;

Prosecutor v Turinabo et al (Indictment) MICT-18-116 (5 June 2018) (Duty Judge) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Indictment/NotIndexable/MICT-18-116/MSC9552R0000521315.PDF>;

Prosecutor v Ngirabatware (Indictment) MICT-19-121-I (10 October 2019) (Duty Judge) <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Indictment/NotIndexable/MICT-19-121/IND458R0000526555.pdf>.

Prosecutor v Ratko Mladić (IT-09-92)

I. CASE DETAILS

- **Case name:** *Prosecutor v Ratko Mladić* (IT-09-92)
- **Tribunal/Court:** International Criminal Tribunal for the Former Yugoslavia (“ICTY”)
- **Offence charged:** Ratko Mladić, former Commander of the Main Staff of the Bosnian Serb Army (VRS), was charged with genocide, crimes against humanity and violations of the laws or customs of war before the ICTY
- **Stage of the proceedings:** On 8 June 2021, the Appeals Chamber (of the Mechanism for International Criminal Tribunals) affirmed Mladić’s convictions for genocide, crimes against humanity and violations of the laws or customs of war, as well as the sentence of life imprisonment imposed by the Trial Chamber.
- **Keywords:** Relevance, Probative value, Prejudice

II. DIGITALLY DERIVED EVIDENCE (DDE)

Type of DDE, where was it obtained and by whom?

Video and Audio Recordings

1. Video of men filmed at Potocari, video of Srebrenica’s people being hit with mortar shells (V00044581A), video of Otes burning (1D165 and clip 22458B), video of Muslim prisoners at Omarska, video entitled “Judgement”, video of two film crews visiting a humanitarian refugee centre in Trnopolje, video of fire-fight during transport to Omarska (exhibit D43), video of a bus of the transport company (65 *ter* 22388E), video D44, contemporaneous local and international radio and television news reports, video of US Department of Homeland Security interview of Mladen Blagojević.
2. Video of men filmed at Potocari was taken in Potocari.²²⁹¹ V00044581A was filmed in Srebrenica.²²⁹² Video entitled “Judgement” was filmed in Omarska.²²⁹³ Video of two film crews visiting a humanitarian refugee centre in Trnopolje was taken in Trnopolje.²²⁹⁴ The video of a bus of the transport company (65 *ter* 22388E) was filmed on the outskirts of Rajlovac.²²⁹⁵ Videos D43 and D44 were filmed on the way to Omarska.²²⁹⁶ Contemporaneous local and international radio and television news reports were open source.²²⁹⁷ It is unclear where P7187 (Video of US Department of Homeland Security interview of Mladen Blagojević, 15 October 2004) was obtained.²²⁹⁸

²²⁹¹ *Prosecutor v Mladić* (Transcript) IT-09-92 (3 July 1996) (TC) 556-557.

²²⁹² *Prosecutor v Mladić* (Transcript) IT-09-92 (19 July 2012) (TC) 1122.

²²⁹³ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 September 2012) (TC) 2634.

²²⁹⁴ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 September 2012) (TC) 2660.

²²⁹⁵ *Prosecutor v Mladić* (Transcript) IT-09-92 (10 October 2012) (TC) 3899.

²²⁹⁶ *Prosecutor v Mladić* (Transcript) IT-09-92 (25 July 2013) (TC) 15089; *Prosecutor v Mladić* (Transcript) IT-09-92 (28 September 2012) (TC) 3314.; IT-09-92 (28 September 2012) (TC) 3314.

²²⁹⁷ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table (Municipalities Component)) IT-09-92 (11 February 2014) (TC) [7]-[8].

²²⁹⁸ *Prosecutor v Mladić* (Judgment, Volume III of V) IT-09-92 (22 November 2017) (TC) fn 11173.

3. Video of men filmed at Potocari was taken by a Serbian journalist.²²⁹⁹ Video entitled “Judgement” was taken by a third party source and then submitted by the Defence.²³⁰⁰ Video of two film crews visiting a humanitarian refugee centre in Trnopolje was taken by a Serb TV unit.²³⁰¹ The video of a bus of the transport company (65 *ter* 22388E) was taken by a photographer named Ibrahim and obtained by a witness afterwards.²³⁰² Videos D43 and D44 were downloaded by the Defence from a website, “emperors-clothes.com”.²³⁰³ Contemporaneous local and international radio and television news reports were open source.²³⁰⁴ P7187 was obtained by the US Department of Homeland Security.²³⁰⁵

Photographs

4. Photos depicting the aftermath of Sarajevo’s siege (Exhibits 76 to 78), photos of graves (included in 65 *ter* 28329), photo of the Marsal Tito barracks, 360-degree photograph shot (P1907), photos of firing points, photos of mortar shells (P6594), photographs in D2117 (Expert Report for the Defence Mortar Attacks on the Sarajevo Area in 1992-1995), photos of a crater.
5. Photos depicting the aftermath of Sarajevo’s siege were taken in Sarajevo.²³⁰⁶ The photo of the Marsal Tito barracks was taken in Zmaja od Bosne Street.²³⁰⁷ Photographs in D2117 (Expert Report for the Defence Mortar Attacks on the Sarajevo Area in 1992-1995) were obtained in Sarajevo.²³⁰⁸ Photos of mortar shells (P6594) were obtained in Vase Miškina Street.²³⁰⁹ Photographs of a crater were taken in Sarejevo.²³¹⁰
6. Photos depicting the aftermath of Sarajevo’s siege were taken by Bosnian police investigators.²³¹¹ It is unclear who took the photo of the Marsal Tito barracks. Photographs in D2117 (Expert Report for the Defence Mortar Attacks on the Sarajevo Area in 1992-1995) were obtained by Defence expert Zorica Subotić.²³¹² It is unclear who obtained P6594.²³¹³ Photographs of the same crater were taken initially by war correspondent Roger Richards, and then subsequently by the Bosnian Special police unit and expert Subotić.²³¹⁴

Intercepted Communications

7. Recording of an order for attack on Sarajevo from General Ratko Mladić and Colonel Mirko Vukašinović (intercept 11), intercepts related to the Srebrenica segment of the Prosecution’s case, intercepts Rule 65 *ter* nos 20779, 20799A (MFI P327) and 27580, intercepts D75, P323,

²²⁹⁹ *Prosecutor v Mladić* (Transcript) IT-09-92 (3 July 1996) (TC) 556-557.

