

EXTRAPOLATIONS FROM CASE LAW

ON THE USE OF
DIGITALLY DERIVED EVIDENCE (DDE) BEFORE
INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Part of the
DIGITALLY DERIVED EVIDENCE PROJECT

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INTRODUCTION

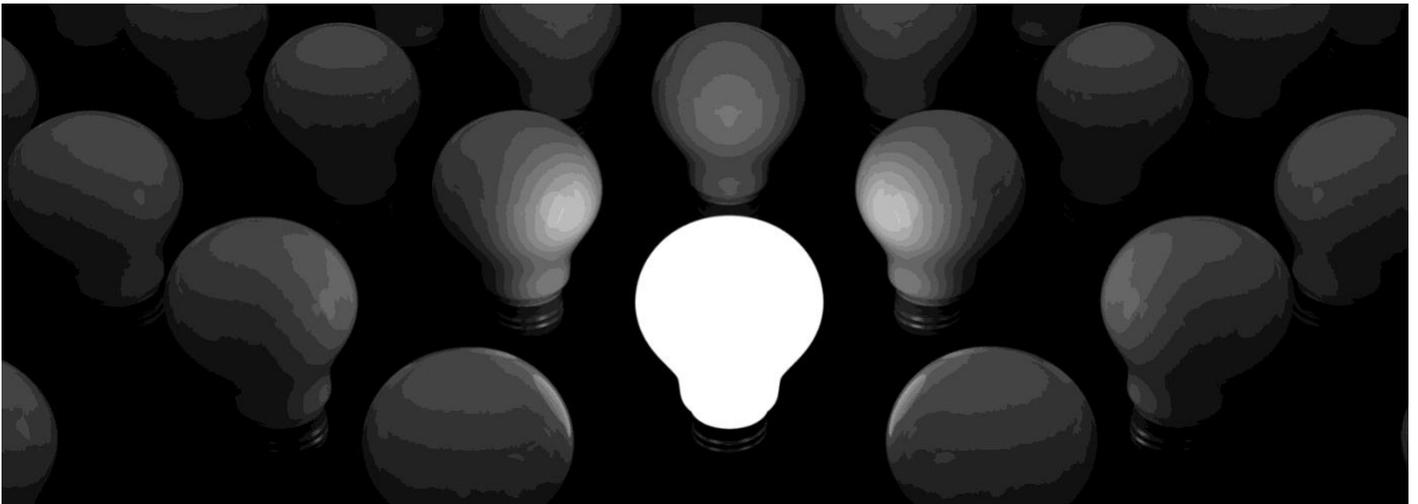
Our Project

As a result of technological advancements, the use of Digitally Derived Evidence (“DDE”) has become increasingly prevalent in international criminal courts and tribunals (“ICCTs”). While the significant use and potential of DDE in international law is indisputable, its use raises numerous challenges and legal questions. Therefore, our project aims to address a legal lacuna by examining the different evidentiary concerns relating to DDE in the ICCTs.

Acknowledgements

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Methodology

The aim of the Extrapolations Document is to summarise the essential arguments pertaining to DDE of the Prosecution, Defence, and the Chambers in key cases before ICCTs. To develop this document, case summaries were prepared. Thousands of pages of court records were analysed aiming to identify whenever relevant discussions on DDE were present. This includes counsels' arguments and the pronouncements by the judicial chambers, as well as relevant information about the case, the Court and rules of procedure and evidence.

The objective of this Extrapolations document is to extract the most essential information pertaining to DDE and, in doing so, deduce legal standards for DDE arising from each case. The information was divided by type of DDE, court or tribunal, stage of proceedings (arrest warrant; pre-trial; trial; appeals), and lastly the arguments of the parties and the Chamber. Dividing the extrapolations by various stages of the proceedings allows for different standards of the burden of proof at specific stages of the proceedings to be considered. The following template was used:

I. TYPE OF DDE

- o Name of Court/Tribunal***

- o Full Case Name***

o STAGE OF PROCEEDINGS

- The arguments of the Prosecution***

- The arguments of the Defence***

- The Court's response***

Counsel's arguments were mainly extracted from the respective written and oral submissions. Whenever these submissions were confidential, completely inaccessible or partially redacted, the arguments were extracted from the Court's decisions or references made by the parties.

Once the most relevant information related to Digitally Derived Evidence was selected, extrapolations were made based exclusively on the Courts' findings. These extrapolations represent the general rules that can be deduced from the Courts' pronouncements that have been further developed into the [Leiden Guidelines on DDE](#) for practitioners.

Table of Contents

INTRODUCTION	3
OUR PROJECT	3
ACKNOWLEDGEMENTS	3
METHODOLOGY	4
VIDEOS	8
PROSECUTOR V. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ (ICC-02/11-01/15)	8
PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO (ICC-01/05-01/08)	11
PROSECUTOR V. THOMAS LUBANGA DYILO (ICC-01/04-01/06).....	13
PROSECUTOR V. AHMAD AL FAQI AL MAHDI (ICC-01/12-01-15).....	18
PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU AND NARCISSE ARIDO (ICC-01/05-01/13).....	19
PROSECUTOR V. BOSCO NTAGANDA (ICC-01/04-02/06).....	21
PROSECUTOR V. DOMINIC ONGWEN (ICC-02/04-01/15)	26
PROSECUTOR V. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI (ICC-01/04-01/07).....	28
PROSECUTOR V. ÉDOUARD KAREMERA, MATTHIEU NGRUMPATSE AND JOSEPH NZIRORERA (ICTR-98-44-T).....	37
PROSECUTOR V. ZDRAVKO TOLIMIR (IT-05-88/2)	39
PHOTOGRAPHS	42
PROSECUTOR V. THOMAS LUBANGA DYILO (ICC-01/04-01/06).....	42
PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO (ICC-01/05-01/08)	43
PROSECUTOR V. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ (ICC-02/11-01/15)	47
PROSECUTOR V. BOSCO NTAGANDA (ICC-01/04-02/06).....	48
PROSECUTOR V. DOMINIC ONGWEN (ICC-02/04-01/15)	50
PROSECUTOR V. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD (ICC-01/12-01/18)	53
PROSECUTOR V. ÉDOUARD KAREMERA, MATTHIEU NGRUMPATSE AND JOSEPH NZIRORERA (ICTR-98-44-T).....	54
AERIAL AND SATELLITE IMAGES	58
PROSECUTOR V. AHMAD AL FAQI AL MAHDI (ICC-01/12-01-15).....	58
PROSECUTOR V. RADISLAV KRSTIC (IT-98-33).....	59
PROSECUTOR V VIDOJE BLAGOJEVIĆ AND DRAGAN JOKIĆ, (IT-02-60-T)	60
PROSECUTOR V VUJADIN POPOVIĆ ET AL. (IT-05-88)	62
PROSECUTOR V ZDRAVKO TOLIMIR (IT-05-88/2)	63
INTERCEPTED COMMUNICATION (INTERCEPTS)	67
PROSECUTOR V DOMINIC ONGWEN (ICC-02/04-01/15)	67
PROSECUTOR V JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BALANA WANDU AND NARCISSA ARIDO (ICC-01/05-01/13).....	72
PROSECUTOR V RADISLAV KRSTIC (IT-98-33).....	79
PROSECUTOR V DRAGAN JOKIĆ (IT-02-60-T).....	82
PROSECUTOR V VUJADIN POPOVIĆ ET AL. (IT-05-88)	86
PROSECUTOR V. ZDRAVKO TOLIMIR (IT-05-88/2)	88
PROSECUTOR V ÉDOUARD KAREMERA, MATTHIEU NGRUMPATSE AND JOSEPH NZIRORERA (ICTR-98-44-T).....	91

CALL DATA RECORDS	95
PROSECUTOR V. SALIM JAMIL AYYASH ET AL. (STL-11-01)	95
PROSECUTOR V. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD (ICC-01/12-01/18)	100
PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO (ICC-01/05-01/08)	102
VISUAL AIDS	105
PROSECUTOR V. DOMINIC ONGWEN (ICC-02/04-01/15)	105
PROSECUTOR V. GERMAIN KATANGA AND MATHIEU NGUDJOLO CHUI (ICC-01/04-01/07).....	106
AUDIO RECORDINGS	109
PROSECUTOR V. JEAN-PIERRE BEMBA GOMBO (ICC-01/05-01/08)	109
PROSECUTOR V THARCISSE RENZAHO (ICTR-97-31).....	112
PROSECUTOR V. CHARLES GHANKAY TAYLOR (SCSL-03-01).....	115

VIDEOS



VIDEOS

International Criminal Court (ICC)

Prosecutor v. Laurent Gbagbo and Charles Blé Goudé (ICC-02/11-01/15)

PRE-TRIAL

#authenticity #relevance #chainofcustody

EXTRAPOLATION

- As much forensic and other material evidence as possible should be made available to the Court.¹
- Evidence should be duly authenticated and have a clear and unbroken chain of custody.²

⊗ The arguments of the Prosecution

1. A witness provided a video that “was filmed in Kenya and claimed it showed a massacre in Yopougon [Côte d’Ivoire] by agents of the LMP [La Majorité Présidentielle]”.³ The Prosecution stated that the witness “clearly explained that he did not film the video himself but, received it from someone else who had told him that it was filmed in Yopougon. The authenticity of this video therefore has no bearing on the credibility of this witness and on the probative value of the rest of his evidence”.⁴

⊗ The arguments of the Defence

2. 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”.⁵

3. Defence Counsel argued that the source of most of the evidence produced by the Prosecution lacked clarity.⁶ The counsel argued that several videos came from unidentified sources and “one can only wonder whether those video clips were actually filmed in Côte d’Ivoire”.⁷ The Defence “pointed out that most of the video clips presented by the Prosecutor (...), are results of a montage

¹ *Prosecutor v. Laurent 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, P-T. Ch. I, 3 June 2013, at 13, para. 27.

² *Prosecutor v. Laurent 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, P-T. Ch. I, 3 June 2013, at 13, para. 27.

³ *Prosecutor v. Laurent Gbagbo*, Public Redacted Version with Annex A of “Prosecution’s submission on issues discussed during the Confirmation Hearing,” ICC-02/11-01/11-420-Red, P-T. Ch. I, 21 March 2013, at 12, para. 25.

⁴ *Prosecutor v. Laurent Gbagbo*, Public Redacted Version with Annex A of “Prosecution’s submission on issues discussed during the Confirmation Hearing,” ICC-02/11-01/11-420-Red, P-T. Ch. I, 21 March 2013, at 12, para. 25.

⁵ *Prosecutor v. Laurent Gbagbo*, Transcript, ICC-02/11-01/11-T-18-Red-ENG, P-T. Ch. I, 25 February 2013, at 31, lines 9-12.

⁶ *Prosecutor v. Laurent Gbagbo*, Transcript, ICC-02/11-01/11-T-18-Red-ENG, P-T. Ch. I, 25 February 2013, at 32, lines 17-20.

⁷ *Prosecutor v. Laurent Gbagbo*, Transcript, ICC-02/11-01/11-T-18-Red-ENG, P-T. Ch. I, 25 February 2013, at 32, lines 10-11.

and the Prosecutor does not seem to have subjected that footage to expert review, thereby leaving the door open to all sorts of manipulation”.⁸

4. The Defence argued that the witness was not credible because he provided to the Prosecutor “a video that was filmed in Kenya and he claimed that this was a massacre perpetrated in Yopougon by agents of the LMP”.⁹

⊗ **The Court’s Response**

5. The Court did not deal specifically with issues of video admissibility, but rather made comments on its approach to evidence submitted by the parties.¹⁰

6. 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”.¹¹

7. However, the Court did consider “it useful to express its general disposition towards certain types of evidence.”¹² It 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”.¹³

TRIAL

#experttestimony #chainofcustody

EXTRAPOLATION

- **An expert may be asked (by a party to the proceedings) to explain his or her methodology for assessing DDE referred to in their report.**¹⁴
- **An expert 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.**¹⁵
- **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.**¹⁶

⁸ *Prosecutor v. Laurent Gbagbo*, Transcript, ICC-02/11-01/11-T-18-Red-ENG, P-T. Ch. I, 25 February 2013, at 32, lines 18-21.

⁹ *Prosecutor v. Laurent Gbagbo*, Transcript, ICC-02/11-01/11-T-18-Red-ENG, P-T. Ch. I, 25 February 2013, at 34, lines 20-25.

¹⁰ *Prosecutor v. Laurent 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, P-T. Ch. I, 3 June 2013, at 12, paras. 25-35.

¹¹ *Prosecutor v. Laurent 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, P-T. Ch. I, 3 June 2013, at 13, para. 26.

¹² *Prosecutor v. Laurent 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, P-T. Ch. I, 3 June 2013, at 13, para. 26.

¹³ *Prosecutor v. Laurent 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, P-T. Ch. I, 3 June 2013, at 13, para. 27.

¹⁴ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 14, lines 7-11.

¹⁵ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 14, lines 7-14.

¹⁶ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquiescement portant sur toutes les charges soit prononcé

⊗ The arguments of the Prosecution

1. An expert was provided with several documents from the Office of the Prosecutor (“OTP”) to prepare his report. These documents related to the death of Mr. Diakite Yaya and included an external examination Report and a forensic Report prepared by two doctors, a funeral document, a video, and a witness statement.¹⁷ The Prosecution asked the expert to explain how he proceeded when he assessed these documents.¹⁸ The expert explained that he first “had to view the video to see, without being influenced by what other forensic experts had said, or the report of the witness's interview.”¹⁹ When he did so he became “immediately aware of the fact that only part of the video contained what one could see of the victim [Mr Yaya], and when it came to the trauma and injury, which was captured on the video.”²⁰ Secondly, he had taken the components of the video apart, “picture by picture and compared them with the description of the injury [described] in two [forensic] reports” that were provided to him.²¹

2. The Prosecution requested that “the report and the documents having been referred to by the expert [including the video] be produced into evidence”.²² It noted 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 during the hearing.²³

⊗ The arguments of the Defence

3. Counsel 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 in evidence.²⁴

⊗ The Court’s Response

4. The Court agreed with the Prosecution that it was not necessary to show the documents, including the video, to the witness during the hearing and said “We will not waste time. It’s okay, they’re in.”²⁵

5. Additionally, the Chambers did not make an evaluation on each individual DDE, but it did make general comments on expert witnesses and evidence tendered through them.

6. Judge Cuno Tarfusser 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

en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, Opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-1263-AnxA, T. Ch. I, 16 July 2019, at 24, para. 35.

¹⁷ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017 at 13, lines 17-18; at 14, lines 3-4.

¹⁸ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017 at 14, lines 4-5.

¹⁹ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 14, lines 7-11.

²⁰ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 14, lines 7-11.

²¹ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 14, lines 7-14.

²² *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 18, lines 8-12.

²³ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 18, lines 20-22.

²⁴ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017 at 18, lines 16-19.

²⁵ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 18, lines 23-14.

content and the quality of the material, as well as its relevance to the issue at stake.”²⁶ Judge Tarfusser further commented on the experts’ “irredeemable unsuitability to meaningfully contribute to the trial by way of compelling conclusions which would be of any use to the Chamber.”²⁷

Prosecutor v. Jean-Pierre Bemba Gombo (ICC-01/05-01/08)

PRE-TRIAL

#probativevalue #objectivity #reliability

EXTRAPOLATION

- **Interviews captured in a video, such as those conducted during an armed conflict by a party to the conflict, may not be objective or reliable should receive low probative value.**²⁸

⊗ The arguments of the Prosecution

1. The Prosecution submitted that “there are no details identifying who produced the video clip, how interviewees were selected, or other conditions surrounding the content of the interviewee’s statements”.²⁹ The Prosecution limited its submissions to argue that “the video clip is not inconsistent with the Prosecution’s case. (...) The fact that this interviewee speculates that the ‘anti-MLC’ [Mouvement de Libération du Congo] segment of the CAR population may have been supporters of the rebels, is consistent with the Prosecution’s theory that the MLC systematically victimised civilians who were perceived to be sympathetic to Bozize’s rebels”.³⁰ The Prosecution did not comment on the fact that the video was produced by the MLC troops.

⊗ The arguments of the Defence

2. During the confirmation hearing, the Defence presented a video [video produced by the MLC troops interviewing people in Sibut; interviewees claim MLC was freeing CAR population from Bozize’s troops³¹] as exculpatory evidence. The Defence argued that although the video was made by the MLC, there are no signs of intimidation or coercion.³² It further argued that the “statements

²⁶ *Prosecutor v. Laurent Gbagbo and Charles 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, Opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-1263-AnxA, T. Ch. I, 16 July 2019, at 24, para. 35.

²⁷ *Prosecutor v. Laurent Gbagbo and Charles 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, Opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-1263-AnxA, T. Ch. I, 16 July 2019, at 25, para. 36.

²⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, P-T. Ch. II, 15 June 2009, at 25-36, para. 104.

²⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution’s Written Submissions Regarding the Confirmation Hearing Held On 12-15 January 2009, ICC-01/05-01/08-377, P-T. Ch. III, 26 January 2009, at 10, para. 31.

³⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution’s Written Submissions Regarding the Confirmation Hearing Held On 12-15 January 2009, ICC-01/05-01/08-377, P-T. Ch. III, 26 January 2009, at 10, para. 32.

³¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, Pre-Trial Ch. II, 15 June 2009, at 35, para. 102.

³² *Prosecutor v. Jean-Pierre Bemba Gombo*, Transcript Confirmation Hearing, ICC-01/05-01/08-T-12-ENG WT, T. Ch. III, 15 January 2009, at 135, lines 13-22.

[of the interviewees] that have been recorded are hardly consistent with a population that is being hounded and hunted by so-called Bemba's men. They are welcoming the assistance of the MLC to support the government that they themselves elected".³³ Thus, the Defence concluded that "in assessing the overall veracity and credibility of the Prosecution evidence, when weighing it with evidence, which is fundamentally and irreconcilably contradictory" the Chamber should bear in mind these facts.³⁴

⊗ **The Court's Response**

3. The Chamber concluded that a "low probative value should be attached" to the video.³⁵ 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".³⁶ 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".³⁷ It concluded that "a low probative value should be attached to this video-based evidence".³⁸

TRIAL

**#relevance #probativevalue #prejudice #authenticity #reliability #integrity
#origin**

EXTRAPOLATION

- **A video of a broadcaster that displays elements such as the date of emission, a logo of the TV programme, and the image and voice of the interviewee with no interruptions, bears sufficient indicia of reliability, originality and integrity.**³⁹

⊗ **The arguments of the Prosecution**

1. The Prosecution argued that the video [a recording of a program called "A Coeur Ouvert" containing an interview of Mr Olivier Kamitatu, MLC Secretary General] "is relevant and has

³³ Prosecutor v. Jean-Pierre Bemba Gombo, Transcript Confirmation Hearing, ICC-01/05-01/08-T-12-ENG WT, T. Ch. III, 15 January 2009, at 136, lines 20-24.

³⁴ Prosecutor v. Jean-Pierre Bemba Gombo, Transcript Confirmation Hearing, ICC-01/05-01/08-T-12-ENG WT, T. Ch. III, 15 January 2009, at 135, lines 13-22; and at 136, lines 1-3.

³⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, P-T. Ch. II, 15 June 2009, at 36, para. 104.

³⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, P-T. Ch. II, 15 June 2009, at 25-36, para. 104.

³⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, P-T. Ch. II, 15 June 2009, at 25-36, para. 104.

³⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, P-T. Ch. II, 15 June 2009, at 25-36, para. 104.

³⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 8 October 2012, at 41, para. 81.

probative value to demonstrate, inter alia, the Accused's knowledge of the crimes committed in CAR".⁴⁰

⊗ **The arguments of the Defence**

2. Defence argued that "the video is relevant to and probative of many aspects of the defence case."⁴¹ The Defence did not dispute the authenticity of the video, nor did it allege that its admission may be prejudicial to the defence.⁴²

⊗ **The Court's Response**

3. The video was admitted.⁴³ The Chamber held that the video bears "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."⁴⁴ "The Chamber is of the view that there is no reason to believe that the admission of the video recording will have a prejudicial effect on a fair trial".⁴⁵

Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06)

PRE-TRIAL

#translation #disclosureofvideos

EXTRAPOLATION

- **Videos should be translated into one of the working languages of the Court at the time of the commencement of the confirmation hearing and should be made available to the Chamber and opposing Party.⁴⁶**

⊗ **The arguments of the Prosecution**

1. The Prosecution stated 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

⁴⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, Annex A to the Prosecution's application for admission of materials into evidence pursuant to Article 64(9) of the Rome Statute, ICC-01/05-01/08-2147-AnxA-Red, T. Ch. III, 28 February 2012, at. 5.

⁴¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 8 October 2012, at 40, para. 80.

⁴² *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 8 October 2012, at 41, para. 81.

⁴³ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 8 October 2012, at 41, para. 81.

⁴⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 8 October 2012, at 41, para. 81.

⁴⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 8 October 2012, at 41, para. 81.

⁴⁶ *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, P-T. Ch. I, 7 November 2006, at 3.

otherwise provided in the Statute”⁴⁷ does not apply to the disclosure obligation in Article 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”.⁴⁸

⊗ **The arguments of the Defence**

2. The Defence argued that “all video material disclosed by the Prosecution, the original form of which is in whole or in part in a language other than English or French, and for which a translation into English or French was not disclosed to the Defence prior to the 9 October 2006 [disclosure] deadline, be excluded from the evidence on which the Prosecution can rely at the confirmation hearing”.⁴⁹

⊗ **The Court’s Response**

3. “Considering that pursuant to Article 61(3) of the Rome Statute, within a reasonable time before the hearing, Thomas Lubanga Dyilo must be provided with a copy of a document containing the charges on which the Prosecutor intends to bring him to trial and be informed of the evidence on which the Prosecutor intends to rely at the confirmation hearing; and that, pursuant to Article 67(1) of the Statute, in the determination of any charge, Thomas Lubanga Dyilo is inter alia entitled to be informed promptly and in detail of the nature, cause and content of the charge, in a language which he fully understands and speaks”.⁵⁰

4. The single judge noted that “the material was transmitted to Defence [...] and that Thomas Lubanga Dyilo fully understands and speaks Swahili [the language the documents were transmitted in].”⁵¹

5. “Considering, however, that under 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 on which the parties intend to rely at the hearing; and considering, therefore, that pursuant to Article 69(4) of the Statute, video excerpts (i) which are not translated into one of the working language of the Court by 9 November 2006 [...] and (ii) whose translation is not made available to the Chamber and the Defence by that time must be declared inadmissible”.⁵²

⁴⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Response to the Defence “Request to exclude video evidence which has not been disclosed in one of the working languages,” ICC-01/04-01/06-662, P-T. Ch. I, 6 November 2006, at 4, para. 11.

⁴⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Response to the Defence “Request to exclude video evidence which has not been disclosed in one of the working languages,” ICC-01/04-01/06-662, P-T. Ch. I, 6 November 2006, at 3, para. 5.

⁴⁹ *Prosecutor v. Thomas 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, P-T. Ch. I, 02 November 2006, at 4, para. 1.

⁵⁰ *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, P-T. Ch. I, 7 November 2006, at 3.

⁵¹ *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, P-T. Ch. I, 7 November 2006, at 3.

⁵² *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, P-T. Ch. I, 7 November 2006, at 3.

TRIAL

#lonevideo #corroboration #content

EXTRAPOLATION

- **The Court can make an inference from the content of the video to the extent the video leads to a definite finding.⁵³**

⊗ **The arguments of the Prosecution**

1. The Prosecution relied “on a number of video excerpts to establish that some of the UPC [Union of Congolese Patriots]/FPLC [Patriotic Forces for the Liberation of Congo] recruits were ‘visibly’ under the age of 15.”⁵⁴

⊗ **The arguments of the Defence**

2. The Defence objected by stating that “it is impossible to distinguish reliably between a 12- or 13-year-old and a 15- or 16-year-old on the basis of a photograph or video extract alone.”⁵⁵

⊗ **The Court’s Response**

3. “Given the undoubted differences in personal perception as regards estimates of age and, most particularly in the context of this case, the difficulties in distinguishing between young people who are relatively close to the age of 15 (whether above or below), the Chamber has exercised caution when considering this evidence. Even allowing for a wide margin of error in assessing an individual’s age, the Chamber has concluded that it is feasible for non-expert witnesses to differentiate between a child who is undoubtedly less than 15 years old and a child who is undoubtedly over 15.”⁵⁶

4. “The Chamber accepts that for many of the young soldiers shown in the video excerpts, it is often very difficult to determine whether they are above or below the age of 15.”⁵⁷ However, the Chamber also “observes that there are children who could be under the age of 15 but they appear too briefly [in a video] to enable a definite finding.”⁵⁸ “Instead, the Chamber has relied on video evidence in this context only to the extent that they depict children who are clearly under the age of 15.”⁵⁹

⁵³ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 377, fn. 2432.

⁵⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 292, para. 644.

⁵⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 292, para. 644; See also *Prosecutor v. Thomas Lubanga Dyilo*, Closing submissions of the Defence, ICC-01/04-01/06-2773-Red-tENG, T. Ch. I, 15 July 2011, at 221, para. 704.

⁵⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 292, para. 643.

⁵⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 292, para. 644.

⁵⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 377, fn. 2432.

⁵⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 292, para. 644.

APPEAL

#corroboration#reliability

EXTRAPOLATION

- There is no strict legal requirement for a video to be corroborated by other evidence for the Court to be able to rely on the video and establish a specific fact.⁶⁰
- Video images may be relied upon to establish the age of a person depicted therein beyond a reasonable doubt.⁶¹

⊗ The arguments of the Prosecution

1. The Prosecutor argues that the Trial Chamber did not err when it accepted video excerpts as evidence of the presence of child soldiers.⁶² The Prosecutor argued that the approach of the Trial Chamber was reasonable because the Trial Chamber “was fully entitled to evaluate the videos and reach reasonable conclusions as to the age of the persons depicted on them”⁶³ and that the Trial Chamber itself noted that it had “exercised caution when considering this evidence.”⁶⁴

2. The Prosecution asserted that video images are routinely admitted as evidence in international tribunals because “the video footage contained therein will usually speak for itself”.⁶⁵ Judges in national jurisdictions have considered video evidence to be at least as reliable as eyewitness testimony. Testimony from lay witnesses is appropriate to assess age.⁶⁶ Accordingly, the Prosecution argued that there seemed to have been no obvious error in the Trial Chamber’s reasoning on the age of the child soldiers in the videos.⁶⁷

⊗ The arguments of the Defence

3. Mr Lubanga argued that it was unreasonable for the Trial Chamber to assess the age of individuals on the basis of video excerpts.⁶⁸ The Defence stated that the video did not “allow discernment of the individual’s facial features, precluding any verification in that regard,”⁶⁹ thus,

⁶⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 81, para. 218.

⁶¹ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 83, para. 222.

⁶² *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 73, para. 193.

⁶³ *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74, ICC-01/04-01/06-2969-Red, A. Ch., 18 February 2013, at 70, para. 162.

⁶⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74, ICC-01/04-01/06-2969-Red, A. Ch., 18 February 2013, at 73, para. 165.

⁶⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74, ICC-01/04-01/06-2969-Red, A. Ch., 18 February 2013, at 70-71, para. 162.

⁶⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74, ICC-01/04-01/06-2969-Red, A. Ch., 18 February 2013, at 72, para. 163.

⁶⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74, ICC-01/04-01/06-2969-Red, A. Ch., 18 February 2013, at 73, para. 164.

⁶⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Requête de la Défense aux fins de présentation d’éléments de preuve supplémentaires dans le cadre des appels à l’encontre du « Jugement rendu en application de l’Article 74: du Statut » et de la « Décision relative à la peine, rendue en application de l’article 76 du Statut », ICC-01/04-01/06-2942-Red, A. Ch., 21 November 2012, paras 7-12, 19; *Prosecutor v. Thomas Lubanga Dyilo*, Transcript, ICC-01/04-01/06-T-363-Red-ENG (WT), A. Ch., 20 May 2014, at 6, line 10, to 8, line 25.

⁶⁹ *Prosecutor v. Thomas 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, A. Ch., 17 October 2014, at 51, para. 184; at 52, para. 186.

“the Chamber manifestly misjudged the video excerpts it accepted as establishing the presence of child soldiers under the age of 15.”⁷⁰

⊗ The Court’s Response

4. The Appeals Chamber found that “it is not *per se* impermissible to make a finding on the age element of the crimes in circumstances where the identity of the victim is unknown.”⁷¹

5. The Appeals Chamber confirms that “there is no strict legal requirement that the video excerpts had to be corroborated by other evidence in order for the Trial Chamber to be able to rely on them. Depending on the circumstances, a single piece of evidence, such as a video image of a person, may suffice to establish a specific fact.”⁷²

6. In relation to the Prosecution’s argument that video evidence “speaks for itself”, the Appeal Chamber held that “[i]t is not generally at issue that video images may be relied upon to establish facts. Rather, the question is whether video images may be relied upon to establish the *age* of the individuals beyond reasonable doubt.”⁷³

7. Additionally, the Appeal Chamber confirmed “the Trial Chamber was indeed aware of the limitations of determining age on the basis of physical appearance, including video images, and expressed caution with regard to age assessment on that basis. It found, in relation to several individuals depicted in the video excerpts, that it was not convinced that they were under the age of fifteen years. Only with respect to a limited number of video excerpts did it conclude that certain individuals depicted therein were under the age of fifteen years. The Appeals Chamber notes that the Trial Chamber indicated that it applied a large margin of error and made findings as to the age of the children only where the children were, in its assessment, “clearly” under the age of fifteen years. The Appeals Chamber considers that such an approach is not unreasonable”.⁷⁴

⁷⁰ *Prosecutor v. Thomas 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, A. Ch., 17 October 2014, at 52, para. 188.

⁷¹ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 73, para. 197.

⁷² *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 81, para. 218.

⁷³ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 82, para. 219.

⁷⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 83, para. 222.

TRIAL

#relevance #probativevalue #prejudice

[N.B. same reasoning for photographs and satellite images]

EXTRAPOLATION

- **When a guilty plea is entered at the pre-trial stage, the Trial Chamber must determine if the evidence submitted and agreed upon by the parties, including any DDE, assists in independently “determining the facts of the case” as required under Article 65(1)(c)(ii) of the Rome Statute.⁷⁵**
- **When deliberating on whether to convict the accused, the Trial Chamber will consider the relevance, probative value, and potential prejudice of evidence, such as DDE, along with any live testimony heard.⁷⁶**

⊗ The arguments of the Prosecution

1. 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”.⁷⁷

⊗ The arguments of the Defence

2. The Defence did not challenge the admissibility of the DDE.⁷⁸

⊗ The Court’s Response

3. During the Directions on the Conduct of the Proceedings, the Presiding Judge stated that it was “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”.⁷⁹ The Judge went on to state: “The Chamber will consider the relevance, probative value, and potential prejudice of evidence, along with testimony of the three

⁷⁵ *Prosecutor v. Admad Al Faqi Al Mahdi*, Judgement and Sentence, ICC-01/12-01/15-171, T. Ch. VIII, 27 September 2016, at 15, paras 29, 44.

⁷⁶ *Prosecutor v. Admad Al Faqi Al Mahdi*, Direction on the conduct of the proceedings, ICC-01/12-01/15-136, T. Ch. VIII, 22 July 2016, at 8, para. 16.

⁷⁷ *Prosecutor v. Admad Al Faqi Al Mahdi*, Transcript Trial Hearing, ICC-01/12-01/15-T-4-Red-ENG, T. Ch. VIII, 22 August 2016, at 41, lines 4-12.

⁷⁸ *Prosecutor v. Admad Al Faqi Al Mahdi*, Transcript Trial Hearing, ICC-01/12-01/15-T-4-Red-ENG, T. Ch. VIII, 22 August 2016, at 41, line 11.

⁷⁹ *Prosecutor v. Admad Al Faqi Al Mahdi*, Direction on the conduct of the proceedings, ICC-01/12-01/15-136, T. Ch. VIII, 22 July 2016, at 8, para. 16.

Prosecution witnesses, in deliberating whether to convict the accused pursuant to Article 65(2) of the Statute”.⁸⁰

4. In the judgment, several pieces of evidence, including video, were used to determine the “established facts of the case” and whether the accused's admission of guilt was supported by those established facts.⁸¹

5. The Trial Chamber 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.”⁸²

6. In particular, the Chamber emphasised that “the Agreement [between the Defence and the OTP] and Mr Al Mahdi’s admissions to be both credible and reliable in full. Mr Al Mahdi went into extensive detail 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.”⁸³

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

TRIAL

#transcripts #translations

EXTRAPOLATION

- **When a video has been formally submitted, any transcripts and translations of that video may be also considered as formally submitted irrespective of whether the transcripts or translations were on the list of evidence formally submitted.**⁸⁴

⊗ The arguments of the Prosecution

1. On 27 November 2015, the Office of the Prosecutor filed its fifth bar table request seeking to admit 108 items into evidence,⁸⁵ including “open-source video-clips obtained on the internet of

⁸⁰ *Prosecutor v. Admad Al Faqi Al Mahdi*, Direction on the conduct of the proceedings, ICC-01/12-01/15-136, T. Ch. VIII, 22 July 2016, at 8, para. 16.