²³⁰⁰ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 September 2012) (TC) 2633.

²³⁰¹ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 September 2012) (TC) 2660.

²³⁰² *Prosecutor v Mladić* (Transcript) IT-09-92 (26 September 2012) (TC) 3057-3061.

²³⁰³ *Prosecutor v Mladić* (Transcript) IT-09-92 (25 July 2013) (TC) 15089; *Prosecutor v Mladić* (Transcript) IT-09-92 (28 September 2012) (TC) 3314; *Prosecutor v Mladić* (Transcript) IT-09-92 (27 November 2013) (TC) 20037-20039. IT-09-92 (27 November 2013) (TC) 20037-20039.

²³⁰⁴ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table (Municipalities Component)) IT-09-92 (11 February 2014) (TC) [7]-[8].

²³⁰⁵ *Prosecutor v Mladić* (Judgment, Volume III of V) IT-09-92 (22 November 2017) (TC) fn 11173.

²³⁰⁶ *Prosecutor v Mladić* (Transcript) IT-09-92 (1 July 1996) (TC) 315-316.

²³⁰⁷ *Prosecutor v Mladić* (Transcript) IT-09-92 (7 December 2012) (TC) 5983.

²³⁰⁸ *Prosecutor v Mladić* (Judgment, Volume II of V) IT-09-92 (22 November 2017) (TC) [2039], fn 8717.

²³⁰⁹ *Prosecutor v Mladić* (Judgment, Volume II of V) IT-09-92 (22 November 2017) (TC) [2161].

²³¹⁰ *Prosecutor v Mladić* (Transcript) IT-09-92 (1 October 2015) (TC) 39597.

²³¹¹ *Prosecutor v Mladić* (Transcript) IT-09-92 (1 July 1996) (TC) 315-316.

²³¹² *Prosecutor v Mladić* (Judgment, Volume II of V) IT-09-92 (22 November 2017) (TC) [2039], fn 8717.

²³¹³ *Prosecutor v Mladić* (Judgment, Volume II of V) IT-09-92 (22 November 2017) (TC) [2161].

²³¹⁴ *Prosecutor v Mladić* (Transcript) IT-09-92 (1 October 2015) (TC) 39598.

P324, P325 and P330, intercepts from the bar table, intercept of phone call between Branko Đerić and Mićo Stanišić (P4119), intercept of the daily updates on the events in Prijedor (P7198), intercept between Colonel Čađo and Miroslav Gagović (P7552), intercept from 2nd Corps Command of a communication between Badem addressed to Mičić (P1581), intercepted communication between General Mladić and Miloš Kostić (P7397), VRS communications.

8. It is unclear where intercept 11 was obtained. The intercepts related to the Srebrenica segment of the Prosecution's case were taken in Srebrenica and Potocari.²³¹⁵ It is unclear where intercepts Rule 65 *ter* nos 20779, 20799A (MFI P327) and 27580 were obtained.²³¹⁶ Ten excerpts of audio recordings were seized from the Mladić family residence.²³¹⁷ It is unclear where intercepts D75, P323, P324, P325 and P330 were obtained.²³¹⁸ It is unclear where intercepts from the bar table were obtained.²³¹⁹ It is unclear where the intercept of a phone call between Branko Đerić and Mićo Stanišić was obtained.²³²⁰ It is unclear where the intercept from 2nd Corps Command of a communication between Badem addressed to Mičić (P1581) came from.²³²¹
9. Intercept 11 was obtained the Republic of Bosnia and Herzegovina Territorial Defence Staff, and then submitted by the Defence.²³²² It is unclear who created the intercepts related to the Srebrenica segment of the Prosecution's case. Intercepts Rule 65 *ter* nos 20779, 20799A (MFI P327) and 27580 were obtained by the Bosnia and Herzegovina Agency for Investigation and Documentation.²³²³ The ten excerpts of audio recordings from the Mladić family residence submitted by the Prosecution were seized by Serbian authorities.²³²⁴ It is unclear who obtained intercepts D75, P323, P324, P325 and P330, which were submitted by the Prosecution.²³²⁵ It is unclear who obtained the intercepts from the bar table.²³²⁶ It is unclear who obtained the intercept of a phone call between Branko Đerić and Mićo Stanišić, which was then submitted by the Prosecution.²³²⁷ It is unclear who obtained the intercept from 2nd Corps Command of a communication between Badem addressed to Mičić (P1581).²³²⁸

²³¹⁵ *Prosecutor v Mladić* (Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment) IT-09-92 (2 May 2013) (TC) [11].

²³¹⁶ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table) IT-09-92 (19 July 2013) (TC) [12].

²³¹⁷ *Prosecutor v Mladić* (Decision on Prosecution Motion to Admit Evidence from the Bar Table: Excerpts from Mladić's Audio Tapes) IT-09-92 (18 September 2013) (TC) [1].

²³¹⁸ *Prosecutor v Mladić* (Decision on the Admission of Intercepts and Authentication Charts) IT-09-92 (6 February 2014) (TC) [1].

²³¹⁹ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table (Municipalities Component)) IT-09-92 (11 February 2014) (TC) [9].

²³²⁰ *Prosecutor v Mladić* (Judgment, Volume I of V) IT-09-92 (22 November 2017) (TC) [727].

²³²¹ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 June 2013) (TC).

²³²² *Prosecutor v Mladić* (Transcript) IT-09-92 (27 August 2012) (TC) 1656.

²³²³ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table) IT-09-92 (19 July 2013) (TC) [12].

²³²⁴ *Prosecutor v Mladić* (Decision on Prosecution Motion to Admit Evidence from the Bar Table: Excerpts from Mladić's Audio Tapes) IT-09-92 (18 September 2013) (TC) [9].

²³²⁵ *Prosecutor v Mladić* (Decision on the Admission of Intercepts and Authentication Charts) IT-09-92 (6 February 2014) (TC) [1].

²³²⁶ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table (Municipalities Component)) IT-09-92 (11 February 2014) (TC) [9].

²³²⁷ *Prosecutor v Mladić* (Judgment, Volume I of V) IT-09-92 (22 November 2017) (TC) [727].

²³²⁸ *Prosecutor v Mladić* (Judgment, Volume III of V) IT-09-92 (22 November 2017) (TC) [2680].

Evidentiary Considerations

Video and Audio Recordings

10. When videos are submitted, they must be sorted out in such a way that judges do not have problems ‘in understanding what was played from what video and what is in evidence and what is separate or as a whole’.²³²⁹
11. With regard to the video entitled “Judgement”, as the Defence wished to rely only on the video’s ambient sound rather than its narration, the Chamber found it unnecessary that it be transcribed as it was not part of the record on which it could rely in the future.²³³⁰
12. With regard to the video of two film crews visiting a humanitarian refugee centre in Trnopolje, the Defence queried whether counsel or staff could prepare transcripts or translation for material brought in from other sources in the absence of transcripts or translation. The Chamber allowed it, as long as it was done with the required accuracy and the material was afterwards presented for translation.²³³¹
13. With regard to the video of the US Department of Homeland Security interview of Mladen Blagojević, the Chamber suggested that if the Prosecution offers excerpts of a video (rather than the video in its entirety), the Defence may add any portions it considers relevant for context. The Prosecution should explain to the Defence what selection it had on its mind, and it might add whatever is needed even if that would be the complete video.²³³²

Photographs

14. The Chamber found that the tendering of documents together with witness statements will, under certain circumstances, not disturb the clarity of the presentation of a party's evidence. This is the case, for example, with photographs, maps, sketches drawn by the witness, and other similar illustrations of the content of the statement as well as shorter documents clearly referred to and explained in the witness's statement.²³³³
15. With regard to P6594, the Chamber found that photographs can be tendered exclusively to test the credibility and the reliability of a witness.²³³⁴ Absent objection from the other party (be it the Prosecution or the Defence), the evidence can be admitted.²³³⁵
16. With regard to the photographs of the crater taken initially by war correspondent Roger Richards, and then subsequently by Defence expert Subotić in 2010, the Chamber observed that expert Subotić’s conclusions drawn from such photographs to be unreliable.²³³⁶ there were obvious limitations to the photographs in terms of reliability. Firstly, they did not depict the same crater, or the same tiles.²³³⁷ Secondly, an editing software was applied to the expert photographs which allowed ‘for each such photograph to be placed in a vertical position by

²³²⁹ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 July 2012) (TC) 1122;) IT-09-92 (22 August 2012) (TC) 1432. *Mladić* (Transcript) IT-09-92 (22 August 2012) (TC) 1432.

²³³⁰ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 September 2012) (TC) 2634.

²³³¹ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 September 2012) (TC) 2664.

²³³² *Prosecutor v Mladić* (Transcript) IT-09-92 (5 March 2015) (TC) 32662.

²³³³ *Prosecutor v Mladić* (Transcript) IT-09-92 (9 July 2012) (TC) 530.

²³³⁴ *Prosecutor v Mladić* (Judgment, Volume II of V) IT-09-92 (22 November 2017) (TC) [2161]; *Prosecutor v Mladić* (Transcript) IT-09-92 (13 June 2014) (TC) 22692-22693.

²³³⁵ *Prosecutor v Mladić* (Transcript) IT-09-92 (3 July 2014) (TC) 23353.

²³³⁶ *Prosecutor v Mladić* (Judgment, Volume II of V) IT-09-92 (22 November 2017) (TC) [2170].

²³³⁷ *Prosecutor v Mladić* (Transcript) IT-09-92 (22 September 2015) (TC) 39145.

computer analysis and thereby remove the angle from which it was filmed and deformations caused by the photography that can all be removed'.²³³⁸

Intercepted Communications

17. The Chamber found that, where the authenticity of documents (be it the transcript of intercepts or also the intercepts themselves) is at issue but has been dealt with extensively in another case, the first thought is to see whether this can be resolved 'by taking judicial notice of the authenticity of documents rather than to receive a full set of evidence on the same issue again'.²³³⁹
18. In addition, it found that the Prosecution could file a bar table motion for its intercept operator evidence well in advance of calling witnesses on that portion of its case in acceptance of the possibility that this would reduce 'the number of witnesses needed to be called to testify in relation to intercept evidence'.²³⁴⁰
19. With regard to intercept 11 (a recording of an order for attack on Sarajevo from General Ratko Mladić and Colonel Mirko Vukašinić), the Prosecution and the Defence agreed there was no dispute about the accuracy of the text of the transcript and the translation of it. In the absence of a dispute as to the accuracy of the text of the intercept's transcript and the translation of it, the Chamber found that the intercept could be played.²³⁴¹
20. With regard to the excerpts of intercepted audio recordings seized from the Mladić family residence, pursuant to Rule 89(C) the Chamber found that admission of evidence from the bar table requires that the Prosecution show that the tendered material be relevant and probative, and that it fit into the case. As the Chamber had already taken judicial notice of the authenticity of the intercepts, their relevance was established. Their probative value was consolidated by the fact that they had been recovered by the Serbian authorities. The absence of direct and precise date and time references did not deprive them of their relevance and probative value, although an additional evidentiary effort may be required to give the excerpts of the intercepts the full weight to be attached to them.
21. As to the Defence argument that one of the Audio Tapes was not accurately translated, the Chamber recalled that even if the parties may disagree on how to interpret the words spoken, this does not deprive these conversations of their relevance for the Prosecution case. The argument goes to weight, not to admissibility, which will be assessed at a later stage against the totality of the evidence.²³⁴²
22. With regard to the intercept of a phone call between Badem and Mičić (P1581), the Chamber found that the Defence's objection as to authenticity or at least lack of information of where it came from was not about relevance, but about background source and authenticity. In such circumstances, witness testimony can resolve any questions about authenticity,²³⁴³ and in the

²³³⁸ *Prosecutor v Mladić* (Transcript) IT-09-92 (1 October 2015) (TC) 39599.