⁸¹ *Prosecutor v. Admad Al Faqi Al Mahdi*, Judgement and Sentence, ICC-01/12-01/15-171, T. Ch. VIII, 27 September 2016, at 15, para. 29; at 26, para. 44.

⁸² *Prosecutor v. Admad Al Faqi Al Mahdi*, Judgement and Sentence, ICC-01/12-01/15-171, T. Ch. VIII, 27 September 2016, at 15, para. 29.

⁸³ *Prosecutor v. Admad Al Faqi Al Mahdi*, Judgement and Sentence, ICC-01/12-01/15-171, T. Ch. VIII, 27 September 2016, at 26, para. 44.

⁸⁴ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on “Prosecution’s fifth request for the admission of evidence from the bar table,” ICC-01/05-01/13-1524, T. Ch. VII, 14 December 2015, at 5, para. 7.

⁸⁵ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Public redacted version of the “Prosecution’s fifth request for the admission of evidence from the bar table,” of 27 November 2015, ICC-01/05-01/13-1498-Red, T. Ch. VII, 30 November 2015, at 3, para. 1.

interviews by Babala and Kilolo with various media outlets before and after their release from detention.”⁸⁶ No particular considerations regarding DDE were made.

⊗ **The arguments of the Defence**

2. “Both the Bemba and Babala Defence object to five items being formally submitted on grounds that the Prosecution did not include them in its list of evidence. Four of these items are annexes to an independent counsel report, and the fifth is a transcript of a video (the video itself is on the list of evidence, but the transcript is not).”⁸⁷

⊗ **The Court’s Response**

3. The Chamber recognized the formal submission of the video transcript. ⁸⁸

4. The Chamber found: “given that the video concerned was indicated on the list of evidence, the defence was given ample notice that the video itself may be submitted during the trial and no prejudice is caused by considering the transcript once the video is recognised as formally submitted. 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.”⁸⁹

5. It reasoned that “it would be unduly formalistic to recognize the submission of a video but not a written record designed to faithfully reflect its contents for better comprehension.”⁹⁰

⁸⁶ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Public redacted version of the “Prosecution’s fifth request for the admission of evidence from the bar table,” of 27 November 2015, ICC-01/05-01/13-1498-Red, T. Ch. VII, 30 November 2015, at 14, para. 36.

⁸⁷ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on “Prosecution’s fifth request for the admission of evidence from the bar table,” ICC-01/05-01/13-1524, T. Ch. VII, 14 December 2015, at 4, para. 4.

⁸⁸ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on “Prosecution’s fifth request for the admission of evidence from the bar table,” ICC-01/05-01/13-1524, T. Ch. VII, 14 December 2015, at 5, para. 7.

⁸⁹ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on “Prosecution’s fifth request for the admission of evidence from the bar table,” ICC-01/05-01/13-1524, T. Ch. VII, 14 December 2015, at 5, para. 7.

⁹⁰ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on “Prosecution’s fifth request for the admission of evidence from the bar table,” ICC-01/05-01/13-1524, T. Ch. VII, 14 December 2015, at 5, para. 7.

TRIAL

#excerpt #transcript #translation #date

EXTRAPOLATION

- **Instead of video excerpts, a video should be submitted in its entirety to assist the Court in contextualising the portions of the video that have been identified by the tendering Party as most relevant.⁹¹**
- **Video should be submitted with a full transcript and a translation. Depending on the stage of the proceedings, the Court may order the Registry to prepare a full transcript and/or a translation.⁹²**
- **The late transcription and/or a translation of a document may have no bearing on the treatment of the evidence.⁹³**
- **(Evidence 1) In response to a party tendering a video, an opposing party may tender the additional excerpts to assist the Court in contextualizing the portions sought to be admitted.⁹⁴**
- **(Evidence 2) The tendering party should sufficiently demonstrate that the proposed evidence is unique and goes beyond other evidence on the record to be admitted.⁹⁵**
- **(Evidence 3) When a witness appears on a video that the party intends to tender into evidence, the relevant video (or excerpts) should be tendered through the witness during the examination-in-chief and not through the bar table. Given the length of videos, the Court may grant additional time for the examination-in-chief of a witness.⁹⁶**
- **The reliability of a video may be proven through a witness who commented on the video.⁹⁷**
- **If a party wishes to present a video to a witness, it must establish that the witness has personal knowledge of the making of the recording or its contents**

⁹¹ *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 8, para. 10.

⁹² *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 8, para. 10.

⁹³ *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 8, para. 10.

⁹⁴ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 7-8, para. 15.

⁹⁵ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 10, para. 21.

⁹⁶ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 12, para. 23.

⁹⁷ *Prosecutor v. Bosco 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, T. Ch. VI, 24 February 2017, at 11, paras 24-25.

by playing a brief excerpt of the video to the extent strictly necessary for the witness to confirm his/her personal knowledge of it.⁹⁸

- A video will not be considered for the truth of its contents unless it is admitted into evidence, even if the video was presented to the witness.⁹⁹
- The party seeking admission should provide “substantiation of the time when the video is supposed to have been shot.”¹⁰⁰ If the party fails to do so, the video may be considered of low probative value and thus may be outweighed by the prejudice that admission of the video would cause, resulting in the video being deemed inadmissible.¹⁰¹

⊗ The arguments of the Prosecution

1. On the Defence’s request to admit into evidence seven excerpts of a video, “the Prosecution argues 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.”¹⁰²
2. On the Defence’s request to admit into evidence videos during the sentencing proceedings:
3. Evidence 1: “While not opposing the admission of the excerpts proposed by the Defence, the Prosecution requests that, should the Chamber admit them into evidence, it should also grant the admission of two extensions of two of the excerpts, so that the Chamber can properly evaluate the nature of the event depicted therein and the related Defence submissions. The Prosecution specifically submits that the further proposed excerpts illustrate the reason for the presence of Lendu leaders at the event depicted in the video.”¹⁰³
4. Evidence 2: “The Prosecution avers that the event depicted in the video has already been extensively dealt with during Mr Ntaganda’s testimony as well as in the Defence’s closing brief and that the Defence has already presented extensive evidence on – and the Chamber made factual findings in relation to – the UPC’s policy with respect to peace and ethnic reconciliation.”¹⁰⁴
5. Evidence 3: “The Prosecution argues that the Defence’s request should be rejected *in limine*, as the Chamber already ruled that the excerpts are to be tendered during the allocated time for examination-in-chief of D-0305 and D-0306.”¹⁰⁵

⁹⁸ *Prosecutor v. Bosco Ntaganda*, Decision on the conduct of proceedings, ICC-01/04-02/06-619, T. Ch. VI, 2 June 2015, at 19, para. 56.

⁹⁹ *Prosecutor v. Bosco Ntaganda*, Decision on the conduct of proceedings, ICC-01/04-02/06-619, T. Ch. VI, 2 June 2015, at 19, para. 56.

¹⁰⁰ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, 28 March 2017, at 29, para. 63.

¹⁰¹ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, 28 March 2017, at 29, para. 63.

¹⁰² *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 7-8, para. 10, citing *Prosecutor v. Bosco Ntaganda*, Prosecution response to the “Second Defence request for the admission of evidence from the bar table”, ICC-01/04-02/06-2223-Conf, T. Ch. VI, 12 February 2018, paras. 18-19; and ICC-01/04-02/06-2208-Conf-AnxA, at 7-15.

¹⁰³ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 7, para. 14.

¹⁰⁴ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 10, para. 20.

¹⁰⁵ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 10, para. 22.

6. “The Prosecution also avers that the Sketch, Document and Videos used with the Witness during his [REDACTED] are sufficiently reliable for admission in the Ntaganda case as the Witness authenticated and provided further information about them.”¹⁰⁶

7. The Prosecution sought admission of three audio/visual recordings [two of them are videos: DRC-OTP-0159-0441 is a video reportage on the presence of alleged child soldiers in Ituri; DRC-OTP-0082-0016 is a 1 hour 41-minute-long video of, at time stamps 00:02:58 to 00:47:20, Mandro training camp purporting to show Chief Kahwa, Commander Kisembo and the accused].¹⁰⁷

⊗ The arguments of the Defence

8. “On 5 February 2018, the defence team for Mr Ntaganda filed a request for the admission into evidence of 20 items from the bar table (‘Request’). It submits that the documents, which largely address events that are contextual, are prima facie reliable and probative of relevant facts.”¹⁰⁸ “Seven excerpts of Document 8, DRC-OTP-1002-0014 [a video], are submitted together with their corresponding transcript and translation, Document 9, DRC-D18-0001-6623. The Defence avers that these excerpts are footage partly broadcast in June 2003 which provide context to the security situation in and around Bunia following the arrival of the Artémis forces.”¹⁰⁹

9. The Defence also sought the admission into evidence of videos during the sentencing proceedings:

10. Evidence 1: “The Defence tendered into evidence four excerpts of video DRC-OTP-0127-0064 citing together with their related transcriptions DRC-OTP-0165-027626 and translations DRC-OTP-0165-0349. The Defence submits that the video depicts a ceremony during which ranks were given out to FPLC soldiers in the presence of FNI [Front des nationalistes et intégrationnistes] and Lendu community leaders and related events in Katoto and is illustrative of Mr Ntaganda’s efforts to reach out to the Lendu community and to promote reconciliation.”¹¹⁰

11. Evidence 2: “The Defence tenders into evidence two excerpts of video DRC-D18-0001-0425, a press conference following the signing of the cessez le feu agreement between the UPC and the RCDGoma dated February 2003, together with their related translations. It submits that the speech by Thomas Lubanga depicted therein, given in Mr Ntaganda’s presence, demonstrates the UPC/FPLC’s efforts towards peace and reconciliation with all communities.”¹¹¹

12. Evidence 3: “The Defence tenders into evidence four excerpts of video DRC-D18-0001-043657 and five excerpts of video DRC-OTP-0118-000258 and their related transcriptions and translations. It submits the videos, depicting a ceremony in Largu in 2004 (...) which demonstrates Mr Ntaganda’s successful efforts to (...) promote reconciliation. The Defence further notes that,

¹⁰⁶ *Prosecutor v. Bosco 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, T. Ch. VI, 24 February 2017, at 8, para. 19.

¹⁰⁷ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, T. Ch. VI, 28 March 2017, at 29, para. 62.

¹⁰⁸ *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 3, para. 11, , citing *Prosecutor v. Bosco Ntaganda*, Second Defence Request for the admission of evidence from the bar table, ICC-01/04-02/06-2208-Conf, T. Ch. VI, 5 February 2018, paras. 16-17; and its confidential Annex A (ICC-01/04-02/06-2208-Conf-AnxA).

¹⁰⁹ *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 7, para. 10, citing *Prosecutor v. Bosco Ntaganda*, Second Defence Request for the admission of evidence from the bar table, ICC-01/04-02/06-2208-Conf, T. Ch. VI, 5 February 2018, paras. 16-17; and its confidential Annex A (ICC-01/04-02/06-2208-Conf-AnxA), at 7-8.

¹¹⁰ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 7, para. 14.

¹¹¹ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 10, para. 20.

considering that Witnesses D-0305 and D-0306 were present during the event depicted on the videos, they could be understood as related to these videos; however, in the interests of efficiency, it requests that it be permitted to tender the proposed excerpts from the bar table, on the understanding that some portions of the videos will be shown to the witnesses during their examination-in-chief.¹¹²

13. The Defence also submitted that the Prosecution’s Materials (Sketch, Document and Videos) used with a Witness “lack sufficient indicia of reliability and as such, ought not to be admitted under Rule 68(2)(c) of the Rules.”¹¹³

14. Furthermore, the Defence objected to the submission by the Prosecution of three audio/visual recordings “on grounds including that they contain factual information prejudicial to the accused which outweighs any probative value.”¹¹⁴

⊗ The Court’s Response

15. On the Defence’s request to admit into evidence seven excerpts of a video, “the Chamber considers 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. The Chamber further finds this video to be prima facie relevant, considers that it has probative value, and is satisfied that no undue prejudice arises from its admission in full. Accordingly, it admits Document 8 [video] into evidence. Under these circumstances, the Chamber finds it appropriate to be provided with a full transcription of the video and, in light of the current stage of the proceedings, instructs the Registry to prepare a transcript thereof, and/or a translation, as appropriate, which shall be admitted into evidence instead of Document 9. The Chamber therefore admits the full transcript of Document 8, (...) and, in this regard, clarifies that the remaining procedural steps identified in the disposition below [namely, the direction for the Registry to prepare a transcript and/or a translation, as appropriate, of Document 8, DRC-OTP-1002-0014] shall have no bearing on the upcoming closure of the presentation of evidence.”¹¹⁵

16. On the Defence’s request to admit videos into evidence during the sentencing proceedings:

17. Evidence 1: “In light of their content, and considering that the Prosecution does not dispute the authenticity of the video excerpts, the Chamber finds that the excerpts of video DRCOTP-0127-0064 proposed for admission into evidence by both parties are unique and go beyond other evidence on the record and are prima facie relevant to the Chamber’s assessment of Mr Ntaganda’s conduct after the events forming part of the charges. Especially as concerns issues the Defence wishes to bring to the attention of the Chamber, and considers that their probative value has been sufficiently established. The Chamber also considers that the additional excerpts proposed by the Prosecution may assist the Chamber in contextualizing the portions sought to be admitted by the Defence. Furthermore, the Chamber is satisfied that no undue prejudice would arise from their admission. Accordingly, the Chamber admits the excerpts of video DRCOTP-0127-0064 as

¹¹² *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 10-11, para. 22.

¹¹³ *Prosecutor v. Bosco 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, T. Ch. VI, 24 February 2017, at 9, para. 21.

¹¹⁴ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, 28 March 2017, at 29, para. 62.

¹¹⁵ *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 8, para. 10.

proposed by the Defence and the Prosecution and their related transcriptions and translations into evidence.”¹¹⁶

18. Evidence 2: “The Chamber considers that the Defence has not sufficiently demonstrated that the aforementioned proposed evidence is unique and goes beyond other evidence on the record. It specifically notes that, in its Judgment, the Chamber indeed dismissed arguments concerning the alleged genuineness of the message of peace and ethnic reconciliation of the UPC. In light of the foregoing, the Chamber decides not to admit the excerpts of video DRC-D18-0001-0425 tendered by the Defence and their related transcriptions and translations into evidence.”¹¹⁷

19. Evidence 3: “Considering the Defence’s submission that Witnesses D-0305 and D-0306 appear on the videos extracts of which the Defence intends to tender into evidence, the Chamber considers it more appropriate – as already indicated in its previous ruling – that the excerpts be tendered during the examination-in-chief of the aforementioned witnesses. Considering further the length of the extracts to be tendered and the procedure for having videos admitted through witnesses, the Chamber grants the Defence’s request for an additional 15 minutes for the examination-in-chief of Witnesses D-0305 and D-0306, respectively, and rejects its request for admission of the tendered excerpts of DRC-D18-0001-0436 and DRC-OTP-0118-0002 and their related transcriptions and translations from the bar table.”¹¹⁸

20. On the issue of the reliability of a video proven through a witness, the Chamber held that “the specific portions of the Videos were both used with the Witness and commented upon by him.”¹¹⁹ “In light of the above, the Chamber finds that the Materials bear sufficient indicia of reliability for the purposes of Rule 68(2)(c) of the Rules.”¹²⁰

21. The Chamber declined to admit the video reportage on the presence of alleged child soldiers in Ituri [DRC-OTP-0159-0441] considering “the Prosecution has 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, the Chamber considers the probative value of the video to be very low. The limited probative value is outweighed by the prejudice that admission of the video would cause.”¹²¹

22. On the issue of the conduct of proceedings, 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

¹¹⁶ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 7-8, para. 15.

¹¹⁷ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 10, para. 21.

¹¹⁸ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 12, para. 23.

¹¹⁹ *Prosecutor v. Bosco 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, T. Ch. VI, 24 February 2017, at 11, para. 24.

¹²⁰ *Prosecutor v. Bosco 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, T. Ch. VI, 24 February 2017, at 11, para. 25.

¹²¹ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, 28 March 2017, at 29, para. 63.