²³³⁹ *Prosecutor v Mladić* (Transcript) IT-09-92 (10 November 2011) (TC I) (TC) 111-113.

²³⁴⁰ *Prosecutor v Mladić* (Transcript) IT-09-92 (3 May 2012) (TC) 372.

²³⁴¹ *Prosecutor v Mladić* (Transcript) IT-09-92 (27 August 2012) (TC) 1657.

²³⁴² *Prosecutor v Mladić* (Decision on Prosecution Motion to Admit Evidence from the Bar Table: Excerpts from Mladić's Audio Tapes) IT-09-92 (18 September 2013) (TC) [9].

²³⁴³ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 June 2013) (TC) 12979-12980.

instant case it did: the intercept was subsequently admitted.²³⁴⁴ If, moreover, there is a date on an intercept that requires translation and that the Prosecution or the Defence wants the Chamber to rely on, a full translation including the heading which bears a date should be uploaded.²³⁴⁵

III. COURT ANALYSIS & LEGAL ARGUMENTS

What arguments/findings were used to support the admission of DDE?

23. **Video and Audio Recordings** With regard to the video of a bus of the transport company (65 *ter* 22388E), the Defence contested its admission on the basis that it did not have relevant enough confirmation of the authenticity of the clip, that the clip was ambiguous in terms of the vehicle and that it was taken after the event and as such not contemporaneous. The Prosecution stated that it had simply shown the Defence two excerpts (P257 and P258) of the entire video, which did show the massacre and was always understood to be a video taken the day after the massacre (as shown by its date stamp, confirming that it had never been the Prosecution's intention to depict the actual shooting of the bus), that the video had been filmed by an individual named in the amalgamated statement, and that the video had been tendered to confirm what the witness had affirmed and that the bus was indeed the one that the witness had recognised he was in.²³⁴⁶
24. With regard to video D44, the Prosecution argued that it could not be admitted on the grounds that it came from the same website as another video, D43, which was marked not admitted on the grounds that it had been doctored and altered.²³⁴⁷ The Defence argued that the arguments of the Prosecution went more to weight to be attributed to the video rather than its admissibility, stating that Mr Vulliamy, the relevant witness, recognised himself in the video as being one of the persons present for the video and was asked questions about the video, and so on that basis the video was appropriate for admission.
25. With regard to the contemporaneous open source local and international radio and television news reports, the Prosecution requested their admission from the bar table.²³⁴⁸ The Defence objected to their admission on the ground that they originated from an open source: they lacked probative value as either the author was unknown - rendering the Defence unable to challenge him or her on the content of the material - or it was unclear whether the source heard the information from others. The Defence argued that these documents lacked sufficient indicia of reliability and should have been tendered through witnesses.²³⁴⁹

Photographs

²³⁴⁴ *Prosecutor v Mladić* (Transcript) IT-09-92 (25 June 2013) (TC) 13324.

²³⁴⁵ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 June 2013) (TC) 13004.

²³⁴⁶ *Prosecutor v Mladić* (Transcript) IT-09-92 (26 September 2012) (TC) 3055-3056.

²³⁴⁷ *Prosecutor v Mladić* (Transcript) IT-09-92 (25 July 2013) (TC) 15089.

²³⁴⁸ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table (Municipalities Component)) IT-09-92 (11 February 2014) (TC) [1].

²³⁴⁹ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table (Municipalities Component)) IT-09-92 (11 February 2014) (TC) [7].

26. With regard to the photographs in D2117 (Expert Report for the Defence Mortar Attacks on the Sarajevo Area in 1992-1995), the Chamber found that they could not be used to rebut the Adjudicated Facts (that on 1 June 1993, two mortar shells were fired from SRK-held territory at a make-shift football pitch at a parking lot where a football tournament with around 200 spectators was held in the community of Dobrinja IIIB).²³⁵⁰
27. With regard to the photographs in D2117 (Expert Report for the Defence Mortar Attacks on the Sarajevo Area in 1992-1995), the Chamber found that they contradicted statements that Subotić, the Defence expert witness, had made. Subotić had drawn significant conclusions about the accuracy of the investigators' determination of the azimuth based on the apparently incorrect placement of the magnetic compass. However, the relevant photograph was too unclear to permit the drawing of any such conclusions.²³⁵¹

Intercepted Communications

28. The Chamber found that the intercepts related to the Srebrenica segment of the Prosecution's case were prima facie relevant to, and probative of, issues arising from the indictment: the alleged joint criminal enterprise ("JCE") to eliminate the Bosnian Muslim population of Srebrenica, commencing in July of 1995, and in particular, the VRS takeover of Potocari by 12 July 1995, as well as communication between members of the alleged JCE, and the whereabouts of the accused on the days of the charged crimes relating to Srebrenica.²³⁵²
29. With regard to the telephone intercept of a conversation between Branko Đerić and Mićo Stanišić (P4119), the Chamber used it to find that until October 1992 Kula prison was accommodating 10,000 Muslim civilians of all ages forced to live in inadequate conditions of accommodation, food, and hygiene, and subjected to regular beatings by prison guards.²³⁵³
30. The Chamber found that the addition of the intercepts related to the Srebrenica segment of the Prosecution's case would not burden the Defence in the preparation of its case: the intercepts in question were no longer than up to a page each, did not raise novel issues of which the Defence had not already been on notice on as forming part of the Prosecution's case, and had been disclosed to the Defence months in advance of the anticipated start of the Prosecution's presentation of the Srebrenica segment of its case. Their addition was therefore in the interests of justice.²³⁵⁴
31. With regard to the telephone intercept of a conversation between Branko Đerić and Mićo Stanišić, the Chamber reviewed it and found it consistent with the Adjudicated Facts (despite the fact that the intercept had been submitted in a previous case).²³⁵⁵

²³⁵⁰ *Prosecutor v Mladić* (Judgment, Volume II of V) IT-09-92 (22 November 2017) (TC) [2039], [2041], fn 8717.

²³⁵¹ *Prosecutor v Mladić* (Judgment, Volume II of V) IT-09-92 (22 November 2017) (TC) [2039], fn 8717.

²³⁵² *Prosecutor v Mladić* (Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment) IT-09-92 (2 May 2013) (TC) [12].

²³⁵³ *Prosecutor v Mladić* (Judgment, Volume I of V) IT-09-92 (22 November 2017) (TC) [728], [732].

²³⁵⁴ *Prosecutor v Mladić* (Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment) IT-09-92 (2 May 2013) (TC) [12].

²³⁵⁵ *Prosecutor v Mladić* (Judgment, Volume I of V) IT-09-92 (22 November 2017) (TC) [727]; *Prosecutor v Župljanin* (Transcript) IT-08-91 (30 October 2009) (TC I) (TC).

32. With regard to the telephone intercept of a conversation between Branko Đerić and Mićo Stanišić, the intercept was admitted both in the instant case and *Župljanin*.²³⁵⁶ The Chamber in *Župljanin* found that, while a forensic report analysing the intercept had clearly said that its authenticity could not be confirmed with any degree of full certainty, the report did say that there were no traces of it having been tampered with. Once the witness confirmed that it was his voice on the intercept and that he was speaking to the Accused, the intercept could be admitted.²³⁵⁷
33. With regard to intercepts Rule 65 *ter* nos 20779, 20799A (MFI P327) and 27580, the Prosecution wished to demonstrate the intent of the Accused with respect to the charges of genocide and persecution contained in the Indictment and argued that the admission of the intercepts would save court time and facilitate the presentation of the Prosecution's case.²³⁵⁸ The Defence opposed the motion in its entirety, challenging their reliability, relevance and capacity to prove the requisite intent for genocide.²³⁵⁹
34. With regard to intercepts D75, P323, P324, P325 and P330, the Prosecution tendered 153 intercepts from the bar table ("Bar Table Intercepts") for the purpose of proving the provenance of those five intercepts. It then filed a notice which contained, as a confidential annex thereto, a table setting out the probative value and the relevance of the Bar Table Intercepts ("Table").²³⁶⁰ The Defence objected to the admission of the Table.²³⁶¹
35. With regard to the intercepts submitted by the Prosecution from the bar table, the Defence objected to their admission on the ground that their origin was an unknown or unverified source, lacking sufficient indicia of reliability or authenticity as a result.²³⁶²
36. With regard to VRS communications, the Defence argued that the ABiH, the SDB, and the Croatian authorities lacked the necessary expertise and technological capacity to intercept them. The Defence further asserted that the intercepts were neither authentic nor reliable as the Tribunal was provided with transcripts of intercepted communications but not with the corresponding audio recordings. The Defence also argued that the transcripts were inaccurate due to negligent reporting procedures and claimed that there were indications that many of them had been forged or doctored after the war.²³⁶³
37. The Prosecution argued that VRS communications were regularly unencrypted and that important communication lines were open and susceptible to interception. It further stated that the intercepts were corroborated by various other sources of evidence, such as original VRS documents, aerial imagery, and the testimony of witnesses, including members of the VRS. The Prosecution asserted that a full chain of custody was established, and that intercept

²³⁵⁶ *Prosecutor v Mladić* (Judgment, Volume I of V) IT-09-92 (22 November 2017) (TC) [727]; *Prosecutor v Župljanin* (Transcript) IT-08-91 (30 October 2009) (TC I) (TC).

²³⁵⁷ *Prosecutor v Župljanin* (Transcript) IT-08-91 (30 October 2009) (TC I) (TC) 2339-2342.

²³⁵⁸ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table) IT-09-92 (19 July 2013) (TC) [2]-[3].

²³⁵⁹ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table) IT-09-92 (19 July 2013) (TC) [4].

²³⁶⁰ *Prosecutor v Mladić* (Decision on the Admission of Intercepts and Authentication Charts) IT-09-92 (6 February 2014) (TC) [1], [3].

²³⁶¹ *Prosecutor v Mladić* (Decision on the Admission of Intercepts and Authentication Charts) IT-09-92 (6 February 2014) (TC) [3].

²³⁶² *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table (Municipalities Component)) IT-09-92 (11 February 2014) (TC) [9].

²³⁶³ *Prosecutor v Mladić* (Judgment, Volume IV of V) IT-09-92 (22 November 2017) (TC) [5305].

operators from the ABiH, the SDB, and the Croatian authorities gave detailed testimony which demonstrated that consistent procedures were followed with regard to the transcription of intercepted conversations.²³⁶⁴

Was the DDE admitted and/or relied upon?

Video and Audio Recordings

38. With regard to the video of a bus of the transport company (65 *ter* 22388E), the Chamber found that the matter of contemporaneity had been dealt with satisfactorily. As to the creator of the video, a witness gave sufficient evidence that it had been a photographer named Ibrahim. The Chamber, however, asked the Prosecution information on all aspects regarding authenticity of the video i.e., when it was seized, where it was seized and from whom it was seized.²³⁶⁵ While there is no public record of that information being provided, the two excerpts (P257 and P258) of the video were subsequently admitted in the absence of objections by the Defence.²³⁶⁶
39. With regard to video D44, in the absence of further information from the Defence regarding the provenance of exhibit D44, in light of the suggested fabrication of the audio of Exhibit D43 and the fact that Exhibit D44, as submitted by the Prosecution, constituted a segment of the latter, and in the absence of information whether the web site "emperors-clothes.com" had compiled or rehosted Exhibit D44, the Chamber found that D44 did not bear sufficient probative value for admission.²³⁶⁷
40. With regard to the contemporaneous open source local and international radio and television news reports, the Chamber found that the general Defence submissions in relation to the origin of these documents were insufficient to successfully challenge their probative value, or preclude admission pursuant to Rule 89 (D) of the Rules. It further recalled that, while the Chamber encouraged the Prosecution to tender documents through witnesses, this did not mean that documents which could have been tendered through witnesses could not be tendered from the bar table at a later stage. Having considered the documents in this category, the Chamber was satisfied that the Prosecution had shown with sufficient clarity and specificity the relevance and probative value of each of these documents, and how they fit into its case.²³⁶⁸

Photographs

41. With regard to the photographs in D2117 (Expert Report for the Defence Mortar Attacks on the Sarajevo Area in 1992-1995), the Chamber admitted them but found them insufficiently reliable.²³⁶⁹

²³⁶⁴ *Prosecutor v Mladić* (Judgment, Volume IV of V) IT-09-92 (22 November 2017) (TC) [5306].