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.”¹²²

Prosecutor v. Dominic Ongwen (ICC-02/04-01/15)

TRIAL

**#corroboration #newsreport #journalism #relevance #probativevalue
#translation**

EXTRAPOLATION

- **Videos that are only partially not in a working language of the Court and are not translated can be submitted on the condition that the tendering party will later provide translation into a working language of the Court.¹²³ The access of the opposing 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.¹²⁴**

⊗ The arguments of the Prosecution

1. 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.¹²⁵ The Prosecution stated: “Evidence [including video evidence] is relevant. It contains information on the background, existence and nature of the armed conflict. The submitted items [including video] identify the LRA as an armed group involved in the conflict in Northern Uganda. They contain information on crimes perpetrated by the LRA against civilians. The items also corroborate evidence that will be presented to the Chamber by witnesses who will provide oral testimony at trial.”¹²⁶

2. According to the Prosecution, “the evidence was probative and had sufficient indicia of reliability. Items include open source materials that were created contemporaneously to the charges, at a time before International Criminal Court proceedings were contemplated. Several items were generated by local media organisations with particular knowledge of the conflict” or “by well-known media organisations with a global presence.”¹²⁷

⊗ The arguments of the Defence

3. The Defence claimed that the “descriptions of some of the contents of the videos and audios do not match the contents indicated by the Prosecution in its annex.” Thus, the Defence argued

¹²² *Prosecutor v. Bosco Ntaganda*, Decision on the conduct of proceedings, ICC-01/04-02/06-619, T. Ch. VI, 2 June 2015, at 19, para. 56.

¹²³ *Prosecutor v. Dominic Ongwen*, Decision on Defence Request regarding the Evidentiary Regime, ICC-02/04-01/15-1546, T. Ch. IX, 19 June 2019, at 3, para 1.

¹²⁴ *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 21-2, para 48.

¹²⁵ *Prosecutor v. Dominic Ongwen*, Prosecution’s request to submit 1006 items of evidence from the ‘bar table’, ICC-02/04-01/15-654, T. Ch. IX, 16 January 2017, at 8, para. 22.

¹²⁶ *Prosecutor v. Dominic Ongwen*, Prosecution’s request to submit 1006 items of evidence from the ‘bar table’, ICC-02/04-01/15-654, T. Ch. IX, 16 January 2017, at 8, para 22.

¹²⁷ *Prosecutor v. Dominic Ongwen*, Prosecution’s request to submit 1006 items of evidence from the ‘bar table’, ICC-02/04-01/15-654, T. Ch. IX, 16 January 2017, at 8-9, para 23.

that it could not “properly respond to the relevance and probative value where the material does not reflect what is purported and this prejudiced the Defence.”¹²⁸

4. The Defence argued that “news reports should be approached with caution as standards of proof for the purposes of journalism are not to the same level as for criminal trials. If the Prosecution wants to submit the accounts contained in these news reports, then it should have independently interviewed the persons concerned.” Regarding videos produced by Ugandan media sources, the Defence argued that “it must be recalled that the context was that of a conflict. The aphorism “in war the first casualty is the truth” is relevant to assessing the probative value of material generated by the news media that was protected by one party to the conflict.”¹²⁹

5. Finally, the Defence stated that “many items have been provided which lack transcripts in one of the official languages of the Court linked to the item. Neither the Chamber nor most members of Mr Ongwen’s Defence can understand the material and thereby evaluate its veracity or indeed even content.”¹³⁰

⊗ The Court’s Response

6. The Chamber stated that the “items of evidence will be recognised as formally submitted during the trial and consideration of their relevance, probative value, and potential prejudice would be deferred until the judgment.”¹³¹

7. Regarding the transcripts in one of the official languages of the Court, the Chamber noted that “several of the items the Defence points to can be understood in English.”¹³² The Chamber also noted that “much of the material the Defence points to, and which cannot be understood in English, are only partially not in a working language of the Court. In many cases, only minor intelligible portions of the materials are not translated. However, the Chamber, and the participants, must be in a position to thoroughly understand the evidence. Thus, the Chamber deems it appropriate to recognise the un-translated materials objected to by the Defence as submitted conditional on the provision of translation into a working language of the Court.”¹³³

8. Moreover, the Chamber was not convinced by the Defence’s argument that the contents do not match the Prosecution’s description, which according to the Chamber were in themselves comments on the relevance and probative value of the materials.¹³⁴ The Chamber pointed out that the 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

¹²⁸ *Prosecutor v. Dominic Ongwen*, Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” 02/04-01/15-701, with confidential Annex A and public Annexes B and C (ICC-02/04-01/15- 654), ICC-02/04-01/15-701, T. Ch. IX, 7 February 2017, at 5, para. 12.

¹²⁹ *Prosecutor v. Dominic Ongwen*, Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” 02/04-01/15-701, with confidential Annex A and public Annexes B and C (ICC-02/04-01/15- 654), ICC-02/04-01/15-701, T. Ch. IX, 7 February 2017, at 5-6, para. 13.

¹³⁰ *Prosecutor v. Dominic Ongwen*, Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” 02/04-01/15-701, with confidential Annex A and public Annexes B and C (ICC-02/04-01/15- 654), ICC-02/04-01/15-701, T. Ch. IX, 7 February 2017, at 6, para. 14.

¹³¹ *Prosecutor v. Dominic Ongwen*, Decision on Defence Request regarding the Evidentiary Regime, ICC-02/04-01/15-1546, T. Ch. IX, 19 June 2019, at 6, para 9.

¹³² *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 6, para 9.

¹³³ *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 6, para 9.

¹³⁴ *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 21-2, para 48.

Prosecution's Pre-Trial Brief and the factual details of the confirmed charges provided the Defence with ample detail to make the relevant arguments."¹³⁵

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07)

TRIAL

#latedisclosure #transcripts #translation #originality #integrity #relevance

EXTRAPOLATION

- **A video should only be disclosed to the Defence from the moment its precise content can be fully understood. It will only be possible for the Defence to fully understand the contents of a video after: the relevant persons appearing in the recording have, to the extent possible, been identified; the location(s) of the recording has or have been indicated as precisely as possible; the date and time of the recording has or have been indicated as precisely as possible; 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.¹³⁶**
- **A video, its transcript and translation must be seen as forming integral parts of the same item of evidence.¹³⁷**
- **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 under regulation 39(1) of the Regulations.¹³⁸**
- **The labour-intensiveness of transcribing and translating video material is not an “exceptional circumstance” in the sense of Regulation 35(2), but it may constitute a “good cause” in the sense of Regulation 35(2).¹³⁹**

¹³⁵ *Prosecutor v. Dominic Ongwen*, Decision on Prosecution's Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 21-2, para 48.

¹³⁶ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 5, para. 9.

¹³⁷ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 9, para. 13.

¹³⁸ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 9, para. 13.

¹³⁹ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 6-7, paras. 7-8.

- Because a video, its transcript and translation must be seen as forming integral parts of the same item of evidence, it would be incoherent to impose restrictions on one, but not the other.¹⁴⁰
- 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.¹⁴¹
- A video may be disclosed after the disclosure deadline to substitute sections that overlap with a previously disclosed video if the new video is of superior quality. However, the Court may not admit the additional material that does not overlap if the party does not justify late disclosure under Regulation 35(2) of the Court Regulations.¹⁴²
- Evidence of “originality and integrity” must be provided before a video can be admitted into evidence.¹⁴³
- Evidence must be provided regarding the date and/or location of audio or video material, as their relevance depends on it.¹⁴⁴

⊗ The arguments of the Prosecution

1. The Prosecution sought the belated disclosure of 25 transcripts and 14 translations of 25 videos as incriminating evidence.¹⁴⁵ It argued that “it was not possible to finalise these transcripts and translations earlier because of the length of time required to undertake such a task.”¹⁴⁶ It added that “although these transcripts and translations are not yet disclosed, the actual videos were disclosed as incriminating evidence at least seven months prior to the commencement of the

¹⁴⁰ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 10, para. 18.

¹⁴¹ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 10, para. 15.

¹⁴² *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 11-12, paras. 20, 25.

¹⁴³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, T. Ch. II, 17 December 2010, at 19, para. 24.

¹⁴⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, T. Ch. II, 17 December 2010, at 19, para. 24.

¹⁴⁵ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 30 June 2009, at 5, para. 7.

¹⁴⁶ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 30 June 2009, at 5, para. 7.

Trial¹⁴⁷ and that, “[a]ccordingly, the Defence has been well positioned to prepare its defence on the basis of the video footage already provided.”¹⁴⁸

2. The Prosecution also sought the belated disclosure of new incriminating video evidence that was recently obtained.¹⁴⁹ It determined that “the video footage within it mostly overlaps with” a video previously disclosed as incriminating evidence¹⁵⁰ but is of “superior video and audio quality” and contains “limited, but relevant, additional footage contained within it.”¹⁵¹ It argued that “the Defence will not suffer prejudice from the addition of video” since much of the footage is contained in a video already disclosed; [i]f this application is granted, Defence will receive the video three months in advance of the Trial.”¹⁵²

3. The Prosecution also requested authorization “to make redactions to the transcript and translation” of a video that was previously disclosed with protective measures [voice distortions and redaction of name]. It argued that such redactions of the transcript and translation of the video should correspond to the protective measures obtained for the video “to ensure the continued effectiveness of the protective measures applied to the video.”¹⁵³

4. The Prosecution tendered “into evidence five (5) video and audio recordings, as well as their transcripts and translations. The video recordings submitted with this motion are prima facie reliable: the images they show are clear and understandable; the date and location of filming, as well as the individuals captured on them, are easily discernible. These videos depict, for the most part, the aftermath of attacks or show various political actors active in Ituri. They are relevant to establish the historical context of the armed conflict. Finally, some of the video and audio recordings originate from MONUC [Mission de l’Organisation de Nations Unies en République Démocratique du Congo] or Radio Candip/RTNC [Radio-Télévision nationale congolaise] and

¹⁴⁷ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 30 June 2009, at 5, para. 8.

¹⁴⁸ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 30 June 2009, at 5, para. 8.

¹⁴⁹ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 30 June 2009, at 6, para. 12.

¹⁵⁰ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 30 June 2009, at 6, para. 13.

¹⁵¹ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 30 June 2009, at 7, para. 14.

¹⁵² *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 30 June 2009, at 7, para. 15.

¹⁵³ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 30 June 2009, at 8, para. 19.

were either publicly broadcast or are otherwise publicly available”.¹⁵⁴ The Prosecution also argued that even though many of the submitted “videos related to the historical contextual and background elements of the case, are not in dispute, and have been subject to an agreement – albeit partial-between the parties (...) the Defence remains in a position to challenge this evidence through means other than calling their authors to testify, such as the examination of other witnesses or adducing documentary evidence. Pursuant to the applicable law, the fact that evidence is proffered without accompanying witness testimony does not cause per se a prejudice to the Defence”.¹⁵⁵

⊗ The arguments of the Defence

5. In light of the case’s procedural history, the Defence submitted that “the Prosecution has had ample time since the start of the case against Mr Katanga, 20 months ago, to disclose all its incriminating videos and their corresponding transcripts and translations.”¹⁵⁶ “The Defence, which has had some experience translating documents (there is no general translation facility provided to the Defence) is sceptical of the OTP’s arguments about the average time necessary to transcribe videos. Even if these times are accurate the Prosecution must have been aware of the facilities available to it after so many years.”¹⁵⁷ It submitted that “the current Prosecution’s request concerns too many documents and is too late”¹⁵⁸ and 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 set in the Chamber’s Order [...] and in the Decisions on the disclosure of the Table of Incriminating Evidence.”¹⁵⁹ The “Prosecution’s Application does not demonstrate good cause but, instead, reveals that the Prosecution has not displayed enough diligence. It should have been prepared to disclose the transcripts and translations of the videos by the time it was required to file its List of Incriminating Evidence.”¹⁶⁰

6. The Defence did not oppose any arguments to the request for redactions in transcript and translation of a video.

¹⁵⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution’s Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, ICC-01/04-01/07-2290, T. Ch. II, 16 July 2010, at 9, para. 31.

¹⁵⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution’s Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, ICC-01/04-01/07-2290, T. Ch. II, 16 July 2010, at 9, para. 19.

¹⁵⁶ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 9 July 2009, at 5, para. 10.

¹⁵⁷ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 9 July 2009, at 5, para. 11.

¹⁵⁸ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 9 July 2009, at 6, para. 13.

¹⁵⁹ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 9 July 2009, at 6, para. 14.

¹⁶⁰ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 9 July 2009, at 6, para. 15.

7. Finally, the Defence objected to the belated disclosure of a new incriminating video evidence “because it is proposed to submit it after the initial deadline for the disclosure of incriminating material and because of its limited relevance.” It underlined that the Prosecution has “already disclosed a video which includes most parts of this new video”. Additionally, the Defence noted that “the Prosecution intends to interview the witness who has provided 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. Thus, in light of the near date of the trial, the submission should be denied.”¹⁶¹

8. In response to the Prosecution’s motion seeking admission of 122 videos/audios, the Defence stated: “[v]ideo recordings should be used with the witnesses that can comment on them. 60 And whilst videos may be admitted into evidence, the oral and/or written commentary should not form part of that evidence. With regard to the authenticity of the videos, mention must be made of their date, their author, their source, and their chain of custody. Also, the footage must be complete insofar as it must not be an extract (if extracted, the Prosecution must show whether the full footage is available and who extracted the parts).”¹⁶²

⊗ The Court’s Response

9. The Court allowed the late submission of transcripts and translations of the 25 videos.¹⁶³ However, it made extensive considerations on the matter. It considered the Defence’s allegation that the delay was due to a lack of diligence to be unfounded because the Court “has to operate with finite means, which, in this case, may translate into a limited capacity of the Prosecution for generating transcripts and translations.”¹⁶⁴ However, the Chamber stressed “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 preparation and to be tried without undue delay”¹⁶⁵ and that the fact that “transcribing and translating video material is especially time consuming, cannot be considered as an ‘exceptional circumstance’” for the purposes of that exception provided in Regulation 35(2).¹⁶⁶ Limited resources and labour-intensiveness can constitute “good cause” in the sense of Regulation 35(2), but the Court noted that “no mention of forthcoming transcripts or translations was made [by the Prosecution] in the

¹⁶¹ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 9 July 2009, at 6, para. 16.

¹⁶² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Katanga Defence Response to Prosecution Bar Table Motion, ICC-01/04-01/07-2348, T. Ch. II, 30 August 2010, at 14, para. 45.

¹⁶³ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 10, para. 15.

¹⁶⁴ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 5, para. 5.

¹⁶⁵ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 6, para. 6.

¹⁶⁶ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 6, para. 7.

relevant disclosure notes”, and that the Prosecution “did not even indicate clearly that such transcripts and translations were still missing and forthcoming.”¹⁶⁷

10. Also, the Chamber expressed concern that, “although the videos were disclosed before the time limit, they were provided to the Defence without a transcript or translation”, wondering “to what extent the Defence has been able, as the Prosecution alleges, to usefully exploit these videos”. The Chamber has itself examined a sample of the videos and found it extremely difficult to understand their precise content without the transcript and translation.”¹⁶⁸

11. 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: (1) the relevant persons appearing in the recording have, to the extent possible, been identified; (2) the location(s) of the recording has or have been indicated as precisely as possible; (3) the date and time of the recording has been indicated as precisely as possible; and (4) 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.”¹⁶⁹

12. The Chamber noted that “there are several ways in which the Prosecution can provide this information [about a video] to the parties and the Chamber. For example, the videos could have sub-titles or spoken commentary. In the present case, the Prosecution chose to rely on transcripts and the translation thereof in order to comply with its disclosure obligations.”¹⁷⁰

13. The Chamber concluded 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.”¹⁷¹

14. However, the Court noted that “neither of the Defence teams raised its voice when the [25] videos were initially disclosed without transcript or translation, and only one of the Defence teams [Defence for Mr. Katanga] has responded to the Application. The Defence for Mr. Katanga requests for the Application to be denied but does not seem to object to the continued reliance of the

¹⁶⁷ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 7, para. 8.

¹⁶⁸ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 5, para. 9.

¹⁶⁹ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 8-9, para. 11.

¹⁷⁰ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 9, para. 12.

¹⁷¹ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 9, para. 13.

Prosecution on the 25 videos in question”.¹⁷² [no reasoning given as to why the Defence did not object].

15. Therefore, the Chamber was 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.”¹⁷³

16. Furthermore, the Chamber allowed for the redactions of the transcript and translation of the video. 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 the video. 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.”¹⁷⁴

17. Regarding the additional disclosure of new incriminating video evidence, the Court allowed the late disclosure of the passages of the video that overlap with the video that was already disclosed because it agreed that it is of better audio-visual quality than the previous one and considered that it would “be to the benefit of all parties and the Chamber itself if the video material is of better quality.”¹⁷⁵ However, it did not admit the additional material as the fact that the Prosecution did not obtain the video before the disclosure deadline “was mainly a consequence of the Prosecution's continuing investigation [...]”¹⁷⁶

18. Additionally, the Court stated that “the Prosecution must either show 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.”¹⁷⁷ However, the Prosecution did not provide a transcript and translation of the new video¹⁷⁸ and therefore, “the Chamber is not in a position to evaluate whether the new evidence [the portion of the footage which

¹⁷² *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 9, para. 14.

¹⁷³ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 10, para. 15.

¹⁷⁴ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 10, para. 18.

¹⁷⁵ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 11, para. 20.

¹⁷⁶ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 12, para. 25.

¹⁷⁷ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 15, para. 30.

¹⁷⁸ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 15, para. 31.

does not overlap with the existing one] is either more compelling than previously disclosed evidence or brings to light a significant new fact” and is “therefore unable to accept the request.”¹⁷⁹

19. In relation to the arguments raised by Prosecution and the Defence regarding the admission of 122 videos/audios, the Chamber held that “[b]efore video [...] 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 [...] video material depends on the date and/or location of recording, evidence must be provided in this regard.”¹⁸⁰

TRIAL

#prejudice #reliability #probativevalue

EXTRAPOLATION

- **The absence of cross-examination due to the witness’s unavailability is a factor to be considered in the ultimate assessment of the probative value and weight to be attributed to video evidence, but does not prevent a video’s introduction into evidence under Rule 68(2)(c) of the Rules of Procedure and Evidence.**
- **It is not prejudicial that certain video material was not sought to be introduced under Rule 68(2)(c) of the Rules of Procedure and Evidence because the witness did not recognise persons or places in them. The other party can seek to have it introduced into evidence or seek to admit other related evidence.**

⊗ The arguments of the Prosecution

1. The Prosecution submitted that, in view of their content and the witnesses’ explanation, the videos or video extracts are relevant to the case against the accused and *prima facie* reliable.¹⁸¹ [The remainder of the argument is redacted].

⊗ The arguments of the Defence

2. The Defence argued that the introduction of the videos or video extracts as associated material under Rule 68(2)(c) would be prejudicial.¹⁸² It submitted that the witness did not create, edit or

¹⁷⁹ *Prosecutor v. Germain Katanga and Mathieu 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, T. Ch. II, 27 July 2009, at 15, para. 32.

¹⁸⁰ *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions, ICC-01/04-01/07-2635, T. Ch. II, 17 December 2010, at 19, para. 24.

¹⁸¹ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 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”, ICC-01/12-01/18-1202-Conf, T. Ch. X, 11 December 2020, at 17, para. 42.

¹⁸² *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0125’s prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18, T. Ch. X, 14 April 2021, at 8, para. 17.

handle the videos, but that they were simply shown to him, without sound, for the purpose of demonstrating his visual recognition of certain persons and places.¹⁸³

3. The Defence further averred that, without a cross-examination due to the unavailability of the witness, it would not be able to test the witness's recognition, seek clarification regarding the source of his knowledge or confront him where he failed to recognise persons and places.¹⁸⁴ The Defence has also argued that it is prejudicial that certain material was not sought to be introduced by the Prosecution because the witness did not recognise the persons or places shown.¹⁸⁵

⊗ The Court's Reasoning

4. The Chamber considered that, in the absence of specific reasons not to do so, the videos can be introduced into evidence via a witness pursuant to Rule 68(2)(c).¹⁸⁶ The Chamber was not convinced by the Defence's argument and noted that the witness was presented all the associated material submitted, including the videos, and that he discussed, at least to a certain extent, their content.¹⁸⁷ The Chamber stated that the absence of cross-examination, which is due to the witness's unavailability, is a factor which will be considered in the ultimate assessment of the probative value and weight to be attributed to this evidence.¹⁸⁸ The Chamber also considered the fact that certain material was not sought to be introduced by the Prosecution, because the witness did not recognise persons or places, is not 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.¹⁸⁹

¹⁸³ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18, T. Ch. X, 14 April 2021, at 8, para. 17.

¹⁸⁴ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18, T. Ch. X, 14 April 2021, at 8, para. 17.

¹⁸⁵ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18, T. Ch. X, 14 April 2021, at 8-9, para. 18.

¹⁸⁶ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18, T. Ch. X, 14 April 2021, at 8-9, para. 18.

¹⁸⁷ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18, T. Ch. X, 14 April 2021, at 8-9, para. 18.

¹⁸⁸ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18, T. Ch. X, 14 April 2021, at 8-9, para. 18.

¹⁸⁹ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the introduction into evidence of P-0125's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, ICC-01/12-01/18, T. Ch. X, 14 April 2021, at 8-9, para. 18.

International Criminal Tribunal for Rwanda (ICTR)

Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera (ICTR-98-44-T)

TRIAL

#authenticity #chainofcustody #relevance

EXTRAPOLATION

- **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.**¹⁹⁰
- **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, and who extracted the parts of the video.**¹⁹¹
- **Videos originating from news reports can be admitted if any accompanying comments made by journalists will be disregarded by the Chamber.**¹⁹²

⊗ **The arguments of the Prosecution**

1. The Prosecutor wanted to admit several videos and reports from various origins. 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.¹⁹³

⊗ **The arguments of the Defence**

2. Mr. Nzirorera's Defence contends that there is no probative value to admitting a video of various scenes in Rwanda without them having been shown to a witness.¹⁹⁴ Additionally, the Defence argued that "Trial Chambers have held that news reports lack sufficient indicia of reliability to be admitted at the ICTR and even the Special Court of Sierra Leone."¹⁹⁵

3. Matthieu Ngirumpatse's Defence noted that the Prosecution wishes to admit several videos and reports from various sources and is aware that the comments of the journalists cannot be entered into evidence, asking the Chamber to disregard them. "However, in the case of videos, it is not simply a matter of ignoring the commentary. It would be forgetting that a report also involves a choice of images and editing that may present information in a way that is completely different

¹⁹⁰ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para. 22.

¹⁹¹ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para. 22.

¹⁹² *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para. 35.

¹⁹³ *Prosecutor v. Édouard 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, T. Ch. III, 26 November 2007, at 5, para. 14.

¹⁹⁴ *Prosecutor v. Édouard Karemera et al.*, Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table, ICTR-98-44-T, T. Ch. III, 3 December 2007, at 19, para. 99.

¹⁹⁵ *Prosecutor v. Édouard Karemera et al.*, Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table, ICTR-98-44-T, T. Ch. III, 3 December 2007, at 19, para. 100.

from the actual report. The Defence has already had to object to the introduction into evidence of a document which was presented as the speech of Prime Minister Kambanda and which included comments and images which were not contemporaneous with the speech. In these circumstances, the Chamber is asked to reject these videos outright.”¹⁹⁶

4. Edouard Karemera’s Defence argued that, generally “[t]he examination of the documents reveals that in most cases the source of these documents is not specified, and when the source is specified, it is not reliable because the conditions for obtaining it are not specified.” Regarding the videos, it argued that their source was not indicated.¹⁹⁷ “The admissibility of documentary evidence requires the identification of its source to verify its authenticity and accuracy. It appears that the documents which the Prosecutor requests to be admitted into evidence, apart from the imprecision of their source, are neither original nor certified documents.”¹⁹⁸ Therefore, the Defence requested the Chamber to reject the Prosecutor’s request to admit the documents.¹⁹⁹

⊗ The Court’s Response

5. The Chamber stated that “[d]ocumentary evidence consists of documents produced as evidence for evaluation by the Tribunal. For the purposes of this case, the term ‘document’ is interpreted broadly, being understood to mean anything in which information of any description is recorded. This interpretation is wide enough to cover not only documents in writing, but also maps, sketches, plans, calendars, graphs, drawings, computerized records, mechanical records, electro-magnetic records, digital records, databases, sound tracks, audio-tapes, video-tapes, photographs, slides and negatives.”²⁰⁰

6. The Chamber excluded a video that did not have sufficient indicia of authenticity. The 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 submitted.”²⁰¹

7. The Chamber admitted three audio/video material constituting a contemporaneous recording of events from Insight News Television Limited and France 3.²⁰² It 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

¹⁹⁶ *Prosecutor v. Édouard 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, T. Ch. III, 4 December 2007, at 3, para. 8.

¹⁹⁷ *Prosecutor v. Édouard 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, T. Ch. III, 4 December 2007, at 4.

¹⁹⁸ *Prosecutor v. Édouard 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, T. Ch. III, 4 December 2007, at 5.

¹⁹⁹ *Prosecutor v. Édouard 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, T. Ch. III, 4 December 2007, at 6.

²⁰⁰ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para 5.

²⁰¹ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para. 22.

²⁰² *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para. 35.

the relevant authorities exercised control.” However, the Chamber decided to disregard any accompanying comments made by the journalists.²⁰³

International Criminal Tribunal for the Former Yugoslavia (ICTY)

Prosecutor v. Zdravko Tolimir (IT-05-88/2)

TRIAL

#authenticity #corroboration

EXTRAPOLATION

- **Videos may be found to be more reliable if they are corroborated by witness testimony and other evidence.**²⁰⁴

⊗ The arguments of the Defence

1. The Defence challenged video evidence depicting a meeting with Mladic, which illustrated the Accused’s central role in Zepa, claiming it is not authentic.²⁰⁵ The Defence argued that the video “contradicts the reasons of logic” as it shows Tolimir in a civilian suit (which was like the suit he was wearing at Vienna and Dayton negotiations) while all others were in uniforms.

⊗ The Court’s Response

2. The Chamber held that “Tolimir challenges the authenticity of the video evidence [of Zepa] of his presence, but fails to show an error in the Trial Chamber’s reliance on that video, along with other evidence, including the eyewitness testimony of Witness Torlak, to conclude that Tolimir was present at the meeting.”²⁰⁶

²⁰³ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para. 35.

²⁰⁴ *Prosecutor v. Zdravko Tolimir*, Judgement, IT-05-88/2-A, A. Ch., 8 April 2015, at 155, para. 373.

²⁰⁵ *Prosecutor v. Zdravko Tolimir*, Public Redacted Version of The Consolidated Appeal Brief, IT-05-88/2-A, A. Ch., 28 February 2014, at 75, para. 321.

²⁰⁶ *Prosecutor v. Zdravko Tolimir*, Judgement, IT-05-88/2-A, A. Ch., 8 April 2015, at 155, para. 373.

In this section:



11

Cases have been extrapolated



3

Stages of proceedings covered –
Pre-Trial, Trial and Appeal



3

International Criminal Courts
and Tribunals considered –
ICC, ICTY, ICTR



PHOTOGRAPHS

PHOTOGRAPHS

International Criminal Court (ICC)

Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06)

TRIAL

#content #corroboration #inference

EXTRAPOLATION

- The Court can make an inference from the content of the video [or photograph] to the extent the video [or photograph] leads to a definite finding.²⁰⁷
- A reliable distinction may be drawn between different age ranges, based on appearance in photographs and videos.²⁰⁸

⊗ The arguments of the Prosecution

1. To establish that some of the UPC [Union des Patriotes Congolais] /FPLC [Forces Patriotiques pour la Libération du Congo] recruits were “visibly” under the age of 15, the Prosecution did not rely on photographs, but videos [see discussion in ‘video’ section’].

⊗ The arguments of the Defence

2. The Defence asserted that “whilst it is possible to accept that an individual can be placed approximately within a particular age bracket (early childhood, adolescence, maturity, old age), it is nevertheless impossible to determine accurately a person's age solely by looking at a photograph of the person, or even to place that person within an age bracket by distinguishing the person from older or younger individuals in the same age bracket. This difficulty is increased substantially in the case of growing adolescents, whose physical appearance depends on numerous factors - primarily diet - and is further aggravated by aspects specific to each community. The difficulty becomes insurmountable when the observer is unacquainted with the community from which the child originates. Hence, it is impossible to distinguish with sufficient certainty a 12- or 13-year-old child from a 15- or 16-year-old child solely on the basis of a photograph or video excerpt”.²⁰⁹

⊗ The Court’s Response

3. In the judgement, the Court discussed the assessment of the age of possible child soldiers mainly through videos, leaving aside the discussion on photographs. However, it must be noted that the

²⁰⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 377, fn. 2432.

²⁰⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 319, para. 718.

²⁰⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Closing submissions of the Defence, ICC-01/04-01/06-2773-Red-tENG, T. Ch. I, 15 July 2011, at 221, para. 704.

Court was “satisfied that there are instances when a reliable distinction can be drawn between a 9 or 10 years-old child and a 14 or 15 years-old child, based solely on appearance”.²¹⁰

Prosecutor v. Jean-Pierre Bemba Gombo (ICC-01/05-01/08)

TRIAL

**#authorship #authenticity #context #relevance #probativevalue #prejudice
#reliability**

EXTRAPOLATION

- **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.**²¹¹
- **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".**²¹²
- **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.**²¹³
- **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 the ICC. They should only be used when no satisfactory alternative investigative avenue is available.**²¹⁴
- **As with all other non-public information, a detailed record of the disclosure shall be kept by the investigating party.**²¹⁵

²¹⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 319, para. 718.

²¹¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 8 October 2012, at 88-89, para. 159.

²¹² *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 20 July 2010, at 34-5, para. 85.

²¹³ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 20 July 2010, at 34-5, para. 85.

²¹⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 20 July 2010, at 35, para. 87.

²¹⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 20 July 2010, at 35, para. 87.

⊗ The arguments of the Prosecution

1. The Prosecution submitted four photographs showing the MLC [Mouvement de Libération du Congo] in Sibut and prove, inter alia, the alleged authority and control of the accused over the MLC in CAR.²¹⁶

2. In response to the Defence's argument [see below] the Prosecution argued that “the purpose of a bar table motion is to introduce evidence without having to call live witnesses; thus the absence of live witnesses is not a per se ground to object to the process”, and the admissibility of each of these items is subject only to the three-stage test of relevance, probative value and prejudice.²¹⁷ The Prosecution recalled that the Chamber had held previously that “it is not necessary that each item of evidence be authenticated via witness testimony”. Therefore, the Prosecution concluded that contrary to the Defence submissions “items may be admitted without calling the authors, creators, collectors or persons with direct knowledge of the information, provided that other indicia satisfy the three-stage test”.²¹⁸

3. The Prosecution requested the Chamber restrict the use of confidential material, including photographs, during defence investigations.²¹⁹ Citing the jurisprudence of Trial Chamber II in *Katanga*, the Prosecution argued for the necessity of “intervention of the Chamber when the Defence seeks to disclose to third parties certain forms of identifying information (namely photographs). In such instances, the Defence must make a specific application to the Chamber before revealing this information to a third party”.²²⁰ Therefore, it argued that the Defence must “make a prior application to the Chamber before it can use photographs of protected witnesses; the Chamber will assess the request, consider the risks, and may propose alternative measures”.²²¹

⊗ The arguments of the Defence

4. Defence objected to the admission of photographs. It argued that they “should have been introduced through their author who testified for the Prosecution. Without having been introduced through the relevant witness, the photos have no context, cannot be authenticated, nor can the Chamber or the Defence even know what or who they are purported to represent”. Therefore, the Defence argued that the photos were not admissible through the Prosecution's bar table motion.²²²

5. On the use of confidential material during investigations, the Defence argued that in the *Katanga* case the Court “left the question of when to disclose non-public material to the discretion of the

²¹⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of the Annex A: Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, ICC-01/05-01/08-2147-AnxA-Red, T. Ch. III, 21 September 2012.

²¹⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's Reply to “Defence Response to the Prosecution's Application for Admission of Evidence from the Bar Table”, ICC-01/05-01/08-2184, T. Ch. III, 30 March 2012, at 5, para. 7.

²¹⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's Reply to “Defence Response to the Prosecution's Application for Admission of Evidence from the Bar Table”, ICC-01/05-01/08-2184, T. Ch. III, 30 March 2012, at 4, para. 4.

²¹⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's request for restriction on the use of confidential material for Defence investigations, ICC-01/05-01/08-784, T. Ch. III, 1 June 2010, at 3, para. 1.

²²⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's request for restriction on the use of confidential material for Defence investigations, ICC-01/05-01/08-784, T. Ch. III, 1 June 2010, at 5, para. 8.

²²¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's request for restriction on the use of confidential material for Defence investigations, ICC-01/05-01/08-784, T. Ch. III, 1 June 2010, at 7, para. 11.

²²² *Prosecutor v. Jean-Pierre Bemba Gombo*, Defence Response to the Prosecution's Application for Admission of Evidence from the Bar Table, ICC-01/05-01/08-2168, T. Ch. III, 19 March 2012, at 18, para. 45.