²³⁶⁵ *Prosecutor v Mladić* (Transcript) IT-09-92 (26 September 2012) (TC) 3092-3093.

²³⁶⁶ *Prosecutor v Mladić* (Transcript) IT-09-92 (10 October 2012) (TC) 3899.

²³⁶⁷ *Prosecutor v Mladić* (Transcript) IT-09-92 (27 November 2013) (TC) 20037-20039.

²³⁶⁸ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table (Municipalities Component)) IT-09-92 (11 February 2014) (TC) [8].

²³⁶⁹ *Prosecutor v Mladić* (Judgment, Volume II of V) IT-09-92 (22 November 2017) (TC) [2039].

42. With regard to the photo of the Marsal Tito barracks, the Defence objected to having it admitted through a witness who, they argued, could not say whether he was involved in them. The Prosecution, mindful of the probative value of this photo, further explained it by asking the witness to authenticate other evidence related to it.²³⁷⁰
43. With regard to the photo of the Marsal Tito barracks, the Chamber found that the photo could be admitted into evidence: the witness had testified that what he had seen in the photograph was similar to what he had seen when doing similar investigations. The witness had also identified what could be seen through a gun-hole in the sandbags opposite the Marsal Tito barracks, which was a sufficient basis for admission of the photo into evidence.²³⁷¹

Intercepted Communications

44. The Chamber admitted the intercepts related to the Srebrenica segment of the Prosecution's case. It found that collectively, the intercepts dated July and August were generally relevant to the charged JCE to eliminate the Bosnian Muslims in Srebrenica by killing the men and boys of Srebrenica and forcibly removing the women, young children and some of the elderly men. While the relevance of several intercepts, when considered individually, might have been questionable on the basis of their ambiguous and/or cryptic content, the Chamber had taken a comprehensive approach and considered the intercepts dated July and August 1995 as constituting a contemporaneous, chronological record of events on the ground, demonstrating a network of interaction and exchange of information during these two crucial months of alleged crimes charged in the Indictment.²³⁷²
45. With regard to the intercepted dated 25 June 1995, the Chamber found that, despite the lack of evidence suggesting whether the accused had a role in the executions discussed therein, it touched upon issues relating to command structure and the alleged involvement of VRS forces in the charged crimes near Srebrenica. The Chamber therefore considered this intercept sufficiently relevant for admission, noting that without further contextualization, its relevance would, however, remain limited.²³⁷³ The relevance and weight the Chamber will ultimately attribute to every individual intercept it admits into evidence can only fully be assessed following further contextualization by witnesses who were either participants in the intercepts, or otherwise have a sufficient basis to provide such contextual testimony. Moreover, it is open to the Defence to challenge the authenticity of intercepts the Chamber has taken judicial notice of.²³⁷⁴
46. The Chamber found that intercepts Rule 65 *ter* nos 20779, 20799A (MFI P327) and 27580 were authentic and that their probative value was not outweighed by the need to ensure a fair trial: the Prosecution had tendered the original audio recordings, the BCS transcription and the corresponding English translation. Additionally, Rule 65 *ter* no. 20799A (MFI P327) had been put to witness John Wilson, who confirmed some of the information contained therein. For intercepts Rule 65 *ter* nos 01643A and 01643B, the Prosecution had specifically indicated that "[t]he voices on the audio tape recordings have been identified as the Accused by OTP staff. If the Defence challenges this identification the Prosecution will tender corroborative

²³⁷⁰ *Prosecutor v Mladić* (Transcript) IT-09-92 (7 December 2012) (TC) 5983-5984.

²³⁷¹ *Prosecutor v Mladić* (Transcript) IT-09-92 (7 December 2012) (TC) 5983.

²³⁷² *Prosecutor v Mladić* (Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment) IT-09-92 (2 May 2013) (TC) [24].

²³⁷³ *Prosecutor v Mladić* (Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment) IT-09-92 (2 May 2013) (TC) [26].

²³⁷⁴ *Prosecutor v Mladić* (Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment) IT-09-92 (2 May 2013) (TC) [29]-[30].

evidence". The Chamber considered, however, that the Defence had made no such challenge and based on the representations made by the Prosecution, the Chamber was satisfied.²³⁷⁵

47. With regard to the Table setting out the probative value and relevance of intercepts Bar Table Intercepts, the Chamber found that the Defence's objections to the admissibility of the Table were misplaced since the Prosecution was not seeking to tender that document into evidence but was merely using it in order to explain the probative value and the relevance of each of the Bar Table Intercepts.²³⁷⁶
48. With regard to the intercepts submitted by the Prosecution from the bar table, the Chamber noted that other than stating that sources "like AID, or Mrs Vidovic" were not reliable, the Defence provided no information why these sources would not be reliable, or more importantly, how their unreliability was reflected in each individual document. The Chamber found that the general challenge raised by the Defence to a source in the abstract was insufficient to challenge the probative value of these documents. Nonetheless, the Chamber stressed that it may take the fact into consideration that the original source of a document was unspecified when ultimately assessing its weight during the final stages of the trial.²³⁷⁷
49. With regard to VRS communications, the Chamber assessed the intercepts in the context of the entire trial record, and was satisfied that the intercepts were genuine contemporaneous reports of intercepted VRS communications. While the Chamber treated the intercepts with caution, and considered whether there was corroboration or further detail provided by other sources of evidence, it found that there was no evidence to support the Defence's assertion that the intercepts were forged or manipulated or that the ABiH, the SDB, and the Croatian authorities were unable to intercept VRS communications.²³⁷⁸ To that end, Colonel Došenović (based on information the Defence provided to him and on what he found on the internet) testified that a distinction must be made between professional military grade and amateur grade manufacture devices: military devices are always more sensitive, and need to meet other challenges, like the configuration of the land, weather, and the way in which they are being used. It is not the same as if you use something in a tent, a dugout, et cetera, or something that you use in an office where the temperature is always right and so on and so forth, when there is no dust, when there are no other influences of that kind. Nevertheless, while the ABiH's equipment may not have been military grade, they were still able to hear participants that were far away.²³⁷⁹

IV. RULES OF EVIDENCE

Relevant Rules of Evidence

50. **Rule 65ter(E)(i) and (ii)** of the ICTY Rules of Procedure and Evidence states that the pre-trial Judge shall order the Prosecutor, upon the report of the Senior Legal Officer, and within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial

²³⁷⁵ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table) IT-09-92 (19 July 2013) (TC) [12].