Defence. The only prerequisites for disclosure are detailed record keeping and a written undertaking by the receiving party not to reproduce or make public the contents of the confidential information. Trial Chamber II had only decided on the Court's prior intervention when the Defence proposed to use the photographs of the protected victims in a public manner".²²³

6. Therefore, "[t]he Defence strongly objects to the Prosecution's proposed mechanism on the possible disclosure of non-public information during Defence investigations. The measures advocated by the Prosecution, consisting of prior approval by the VWU - or the Court - constitute a serious violation of the autonomy of the Defence".²²⁴

7. It further argued that "Ultimately, the Prosecution wishes to prohibit the Defence from disclosing the fact that a particular person is a witness, although in principle this is entirely justifiable, it is not always practical. The Defence may argue that a Prosecution witness is not credible and that by personally incriminating the Accused, he is motivated by animosity. In such circumstances, it would certainly be disingenuous to conceal the fact that an individual is a prosecution witness, particularly where the only reason for the Defence to approach a witness is to impeach the credibility of the witness".²²⁵

⊗ The Court's Response

8. Two of the photos were admitted and were held to be relevant and probative since they provided "sufficient indicia of reliability".²²⁶ The Chamber noted that these two photos "were discussed in Court and tendered into evidence both by the prosecution and the defence during testimony (...) As such, the Chamber is satisfied that both photographs are relevant to matters that are properly to be considered by the Chamber. In relation to their probative value, the Chamber is satisfied that the photographs provide sufficient indicia of reliability. Against this background, the Chamber finds that the admission of these photographs will not unfairly prejudice the defence".²²⁷

9. The remaining two photos were not admitted.²²⁸ The Chamber noted that the photographs "have not been discussed in court so far. As stated above, 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. However, in relation to these photographs, the prosecution has not provided any information or evidence to support their authenticity and reliability. In light of the absence of this information, although the photographs

²²³ *Prosecutor v. Jean-Pierre Bemba Gombo*, Réponse de la Défense à la requête de l'Accusation de restreindre l'utilisation des informations confidentielles pour les enquêtes de la Défense, ICC-01/05-01/08-789, T. Ch. III, 8 June 2010, at. 3, para. 3 [unofficial translation].

²²⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, Réponse de la Défense à la requête de l'Accusation de restreindre l'utilisation des informations confidentielles pour les enquêtes de la Défense, ICC-01/05-01/08-789, T. Ch. III, 8 June 2010, at. 4, para. 6 [unofficial translation].

²²⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, Réponse de la Défense à la requête de l'Accusation de restreindre l'utilisation des informations confidentielles pour les enquêtes de la Défense, ICC-01/05-01/08-789, T. Ch. III, 8 June 2010, at. 5, para. 9 [unofficial translation].

²²⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 8 October 2012, at 88, para. 158.

²²⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 8 October 2012, at 88, para. 158.

²²⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 8 October 2012, at 88-89, para. 159.

appear in principle to be relevant to matters that are properly to be considered by the Chamber, their alleged probative value is outweighed by their potential unfair prejudice to a fair trial”.²²⁹

10. On the use of witnesses’ photographs during investigations, the Chamber noted that “[a]s to photographs of witnesses and others affected by the work of the Court, pursuant to Article 68(1) of the Statute, the Chamber is required to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Circulation of an individual's image, without his or her consent, depending on the circumstances, may constitute an unjustified infringement of the right to privacy or ‘private life’”.²³⁰

11. After considering “the potential heightened security concerns that are associated with the circulation of an individual's image and whether disclosure of a photograph may infringe the right to privacy”, the Chamber applied “the following approach to disclosure of photographic images. The presumption is that all the materials disclosed by the prosecution, either as part of the evidence it intends to advance against the accused (Rule 76 of the Rules), or exculpatory evidence or “material” for defence preparation (Article 67(2) of the Statute or Rule 77 of the Rules), will be provided in their entirety. Anything falling within those categories can only be withheld - “redacted” - for good cause (e.g., substantive security concerns) if this step is not inimical to a fair trial”.²³¹

12. The Chamber also noted that “The individual concerned should be consulted, whenever possible, prior to disclosure to ensure there are no unaddressed substantive issues, such as security risks which should be brought to the attention of the Chamber, and absent the latter, the presumption is that there will be full disclosure”.²³²

13. Finally, the Chamber concluded that “Once disclosure has occurred, the Chamber does not consider it appropriate to order a party or participant to make a discrete application in advance, whenever a photograph is to be shown during the course of investigations - this proposal does not sufficiently reflect the exigencies of in situ enquiries which have a significant degree of unpredictability. Indeed, this suggestion would frequently render the investigations ineffective. However, the Chamber emphasises that a very high degree of care is to be taken to ensure that the use of photographs does not unnecessarily link the individuals depicted therein with the Court, and particularly the way in which they are involved with the ICC. They should only be used when no satisfactory alternative investigative avenue is available. As with all other non-public information, a detailed record of the disclosure shall be kept by the investigating party”.²³³

²²⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 8 October 2012, at 88-89, para. 159.

²³⁰ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 20 July 2010, at 34-5, para. 85.

²³¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 20 July 2010, at 34-5, para. 85.

²³² *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 20 July 2010, at 35, para. 86.

²³³ *Prosecutor v. Jean-Pierre Bemba Gombo*, 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, T. Ch. III, 20 July 2010, at 35, para. 87.

TRIAL

#expertwitness #relevance #probativevalue #courtresources

EXTRAPOLATION

- **An expert report should not be commissioned if it is not likely to be of assistance to the Chambers.**²³⁴

⊗ The arguments of the Prosecution

1. 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.²³⁵ The expert limited his answer to speaking generally about photographs as one of the types of documentary evidence. The expert described some issues with “autopsies conducted on the basis of injury reflected in photographs”.²³⁶

2. The expert explained that this type of autopsy “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. Photographs can also be taken by people who have no scientific training and, therefore, may not reflect the full picture. 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 and, 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”.²³⁷

⊗ The arguments of the Defence

[No discussion from Counsel on photographs in general].

⊗ The Court’s Response

5. The Chamber did not make an evaluation on each individual form of DDE, but it did make general comments on expert witnesses and evidence tendered through them.

6. In a separate opinion, Judge Cuno Tarfusser²³⁸ noted that the expert, “an ‘OTP scientific response unit’ staff member, was mainly tasked with determining whether material relating to the death of an alleged victim of the 17 March 2011 incident would assist in the identification of the

²³⁴ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-1263-AnxA, T. Ch. I, 16 July 2019, at 26, para. 37.

²³⁵ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 11, lines 20-21.

²³⁶ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 11, lines 23-24.

²³⁷ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 11, lines 24-25 and 12, lines 1-7.

²³⁸ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-1263-AnxA, T. Ch. I, 16 July 2019.

identity of said victim and of the circumstances of his death; his conclusion was that there was no element suitable to cast doubt on the hypothesis of the Prosecutor”.²³⁹

7. Judge Cuno Tarfusser criticised 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”.²⁴⁰

8. He further noted that “[t]he time elapsed between the alleged events and the time of the expertise, in the absence of any measure of preservation on the relevant objects and notwithstanding the efforts of the experts and irrespective of their professionalism, made it per se inconceivable that anything suitable to be defined as ‘evidence’ might result from their activities; at best, their contribution 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.”²⁴¹

Prosecutor v. Bosco Ntaganda (ICC-01/04-02/06)

TRIAL

#authenticity #provenance #relevance #probativevalue

EXTRAPOLATION

- **In order to determine their relevance and probative value, photographs should be dated.**²⁴²
- **The tendering party should provide substantiation or reliable information as to the date and location and events depicted on the photographs, otherwise the probative value of the photographs may be considered to be low and may not be admitted.**²⁴³
- **In case quality of the photographs is poor and it is unclear as to who took the photographs and how they were developed, the content of the photographs can be corroborated by consistent and credible testimonies from witnesses present at the moment of taking photographs.**²⁴⁴

⊗ The arguments of the Prosecution

1. The Prosecution sought admission of ten photographs [depicting members of the UPC/FPLC in civilian and military clothes, including the accused], to establish the “presence of co-perpetrators

²³⁹ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-1263-AnxA, T. Ch. I, 16 July 2019, at 23, para. 32.

²⁴⁰ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-1263-AnxA, T. Ch. I, 16 July 2019, at 24, para. 35.

²⁴¹ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-1263-AnxA, T. Ch. I, 16 July 2019, at 25, para. 36.

²⁴² *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, T. Ch. VI, 28 March 2017, at 31, para. 68.

²⁴³ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, T. Ch. VI, 28 March 2017, at 32, para. 68.

²⁴⁴ *Prosecutor v. Bosco Ntaganda*, Judgment, ICC-01/04-02/06-2359, T. Ch. VI, 8 July 2019, at 122, para. 282.

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.²⁴⁵

2. Regarding another group of photographs, related to the Kobu massacre, the Prosecution argued that “many witnesses who identified individuals in the photographs were present in Kobu and saw the photographed bodies in person shortly after the bodies were discovered”.²⁴⁶ 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”.²⁴⁷

⊗ **The arguments of the Defence**

3. The Defence argued that the ten photographs [depicting members of the UPC/FPLC in civilian and military clothes, including the accused] were “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”.²⁴⁸

4. The Defence also challenged the authenticity of groups of photographs taken in Kobu. It argued that “no purported photographer offered testimony; on the contrary, numerous lies were heard concerning the provenance of the photos”.²⁴⁹ It also asserted 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’”.²⁵⁰

⊗ **The Court’s Response**

5. Regarding the ten photographs [depicting members of the UPC/FPLC in civilian and military clothes, including the accused], the Chamber held that since six photographs were not dated “their relevance to issues of the case and probative value cannot be determined”.²⁵¹ For the other “four photographs that appear to be dated, the Chamber considered that, apart from one photo, the Prosecution had not provided any information on the basis of which the Chamber can conclude that the dates are correct”.²⁵² Out of these four photographs, “one photo (...) refers to a date in 2000, and therefore falls outside the temporal scope of the charges. The other three photographs (...) appear to be dated from ‘08/07 2003’, 22 November 2002 and ‘January-February 2003’. Therefore, the Chamber considered that “while these photos could have some relevance, in the

²⁴⁵ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, T. Ch. VI, 28 March 2017, at 31, para. 67.

²⁴⁶ *Prosecutor v. Bosco 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, T. Ch. VI, 7 November 2018, at 59, para. 151.

²⁴⁷ *Prosecutor v. Bosco 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, T. Ch. VI, 7 November 2018, at 59, para. 152.

²⁴⁸ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, T. Ch. VI, 28 March 2017, at 31, para. 67.

²⁴⁹ *Prosecutor v. Bosco Ntaganda*, Judgment, ICC-01/04-02/06-2359, T. Ch. VI, 8 July 2019, at 122, para. 281. See also, *Prosecutor v. Bosco Ntaganda*, Public Redacted Version Annex 1 to filing ICC-01/04-02/06-2298 (Defence Closing Brief), ICC-01/04-02/06-2298-Anx1-Corr-Red, at 245, para. 878.

²⁵⁰ *Prosecutor v. Bosco Ntaganda*, Judgment, ICC-01/04-02/06-2359, T. Ch. VI, 8 July 2019, at 122, para. 281. See also, *Prosecutor v. Bosco Ntaganda*, Public Redacted Version Annex 1 to filing ICC-01/04-02/06-2298 (Defence Closing Brief), ICC-01/04-02/06-2298-Anx1-Corr-Red, at 245, para. 888.

²⁵¹ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, T. Ch. VI, 28 March 2017, at 31, para. 68.

²⁵² *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, T. Ch. VI, 28 March 2017, at 31-32, para. 68.

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. The Chamber therefore declines to admit these ten items into evidence”.²⁵³

6. On the photographs taken in Kobu, the Chamber held 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 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”.²⁵⁴ It noted the “consistent testimony from witnesses who said they recognized victims in certain photos” and thus considered “the Defence assertion that such identifications were implausible and indicative of contamination to be similarly unsubstantiated”.²⁵⁵ The Chamber also noted the consistency between the images depicted in the photographs and the scene described by eyewitnesses.²⁵⁶

Prosecutor v. Dominic Ongwen (ICC-02/04-01/15)

TRIAL

#corroboration #provenance #location #hearsay

EXTRAPOLATION

- **A submission approach to evidence defers the ruling on objections regarding the relevance and admissibility of evidence until the judgment in order to assess the evidence holistically.**²⁵⁷

⊗ The arguments of the Prosecution

1. The Prosecution formally submitted 1006 items of evidence, amongst which there were “photographic images. Many of these images were generated by Ugandan authorities in the course of investigating attacks attributed to the LRA. (...) These are relevant because they provide a contemporaneous image of the nature and effect of LRA attacks against the civilian population. It is corroborative of evidence that will be presented to the Chamber by witnesses who will provide oral testimony at trial”.²⁵⁸

2. Thus, the Prosecution argued that “[t]he evidence is probative and has sufficient indicia of reliability. The images speak for themselves and are consistent with the Prosecution’s case as outlined in its Pre-Trial Brief. (...) Several photographs were generated contemporaneously during investigative activities.”²⁵⁹

²⁵³ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, T. Ch. VI, 28 March 2017, at , at 32, para. 68.

²⁵⁴ *Prosecutor v. Bosco Ntaganda*, Judgment, ICC-01/04-02/06-2359, T. Ch. VI, 8 July 2019, at 122, para. 282.

²⁵⁵ *Prosecutor v. Bosco Ntaganda*, Judgment, ICC-01/04-02/06-2359, T. Ch. VI, 8 July 2019, at 122, para. 282.

²⁵⁶ *Prosecutor v. Bosco Ntaganda*, Judgment, ICC-01/04-02/06-2359, T. Ch. VI, 8 July 2019, at 122, para. 282.

²⁵⁷ *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 22, para. 50.

²⁵⁸ *Prosecutor v. Dominic Ongwen*, Prosecution’s request to submit 1006 items of evidence from the “bar table”, ICC-02/04-01/15-654, T. Ch. IX, 16 January 2017, at 13, para. 38.

²⁵⁹ *Prosecutor v. Dominic Ongwen*, Prosecution’s request to submit 1006 items of evidence from the “bar table”, ICC-02/04-01/15-654, T. Ch. IX, 16 January 2017, at 14, para. 40.

⊗ The arguments of the Defence

3. The Defence opposed the submission of the photographs through the bar table.²⁶⁰ It argued that most photographs “should be submitted either through a witness’s live testimony, Rule 68(2)(b) or through Rule 68(3). Almost all of the photographs were received by the Prosecution” or “collected from a ‘UPDF [Uganda People's Defence Force] Liaison Officer’”, and since most of the witnesses involved were going to testify before the chamber, “the evidence should be proffered at that time either through testimony or through Rule 68(3)”.²⁶¹ The Defence further argued that one of the Prosecution's witness testimony was “yet to be officially submitted via Rule 68(2)(b), and the Chamber should require the Prosecution to follow the proper procedure for submitting evidence”.²⁶²

4. The Defence also argued that certain photographs were “outside the [temporal] jurisdiction of the case” and that regarding one of them, “the Prosecution’s interpretation of the photograph is contrary to the information supplied by the person from whom the photograph was collected”. It further argued that the photographs lack probative value as the items fall heavily outside the jurisdiction of the case.²⁶³

5. Additionally, the Defence claimed that the Prosecution attempted “to proffer [some of items] without noting the location of the photograph” and, therefore, “[t]he prejudicial effect outweighs the probative value and relevance”.²⁶⁴ Finally, regarding four photographs [monuments in Lukodi and Odek which purport to list persons who died during attacks], the Defence argued that “[t]he Prosecution submits no testimony explaining the relevance or probative nature of the photographs, no explanation as to the process in which the names were chosen for inscription on the monuments, and lists in the Application at Confidential Annex A that these items related to the allegations of murder. Without further information, these items should be excluded from submission as they have no probative value, little to no relevance and amount to hearsay evidence which is highly prejudicial to the Defence”.²⁶⁵

⊗ The Court’s Response

6. The Chamber noted that “[t]he Defence’s objections relate to the relevance, probative value and potential prejudice of the evidence concerned. Consistent with its general approach, the Chamber sees no reason to exceptionally consider these objections at this point in time”.²⁶⁶

²⁶⁰ *Prosecutor v. Dominic Ongwen*, Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” 02/04-01/15-701, with confidential Annex A and public Annexes B and C ICC-02/04-01/15-654), ICC-02/04-01/15-701, T. Ch. IX, 7 February 2017, at 15, para. 45.

²⁶¹ *Prosecutor v. Dominic Ongwen*, Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” 02/04-01/15-701, with confidential Annex A and public Annexes B and C ICC-02/04-01/15-654), ICC-02/04-01/15-701, T. Ch. IX, 7 February 2017, at 15, para. 45.

²⁶² *Prosecutor v. Dominic Ongwen*, Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” 02/04-01/15-701, with confidential Annex A and public Annexes B and C ICC-02/04-01/15-654), ICC-02/04-01/15-701, T. Ch. IX, 7 February 2017, at 15, para. 45.

²⁶³ *Prosecutor v. Dominic Ongwen*, Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” 02/04-01/15-701, with confidential Annex A and public Annexes B and C ICC-02/04-01/15-654), ICC-02/04-01/15-701, T. Ch. IX, 7 February 2017, at 15-16, para. 47.

²⁶⁴ *Prosecutor v. Dominic Ongwen*, Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” 02/04-01/15-701, with confidential Annex A and public Annexes B and C ICC-02/04-01/15-654), ICC-02/04-01/15-701, T. Ch. IX, 7 February 2017, at 16, para. 48.

²⁶⁵ *Prosecutor v. Dominic Ongwen*, Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” 02/04-01/15-701, with confidential Annex A and public Annexes B and C ICC-02/04-01/15-654), ICC-02/04-01/15-701, T. Ch. IX, 7 February 2017, at 16, para. 49.

²⁶⁶ *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 21, para. 46.

7. The Chamber did “not make a determination concerning the relevance and probative value of items related to witnesses who are set to testify. The Chamber sees no reason why the Defence cannot adequately prepare to examine the relevant witnesses in the absence of any such determination by the Chamber. Indeed, knowing that an item is recognised as submitted prior to the testimony of a witness adequately aids the Defence’s preparation and allows the Defence to prepare to question the witness in relation to the document, if it wishes”.²⁶⁷

8. “As to the Defence’s arguments on the submission other than through a witness of evidence that goes to critical elements of the charges, the Chamber notes that there is nothing prejudicial about submitting such evidence through this procedure. Nor does such submission relieve the Prosecution of its burden of proof or shift that burden to the Defence. As discussed above, the method of submission of documentary evidence has no bearing on how the Chamber will eventually evaluate the evidence. Further, the Chamber has previously indicated that it will not set limits on how it will consider any submitted evidence”.²⁶⁸

9. Therefore, the Chamber recognised the submission of certain items identified by the Prosecution but deferred consideration of the Defence’s various objections until the judgment and in the light of the entirety of the evidence brought before it.²⁶⁹

²⁶⁷ *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 21, para. 47.

²⁶⁸ *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 22, para. 49.

²⁶⁹ *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 22, para. 50.

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

TRIAL

#admissability #crossexamination #corroboration

EXTRAPOLATION

- **Photographs can be submitted into evidence via Rule 68(3) of the Rules of Procedure and Evidence even if the witness did not recognise individuals shown to him in some of the photographs, since this issue can be addressed by the Defence in the cross-examination²⁷⁰.**

⊗ The arguments of the Prosecution

1. The Prosecution submitted that, in view of their content and the witnesses' explanation, the videos or video extracts are relevant to the case against the accused and *prima facie* reliable.²⁷¹ [The remainder of the argument is redacted].

⊗ The arguments of the Defence

2. The Defence opposed the introduction of the photographs as associated material which in its view could not be considered testimony for the purposes of the Rule 68.²⁷² The Defence argued that this was because the witness did not recognise individuals shown to him in some of the photos.²⁷³

⊗ The Court's Reasoning

3. The Chamber considered that the objections raised by the Defence refer more to the weight to be given to the photographs as associated material and the witness's comments to them.²⁷⁴ The Chamber was of the view that these issues could be addressed by the Defence in its cross-examination, which remains unaffected.²⁷⁵ It stated that this is in line with the approach taken by the Chamber which adopted 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

²⁷⁰ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 16, para. 42.

²⁷¹ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 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", ICC-01/12-01/18-1202-Conf, T. Ch. X, 11 December 2020, at 17, para. 42.

²⁷² *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 16, para. 42.

²⁷³ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 16, para. 42.

²⁷⁴ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 16, para. 42.

²⁷⁵ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 16, para. 42.

part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.”²⁷⁶

International Criminal Tribunal for Rwanda (ICTR)

Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera (ICTR-98-44-T)

TRIAL

#authenticity #chainofcustody #relevance

EXTRAPOLATION

- 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,²⁷⁷ or there is no corroborating evidence or other information regarding the chain of custody.²⁷⁸
- 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.²⁷⁹
- The photographs will be assigned low probative if no witness testifies on their content.²⁸⁰

⊗ The arguments of the Prosecution

1. The Prosecution requested the Trial Chamber to admit into evidence 143 documents, amongst which there were photographs.²⁸¹ It argued that the photos were created by ICTR investigators and are *prima facie* authentic.²⁸²

⊗ The arguments of the Defence

2. Mr. Nzirorera’s Defence objected “to the admission of photographs not shown to a witness, as they have no probative value under those circumstances. There is also no foundation for showing that the places depicted were as they were during the 1994 events. Finally, the inclusion of

²⁷⁶ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 16, para. 42.

²⁷⁷ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, at 8-9, para. 22.

²⁷⁸ *Prosecutor v. Édouard Karemera et al.*, Annex to the Decision on the Prosecutor’s Motion of 26 November 2007 for Admission of Certain Exhibits into Evidence, T. Ch. III, 25 January 2008, at 3.

²⁷⁹ *Prosecutor v. Édouard Karemera et al.*, Annex to the Decision on the Prosecutor’s Motion of 26 November 2007 for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, at 4.

²⁸⁰ *Prosecutor v. Édouard Karemera et al.*, Annex to the Decision on the Prosecutor’s Motion of 26 November 2007 for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, at 4.

²⁸¹ *Prosecutor v. Édouard 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, T. Ch. III, 26 November 2007, at 2, paras. 1-4 and at 4, para 12.

²⁸² *Prosecutor v. Édouard 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, T. Ch. III, 26 November 2007, at 7, para. 30.

photographs of after-the-fact memorials, with their displays of skulls, is irrelevant and any probative value is outweighed by their prejudicial effect”.²⁸³ It further argued that “[i]f the prosecution believed these photographs were necessary to the Trial Chamber's understanding of the events, it should have presented them to a witness. It called witnesses concerning all the places depicted in the photographs. It should not now be allowed to dump photographs into the trial record without having laid an adequate foundation”.²⁸⁴

3. Mr. Ngirumpatse's Defence stated that “[t]he authenticity of the maps and photographs made by the OTP investigators is not in question, but the question arises as to their usefulness to the Chamber outside of their context. These maps and photographs are largely post-1994 and cannot be taken as representing the configuration of the scene at the time. No evidential value can therefore be attached to them in the absence of a witness who can put them into context”.²⁸⁵

4. Mr. Karemera's Defence argued that the source of some photos was not indicated while other “photos were taken 11 years after the events of April 1994” and, therefore, cannot present an objective picture of what happened back then.²⁸⁶

⊗ The Court's Response

5. The Court stated by explaining that “[d]ocumentary evidence has been defined in the jurisprudence of the ICTR as including ‘anything in which information of any kind has been recorded’.²⁸⁷ This includes maps, digital records, audio and video tapes, photographs and so forth”.²⁸⁸

6. The Court found that some pieces of evidence, including a photograph [of an ONATRACOM bus] “did not have sufficient indicia of authenticity. The Chamber finds that the origin of these documents is doubtful, as they are undated and bear no official stamp, seals, signatures, and/or the author of the document is unknown”.²⁸⁹ The Chamber excluded the evidence based on “lack of authenticity: no date, no corroborating evidence, no indication of the chain of custody or author of photographs”.²⁹⁰

7. Regarding another group of photos, the Chamber found that “[t]he description provided by the Prosecutor in relation to those pictures has not been sufficient to establish their prima facie

²⁸³ *Prosecutor v. Édouard Karemera et al.*, Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table, ICTR-98-44-T, T. Ch. III, 3 December 2007, at 17, para. 91.

²⁸⁴ *Prosecutor v. Édouard Karemera et al.*, Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table, ICTR-98-44-T, T. Ch. III, 3 December 2007, at 17, para. 92.

²⁸⁵ *Prosecutor v. Édouard Karemera et al.*, Mémoire en Réponse pour M. Ngirumpatse sur la “Prosecutor's motion for admission on certain materials under Rule 89 (C) of the Rules of Procedure and Evidence” en date du 26/11/07, ICTR-98-44-T, T. Ch. III, 4 December 2007, at 6, para. 23 [unofficial translation].

²⁸⁶ *Prosecutor v. Édouard 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, T. Ch. III, at 4 [unofficial translation].

²⁸⁷ In this paragraph, the Court cites *Prosecutor v. Alfred Musema*, Judgement and Sentence, ICTR-96-13-T, T. Ch. I, 27 January 2000, at 26, para. 53 (“Documentary evidence consists of documents produced as evidence for evaluation by the Tribunal. For the purposes of this case, the term ‘document’ is interpreted broadly, being understood to mean anything in which information of any description is recorded. This interpretation is wide enough to cover not only documents in writing, but also maps, sketches, plans, calendars, graphs, drawings, computerized records, mechanical records, electro-magnetic records, digital records, databases, sound tracks, audio-tapes, video-tapes, photographs, slides and negatives”).

²⁸⁸ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, at 3, para. 5.

²⁸⁹ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, at 8-9, para. 22.

²⁹⁰ *Prosecutor v. Édouard Karemera et al.*, Annex to the Decision on the Prosecutor's Motion of 26 November 2007 for Admission of Certain Exhibits Into Evidence, T. Ch. III, 25 January 2008, at 3.

relevance with regards to the particular counts of the indictment. Moreover, the Prosecutor has not indicated in what way the contents of these photographs have been supported by other evidence”.²⁹¹

8. The Chamber further noted “(i) that the indication by the Prosecutor that the photographs were taken in 2005 by the Office of the Prosecution (“OTP”) intern, 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 is not satisfied that the Prosecutor made a *prima facie* showing of their reliability”.²⁹² Therefore, the photographs were excluded based on “lack of authenticity: no supporting evidence or information on the pictures” and “lack of relevance: insufficient showing of relevance”.²⁹³ The Chamber also excluded another set of photos based on “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” and low “probative value: no witness testified”.²⁹⁴

In this section:



7

Cases have been extrapolated



1

Stage of proceedings covered
– Trial



2

International Criminal
Courts and Tribunals
considered – ICC, ICTR

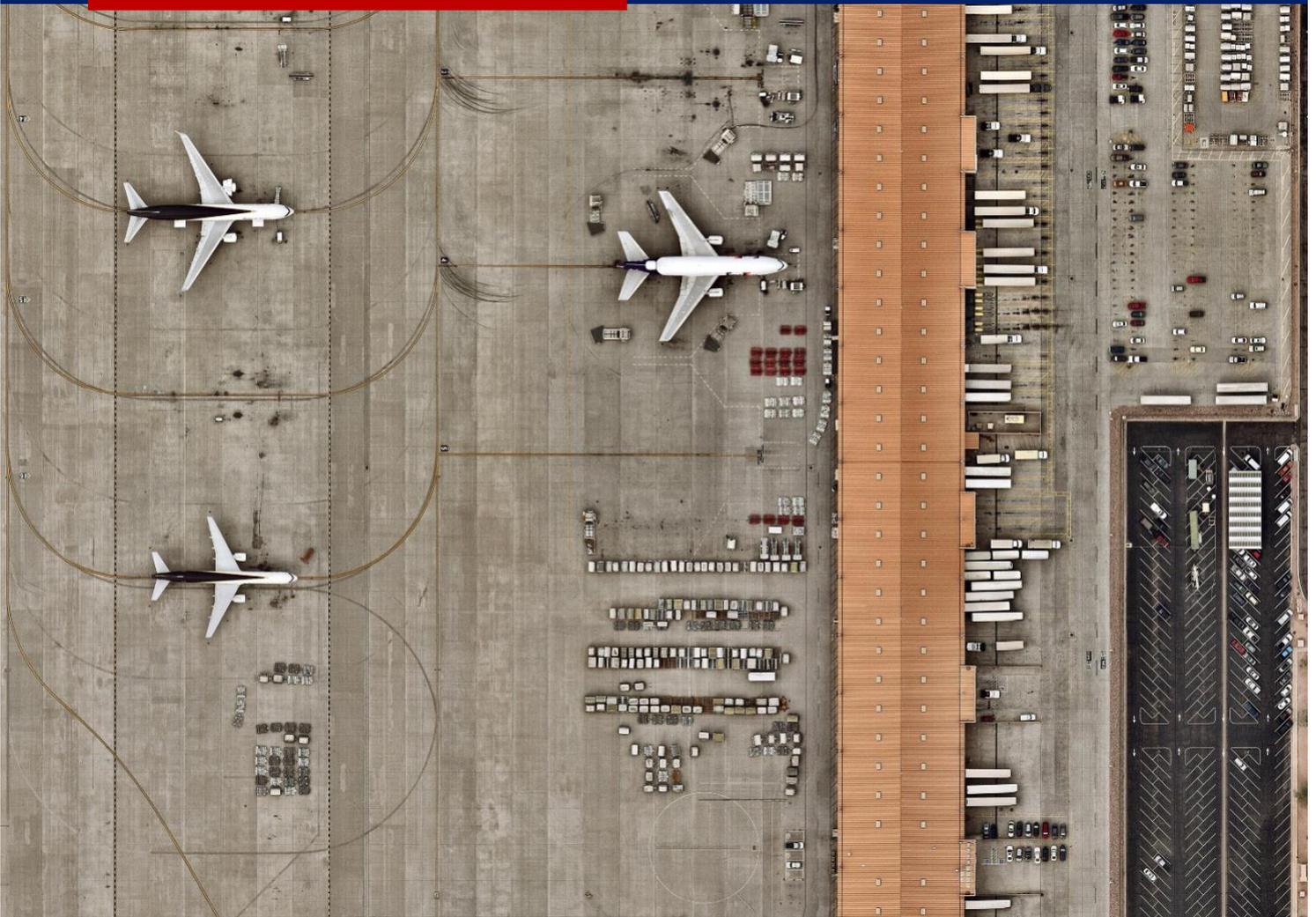
²⁹¹ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, at 9, para. 23.

²⁹² *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, at 9, para. 24.

²⁹³ *Prosecutor v. Édouard Karemera et al.*, Annex to the Decision on the Prosecutor’s Motion of 26 November 2007 for Admission of Certain Exhibits Into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, at 4.

²⁹⁴ *Prosecutor v. Édouard Karemera et al.*, Annex to the Decision on the Prosecutor’s Motion of 26 November 2007 for Admission of Certain Exhibits Into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, at 4.

AERIAL AND SATELLITE IMAGES



AERIAL AND SATELLITE IMAGES

International Criminal Court (ICC)

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

TRIAL

#relevance #probativevalue #prejudice

EXTRAPOLATION

- Following an accepted admission of guilt by the accused, Defence and Prosecution counsel agree on the facts of the case put forward by the Prosecution under Article 65(2) of the Rome Statute, leaving the Court to consider relevance, probative value and potential prejudice of the evidence. This can include photographs presented on the digital platform, along with any live testimony heard, when deliberating on the accused's conviction.²⁹⁵

⊗ The arguments of the Prosecution

1. The Prosecution introduced satellite images, photographs, videos, and other material gleaned from the Internet to corroborate the guilty plea by showing the state of mausoleums before, during and after destruction, including the participation of the Accused in the destruction. Outside of corroborating the guilty plea, the Prosecution did not seek to discuss evidentiary considerations related to DDE.²⁹⁶

⊗ The arguments of the Defence

2. The Defence did not challenge the admissibility of the materials as they were accepted by the Defence.²⁹⁷

⊗ The Court's Response

3. The Trial Judge stated, "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."²⁹⁸ The Chamber therefore at trial presumably considered the probative value and potential prejudice of the evidence, including the DDE, when deciding on whether to convict Al Mahdi. However, the Chamber did not elaborate on these considerations at trial or in the final judgment.

²⁹⁵ *Prosecutor v Admad Al Faqi Al Mahdi* (Direction on the Conduct of the Proceedings) ICC-01/12-01/15-136 (22 July 2016) p 8 [16].

²⁹⁶ *Prosecutor v Admad Al Faqi Al Mahdi*, Transcript Trial Hearing, ICC-01/12-01/15-T-4-Red-ENG, T. Ch. VIII, 22 August 2016, at 41, lines 7-12.

²⁹⁷ *Prosecutor v Admad Al Faqi Al Mahdi*, Transcript Trial Hearing, ICC-01/12-01/15-T-4-Red-ENG, T. Ch. VIII, 22 August 2016, at 41, line 11.

²⁹⁸ *Prosecutor v Admad Al Faqi Al Mahdi*, Direction on the Conduct of the Proceedings, ICC-01/12-01/15-136, T. Ch. VIII., 22 July 2016, at 8, para 16.

International Criminal Tribunal for the Former Yugoslavia (ICTY)

Prosecutor v. Radislav Krstic (IT-98-33)

TRIAL

#corroboration #voluminousdata #expertwitness

EXTRAPOLATION

- Where forensic evidence, including aerial images, is voluminous it may be entered into evidence via expert reports summarizing the forensic evidence²⁹⁹.