²³⁷⁶ *Prosecutor v Mladić* (Decision on the Admission of Intercepts and Authentication Charts) IT-09-92 (6 February 2014) (TC) [8].

²³⁷⁷ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table (Municipalities Component)) IT-09-92 (11 February 2014) (TC) [11].

²³⁷⁸ *Prosecutor v Mladić* (Judgment, Volume IV of V) IT-09-92 (22 November 2017) (TC) [5307].

²³⁷⁹ *Prosecutor v Mladić* (Transcript) IT-09-92 (13 August 2015) (TC) 37746-37747.

Conference required by Rule 73 bis, to file the final version of the Prosecutor's pre-trial brief including, for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused; this brief shall include any admissions by the parties and a statement of matters which are not in dispute; as well as a statement of contested matters of fact and law, and the list of witnesses the Prosecutor intends to call.

51. **Rule 65ter(E)(iii)** states that the pre-trial Judge shall order the Prosecutor, upon the report of the Senior Legal Officer, and within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference required by Rule 73 bis, to file the list of exhibits the Prosecutor intends to offer stating where possible whether the defence has any objection as to authenticity. The Prosecutor shall serve on the defence copies of the exhibits so listed
52. **Rule 89(D)** states that a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
53. **Rule 89(C)** states that a Chamber may admit any relevant evidence which it deems to have probative value.

Application of Rules of Evidence

54. **Rule 65ter(E)** Pursuant to Rule 65ter(E)(ii), the Chamber found that the Prosecution could file a bar table motion for its intercept operator evidence well in advance of calling witnesses on that portion of its case in acceptance of the possibility that this would reduce 'the number of witnesses needed to be called to testify in relation to intercept evidence'.²³⁸⁰
55. **Rule 65ter(E)(iii)** Pursuant to Rule 65ter(E)(iii), the Chamber found that it was in the interests of justice to add the intercepts related to the Srebrenica segment of the Prosecution's case to the Prosecution's Rule 65ter exhibit list.²³⁸¹
56. **Rule 89(D)** Pursuant to Rule 89(D), the Chamber found that on the basis of its review of the Rule 65 ter nos 20779, 20799A (MFI P327), 27580, 01643A and 01643B intercepts, and absent any specific submissions by the Defence contesting their authenticity or reliability, their probative value was not outweighed by the need to ensure a fair trial.²³⁸²
57. **Rule 89(C)** Pursuant to Rule 89C, the Chamber found that video D44 did not bear sufficient probative value for admission in the absence of further information from the Defence regarding the provenance of exhibit D44 and whether the web site "emperors-clothes.com" had compiled or rehosted Exhibit D44, and in light of the suggested fabrication of the audio of Exhibit D43 and the fact that Exhibit D44, as submitted by the Prosecution, constituted a segment of the latter.²³⁸³

²³⁸⁰ *Prosecutor v Mladić* (Transcript) IT-09-92 (3 May 2012) (TC) 372; *Prosecutor v Mladić* (Transcript) IT-09-92 (29 March 2012) (TC) 238-241.) IT-09-92 (29 March 2012) (TC) 238-241.

²³⁸¹ *Prosecutor v Mladić* (Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment) IT-09-92 (2 May 2013) (TC) [12].

²³⁸² *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table) IT-09-92 (19 July 2013) (TC) [12].

²³⁸³ *Prosecutor v Mladić* (Transcript) IT-09-92 (27 November 2013) (TC) 20037-20039.

V. EXTRAPOLATIONS

Video and Audio Recordings

58. Before submission, videos must be sorted out in such a way that judges understand what was played from what video and what is in evidence and what is separate or as a whole.²³⁸⁴
59. If counsel wishes to rely only on a video's ambient sound rather than its narration, it is unnecessary that it be transcribed.²³⁸⁵
60. Videos brought in from other sources and devoid of translation and transcription can be translated and transcribed by counsel, so long as it is done with accuracy and the material is presented for translation afterwards.²³⁸⁶ If, moreover, there is a date on an intercept that requires translation and that counsel wants the Trial Chamber to rely on, a full translation including the heading which bears a date should be uploaded.²³⁸⁷
61. Where counsel offers excerpts of a video (rather than the video in its entirety), opposing counsel may add any portions it considers relevant for context. Counsel should explain to opposing counsel what selection it had on its mind, and it might add whatever is needed even if that would be the complete video.²³⁸⁸
62. A video does not bear sufficient probative value for admission if it constitutes part of another video that has already been denied admission.²³⁸⁹
63. Pursuant to Rule 89(D) of the ICTY Rules of Procedure and Evidence, 'a Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial'. Nevertheless, open source videos may be admitted if counsel shows with sufficient clarity and specificity the relevance and probative value of these documents, and how they fit into its case.²³⁹⁰

Photographs

64. The tendering of documents together with witness statements will, under certain circumstances, not disturb the clarity of the presentation of a party's evidence.²³⁹¹

²³⁸⁴ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 July 2012) (TC) 1122; *Prosecutor v Mladić* (Transcript) IT-09-92 (22 August 2012) (TC) 1432.; IT-09-92 (22 August 2012) (TC) 1432.

²³⁸⁵ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 September 2012) (TC) 2634.

²³⁸⁶ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 September 2012) (TC) 2664.

²³⁸⁷ *Prosecutor v Mladić* (Transcript) IT-09-92 (19 June 2013) (TC) 13004.

²³⁸⁸ *Prosecutor v Mladić* (Transcript) IT-09-92 (5 March 2015) (TC) 32662.

²³⁸⁹ *Prosecutor v Mladić* (Transcript) IT-09-92 (27 November 2013) (TC) 20037-20039.

²³⁹⁰ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table (Municipalities Component)) IT-09-92 (11 February 2014) (TC) [8].

²³⁹¹ *Prosecutor v Mladić* (Transcript) IT-09-92 (9 July 2012) (TC) 530.

65. Photographs can be tendered exclusively to test the credibility and the reliability of a witness.²³⁹²
66. An expert witness' testimony is unreliable if based on conclusions drawn from photographs displaying obvious limitations in terms of reliability.²³⁹³

Intercepted Communications

67. Where the authenticity of intercepts is at issue but has been dealt with extensively in another case, the Trial Chamber may take judicial notice of the authenticity of documents rather than receive a full set of evidence on the same issue again.²³⁹⁴
68. Counsel can file a bar table motion for its intercept operator evidence well in advance of calling witnesses on that portion of its case if this would reduce the number of witnesses needed to be called to testify on intercept evidence.²³⁹⁵
69. An intercept can be played if the Prosecution and the Defence agree about the accuracy of the text of its transcript and translation.²³⁹⁶ Even if the parties disagree on how to interpret the words spoken, this does not deprive intercepts of their relevance for the Prosecution case. The argument goes to weight, not to admissibility, which will be assessed at a later stage against the totality of the evidence.²³⁹⁷
70. Pursuant to Rule 89(C) of the ICTY Rules of Procedure and Evidence, admission of intercepts from the bar table requires that Counsel show that the tendered material is relevant and probative, and that it fits into the case.²³⁹⁸
71. Objections as to an intercept's authenticity (or lack of information on where it comes from) is not about relevance, but about background source and authenticity. In such circumstances, witness testimony can resolve any questions about authenticity.
72. Intercepts submitted from the bar table can be admitted if their admission is in the interests of justice and does not burden the Defence in the preparation of its case.²³⁹⁹
73. Where the relevance of several intercepts, considered individually, is questionable on the basis of their ambiguous and/or cryptic content, the Trial Chamber may nevertheless take a comprehensive approach if they constitute a contemporaneous, chronological record of events on the ground and demonstrate a network of interaction and exchange of information concerning the alleged crimes charged in the Indictment.²⁴⁰⁰

²³⁹² *Prosecutor v Mladić* (Judgment, Volume II of V) IT-09-92 (22 November 2017) (TC) [2161]; *Prosecutor v Mladić* (Transcript) IT-09-92 (13 June 2014) (TC) 22692-22693.) IT-09-92 (13 June 2014) (TC) 22692-22693.

²³⁹³ *Prosecutor v Mladić* (Judgment, Volume II of V) IT-09-92 (22 November 2017) (TC) [2170]; *Prosecutor v Mladić* (Judgment, Volume II of V) IT-09-92 (22 November 2017) (TC) [2039], fn 8717. IT-09-92 (22 November 2017) (TC) [2039], fn 8717.

²³⁹⁴ *Prosecutor v Mladić* (Transcript) IT-09-92 (10 November 2011) (TC I) (TC) 111-113.

²³⁹⁵ *Prosecutor v Mladić* (Transcript) IT-09-92 (3 May 2012) (TC) 372.

²³⁹⁶ *Prosecutor v Mladić* (Transcript) IT-09-92 (27 August 2012) (TC) 1657.

²³⁹⁷ *Prosecutor v Mladić* (Decision on Prosecution Motion to Admit Evidence from the Bar Table: Excerpts from Mladić's Audio Tapes) IT-09-92 (18 September 2013) (TC) [9].

²³⁹⁸ *Prosecutor v Mladić* (Decision on Prosecution Motion to Admit Evidence from the Bar Table: Excerpts from Mladić's Audio Tapes) IT-09-92 (18 September 2013) (TC) [9].

²³⁹⁹ *Prosecutor v Mladić* (Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment) IT-09-92 (2 May 2013) (TC) [12].

²⁴⁰⁰ *Prosecutor v Mladić* (Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment) IT-09-92 (2 May 2013) (TC) [24].

74. An intercept whose authenticity cannot be confirmed with certainty may nevertheless be admitted if a forensic reports states that there are no traces of it having been tampered with.²⁴⁰¹
75. The authenticity and probative value of intercepts is not outweighed by the need to ensure a fair trial if counsel tenders the original recordings, the original transcription, and the corresponding English translation. Witness testimony confirming some of the information contained therein may lead the Trial Chamber to give the evidence further weight.²⁴⁰²
76. Intercepts need not be admitted if used only to explain the probative value and the relevance of other intercepts.²⁴⁰³
77. Where the original source of an intercept is unspecified, the Trial Chamber may take that into consideration when assessing its weight during the final stages of the trial.²⁴⁰⁴
78. To accord intercepts weight, it may have to be shown that whoever obtained the admitted intercepts had the technical means to intercept communication.²⁴⁰⁵

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²⁴⁰¹ *Prosecutor v Župljanin* (Transcript) IT-08-91 (30 October 2009) (TC I) (TC) 2339-2342.

²⁴⁰² *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table) IT-09-92 (19 July 2013) (TC) [12].

²⁴⁰³ *Prosecutor v Mladić* (Decision on the Admission of Intercepts and Authentication Charts) IT-09-92 (6 February 2014) (TC) [1], [3], [8].

²⁴⁰⁴ *Prosecutor v Mladić* (Decision on Prosecution Motion for Admission of Documents from the Bar Table (Municipalities Component)) IT-09-92 (11 February 2014) (TC) [11].

²⁴⁰⁵ *Prosecutor v Mladić* (Judgment, Volume IV of V) IT-09-92 (22 November 2017) (TC) [5305], [5307].

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