⊗ The arguments of the Prosecution

1. The Prosecution submitted aerial reconnaissance photographs, provided to the prosecution by the United States pursuant to Rule 70 of the RPEs, to corroborate the survivors' testimonies³⁰⁰ as well as to corroborate other forms of evidence, including communication intercepts and physical forensic evidence.³⁰¹
2. The aerial imagery DDE was entered into evidence via expert reports offering summaries of the forensic evidence due to the forensic evidence's voluminous nature.³⁰²

⊗ The arguments of the Defence

3. The Defence presented no objections to the exhibits brought by the Prosecution.³⁰³

⊗ The Court's Response

4. The Trial Chamber accepted the aerial photographs as corroborating evidence for witness testimony: "the accounts given by the survivors of the execution sites are corroborated by [...] aerial reconnaissance photographs taken in 1995,"³⁰⁴ as well as confirming the reliability of intercept communications: "The OTP embarked on a process of corroborating the intercepts with information obtained from other sources, such as [...] aerial images."³⁰⁵ "The Trial Chamber considered the intercepted communication to be a reliable source of evidence [...] reinforced by the measures taken by the OTP to verify the reliability of the intercepted evidence as part of the "intercept project."³⁰⁶
5. Further reasoning of the Court with respect to the aerial images is not contained in the public court record.

²⁹⁹ *Prosecutor v Radislav Krstić*, [Judgement](#), IT-98-33-T, 2 August 2001, T. Ch., at para 71- 79.

³⁰⁰ *Prosecutor v Radislav Krstić*, [Judgement](#), IT-98-33-T, T. Ch., 2 August 2001, at 2, para. 4, available at <https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

³⁰¹ *Prosecutor v Radislav Krstić*, [Judgement](#), IT-98-33-T, T. Ch., 2 August 2001, at 37, para 114.

³⁰² *Prosecutor v Radislav Krstić*, [Transcript Trial Hearing](#), ICTY, T. Ch. I, 26 May 2000, pgs 3548 (lines 16-25), 3549 (lines 1-10); *Prosecutor v Radislav Krstić*, [Judgement](#), IT-98-33-T, T. Ch., 2 August 2001, at 22, fn 136.

³⁰³ *Prosecutor v Radislav Krstić*, [Transcript Trial Hearing](#), ICTY, T. Ch. I, 26 May 2000, pgs 3572 (lines 23-25), 3573 (lines 1, 11).

³⁰⁴ *Prosecutor v Radislav Krstić*, [Judgement](#), IT-98-33-T, T. Ch., 2 August 2001, at 2, para. 4, available at <https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

³⁰⁵ *Prosecutor v Radislav Krstić*, [Judgement](#), IT-98-33-T, T. Ch., 2 August 2001, at 37, para 114.

³⁰⁶ *Prosecutor v Radislav Krstić*, [Judgement](#), IT-98-33-T, T. Ch., 2 August 2001, at 37, para 116.

TRIAL

#expertwitness #admissibility

EXTRAPOLATION

- 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*).³⁰⁷
- 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.³⁰⁸
- Multiple aerial and satellite imagery exhibits tendered together should be submitted with an index.³⁰⁹

⊗ **The arguments of the Prosecution**

1. The Prosecution sought to admit all exhibits, including aerial images, that had been previously put before and admitted at the ICTY during related witness testimony at previous ICTY trials.³¹⁰
2. For instance, the aerial image of an area (Branjevo farm) was previously put to a witness, Mr. Erdemovic, in *Krstic*. OTP sought to have the image admitted on the basis that Mr. Erdemovic's former witness testimony and transcript had been previously admitted.³¹¹
3. The majority of aerial images the OTP sought to be admitted were related and used in the expert report created previously by D. Manning for the *Krstic* case.³¹² The OTP sought admission of the expert report and testimony from *Krstic* 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.)³¹³
4. The aerial images had been provided by the US Government, pursuant to Rule 70 of the ICTY Rules of Procedure and Evidence. Rule 70 allows the Prosecutor to receive confidential information

³⁰⁷ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on Prosecution's Motions for admission of expert statements, IT-02060-T, T. Ch. I, Section, 7 November 2003, para 28, available at https://www.icty.org/x/cases/blagojevic_jokic/tdec/en/031107.htm.

³⁰⁸ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 bis, IT-02060-T, T. Ch. I, Section A, 12 June 2003, para. 30.

³⁰⁹ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 bis, IT-02060-T, T. Ch. I, Section A, 12 June 2003, para. 32, available at https://www.icty.org/x/cases/blagojevic_jokic/tdec/en/030612.htm#2.

³¹⁰ *Prosecutor v. Vidoje Blagojević and Dragan 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, T. Ch., 5 December 2003, p.1 para 2; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 bis, IT-02060-T, T. Ch. I, Section A, 12 June 2003, para. 30.

³¹¹ *Prosecutor v. Vidoje Blagojević and Dragan 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, T. Ch., 5 December 2003, p 20588 (p. 155 of pdf).

³¹² *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on Prosecution's Motions for admission of expert statements, IT-02060-T, ICTY, 7 November 2003, para 30

³¹³ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on Prosecution's Motions for admission of expert statements, IT-02060-T, ICTY, 7 November 2003, para 18

on a limited basis and under certain conditions. The precise origin of the images was therefore not disclosed as they were classified by the U.S government.

⊗ The arguments of the Defence

5. The Defence did not oppose the admission of the previously admitted exhibits, including the expert reports and the aerial and satellite imagery therein.³¹⁴

6. The Defence did, however, oppose the related admission of a section of the previous witness testimonies without cross-examination “on the basis that they are either unreliable as such, or that it would be in the interest of justice to have the witnesses appear for cross-examination.”³¹⁵

⊗ The Court’s Response

7. The Trial Chamber noted that although Rule 92 *bis* (D) does not explicitly provide for the admission of exhibits admitted during former testimony, pursuant to this rule those exhibits are admissible alongside former testimony as they form an inseparable and indispensable part of the testimony.³¹⁶ 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 *Krstic* case exhibit) it was difficult to identify the exact exhibits from the *Krstic* case.³¹⁷ The decision on the admission of the attached exhibits to the testimony was reserved until an index was provided.³¹⁸

8. In relation to expert testimony, submitted by the Prosecution as reports, the Court found that the appropriate test to be applied was Rule 94 *bis*, as it was applicable *lex specialis* (as opposed to Rule 92 *bis* as *lex generalis*)³¹⁹ and it was the Trial Chamber’s standard practice.³²⁰ The Trial Chamber therefore applied Rule 94 *bis* and determined D. Manning was a live witness, whose report was highly relevant to the case and admissible under Rule 89 and its Guidelines on the Standards Governing the Admission of Evidence, and who the Defence would be able to cross-examine.³²¹ Once satisfied that the authors of all reports were qualified as experts,³²² that the evidence had probative value and relevance, and that the evidence assisted in providing a complete picture, the Trial Chamber admitted the prior expert evidence (including the aerial images attached or used in their reports).³²³

9. In relation to Mr Erdemovic’s testimony and related exhibits, the Court rejected the Prosecution’s argument relating to Rule 94 *bis* or Rule 89(F) but admitted the evidence under Rule 92 *bis*. The

³¹⁴ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on Prosecution’s Motions for admission of expert statements, IT-02060-T, ICTY, 7 November 2003, para 30 and 35.

³¹⁵ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*, IT-02060-T, T. Ch. I, Section A, 12 June 2003, para. 3.

³¹⁶ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*, IT-02060-T, T. Ch. I, Section A, 12 June 2003, para. 30.

³¹⁷ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*, IT-02060-T, T. Ch. I, Section A, 12 June 2003, para. 31.

³¹⁸ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, First Decision on Prosecution’s Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 *bis*, IT-02060-T, T. Ch. I, Section A, 12 June 2003, para. 32, available at https://www.icty.org/x/cases/blagojevic_jokic/tdec/en/030612.htm#2.

³¹⁹ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on Prosecution’s Motions for admission of expert statements, IT-02060-T, T. Ch. I, Section, 7 November 2003, para 28, available at https://www.icty.org/x/cases/blagojevic_jokic/tdec/en/031107.htm.

³²⁰ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on Prosecution’s Motions for admission of expert statements, IT-02060-T, T. Ch. I, Section, 7 November 2003, para 29.

³²¹ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on Prosecution’s Motions for admission of expert statements, IT-02060-T, T. Ch. I, Section, 7 November 2003, para 30.

³²² *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on Prosecution’s Motions for admission of expert statements, IT-02060-T, T. Ch. I, Section, 7 November 2003, para 29.

³²³ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on Prosecution’s Motions for admission of expert statements, IT-02060-T, T. Ch. I, Section, 7 November 2003, para 35.

Chamber found it more appropriate to admit the aerial images that were attached to previous witness' evidence under Rule 94 *bis* as written statements and transcripts in lieu of oral testimony.

Prosecutor v Vujadin Popović et al. (IT-05-88)

TRIAL

#reliability #authentication

EXTRAPOLATION

- **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.**³²⁴
- **With adequate witness/expert corroboration, aerial images can be considered authentic and reliable and due weight can be accorded to them.**³²⁵
- **The authenticity of the aerial imagery evidence goes to the weight of the evidence rather than its admissibility.**³²⁶

⊗ The arguments of the Prosecution

1. Pursuant to Rule 70, which governs evidence that is confidential information and not subject to disclosure, OTP tendered aerial images that had been provided by the U.S. government.³²⁷ 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.”³²⁸

⊗ The arguments of the Defence

2. Counsel for Defendant Beara raised an objection to the admissibility of the aerial images and argued that the aerial images tendered by the Prosecution were not reliable.³²⁹ Counsel for Defendant 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.”³³⁰ Counsel for Defendant Popović also pointed out that “for some images we do not have any link which connects it with the

³²⁴ *Prosecutor v. Popovic et al.*, Public Redacted Judgment, Volume I, Case No. IT-05-88-T, Chamber II, 10th June, 2010, Para 75. (Available at, <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>)

³²⁵ *Prosecutor v. Popovic et al.*, Public Redacted Judgment, Volume I, Case No. IT-05-88-T, Chamber II, 10th June, 2010, Para 75. (Available at, <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>)

³²⁶ *Prosecutor v. Popovic et al.*, Transcript, Case No. IT-05-88-T, Chamber II, 7th February 2008, Page 21187. (Available at, <https://www.icty.org/x/cases/popovic/trans/en/080207ED.htm>)

³²⁷ *Prosecutor v. Popovic et al.*, Public Redacted Judgment, Volume I, Case No. IT-05-88-T, Chamber II, 10th June, 2010, Para 72. (Available at, <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>)

³²⁸ *Prosecutor v. Popovic et al.*, Public Redacted Judgment, Volume I, IT-05-88-T, T. Ch. II, 10 June 2010, at 19, para. 73. Available at <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>.

³²⁹ *Prosecutor v. Popovic et al.*, Public Redacted Judgment, Volume I, IT-05-88-T, T. Ch. II, 10 June 2010, at 19, para. 73. Available at <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>.

³³⁰ *Prosecutor v. Popovic et al.*, Public Redacted Judgment, Volume I, IT-05-88-T, T. Ch. II, 10 June 2010, at 19, para. 74. Available at <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>.

particular place where the grave is located, and this is because none of the images have site code or coordinates.”³³¹

3. The Defence furthermore asserted that the prosecution failed to establish the proper foundation and authenticity for the aerial images to be admitted: “It’s our submission that the documents should be rejected at whole, given alone Mr. Butler’s affirmation that no one was able to remove or strike out any portions of those aerial images, which is in direct contravention to what Mr. Ruez said when he acknowledged he removed the date.”³³²

⊗ **The Court’s Response**

4. The Chamber admitted and relied upon the aerial images.³³³ 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.³³⁴ The Chamber added that the Defence argument about authentication goes to weight of evidence rather than its admissibility.³³⁵

5. 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.³³⁶ The Trial Chamber determined the Defence’s argument alleging that “insufficient images were tendered to rely on the description of those images given by the United States Government” to be without merit.³³⁷ The Trial Chamber found the aerial images to be authentic and reliable in light of the Prosecution’s witness and expert evidence, and accorded them due weight.³³⁸

Prosecutor v Zdravko Tolimir (IT-05-88/2)

TRIAL

#reliability #authenticity #probativevalue #credibility #utility #corroboration

EXTRAPOLATION

- **Lack of information regarding the method of creation does not impair the credibility of aerial images.**³³⁹
- **When the actual subjects depicted on the aerial images are found/located, this vouches for the images’ authenticity and utility.**³⁴⁰

³³¹ *Prosecutor v. Popovic et al.*, Public Redacted Judgment, Volume I, IT-05-88-T, T. Ch. II, 10 June 2010, at 19, para. 74. Available at <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>.

³³² *Prosecutor v. Popovic et al.*, Transcript, IT-05-88-T, T. Ch. II, 6 February 2008, at 21172, lines 4-13. Available at <https://icty.org/x/cases/popovic/trans/en/080206ED.htm>.

³³³ *Prosecutor v. Popovic et al.*, Public Redacted Judgment, Volume I, IT-05-88-T, T. Ch. II, 10 June 2010, at 19, para. 73. Available at <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>.

³³⁴ *Prosecutor v. Popovic et al.*, Transcript, IT-05-88-T, T. Ch. II, 7 February 2008, at 21187, lines 22-25. Available at <https://icty.org/x/cases/popovic/trans/en/080207ED.htm>.

³³⁵ *Prosecutor v. Popovic et al.*, Transcript, IT-05-88-T, T. Ch. II, 7 February 2008, at 21187, lines 20-22. Available at <https://icty.org/x/cases/popovic/trans/en/080207ED.htm>.

³³⁶ *Prosecutor v. Popovic et al.*, Public Redacted Judgment, Volume I, IT-05-88-T, T. Ch. II, 10 June 2010, at 19, para. 75.

³³⁷ *Prosecutor v. Popovic et al.*, Public Redacted Judgment, Volume I, IT-05-88-T, T. Ch. II, 10 June 2010, at 19, para. 75.

³³⁸ *Prosecutor v. Popovic et al.*, Public Redacted Judgment, Volume I, IT-05-88-T, T. Ch. II, 10 June 2010, at 19, para. 75. Available at <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>.

³³⁹ *Prosecutor v Tolimir (Judgement)* IT-05-88/2-T (12 December 2012) (TC II) [70].

³⁴⁰ *Prosecutor v Tolimir (Judgement)* IT-05-88/2-T (12 December 2012) (TC II) [70].

- Interpretation and authentication of aerial and satellite imagery can be derived from witness corroboration.³⁴¹

⊗ The arguments of the Prosecution

1. The Prosecution tendered testimony by former Prosecution investigators as evidence about the use of aerial images. The Prosecution submitted that the testimony illustrated the images' authenticity and utility by the investigators' use of the images to locate gravesites.³⁴² An archaeologist expert witness also used the aerial images, further illustrating the images' utility.³⁴³ Aerial images were furthermore used to corroborate survivor testimony and vehicle logs.³⁴⁴

⊗ The arguments of the Defence

2. Defence Counsel challenged the reliability of the aerial images due to lack of evidence as to their origin, method of creation, manner of editing, how they should be interpreted, and whether the Prosecution received them in their original form or whether they were modified.³⁴⁵ The Prosecution did not specify if the images were satellite photographs, images taken by an unmanned aircraft, or images taken by other means.³⁴⁶ According to the Defence, this rendered the aerial images unreliable evidence.³⁴⁷

⊗ The Court's Response

3. The Trial Chamber acknowledged that evidence was lacking with regard to the method of creation of the images, but it nevertheless determined that the credibility of the aerial images in general was not impaired.³⁴⁸ The utility of the aerial images to locate gravesites in itself vouched for the images' authenticity.³⁴⁹ Interpretation and authenticity was furthermore derived from witness corroboration. The Trial Chamber stated that it "finds aerial images generally to be reliable and of probative value."³⁵⁰

³⁴¹ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [70].

³⁴² *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [70].

³⁴³ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [70].

³⁴⁴ *Prosecutor v Tolimir* ([Prosecution Filing of Public Version of Pre-Trial Brief](#)) IT-05-88/2-PT (29 September 2009) (PTC) [65], [110].

³⁴⁵ *Prosecutor v Tolimir* ([Public Redacted Version of Defence Final Trial Brief](#)) IT-05-88/2-T (1 October 2012) (TC II) [158]-[160].

³⁴⁶ *Prosecutor v Tolimir* ([Public Redacted Version of Defence Final Trial Brief](#)) IT-05-88/2-T (1 October 2012) (TC II) [158].

³⁴⁷ *Prosecutor v Tolimir* ([Public Redacted Version of Defence Final Trial Brief](#)) IT-05-88/2-T (1 October 2012) (TC II) [160].

³⁴⁸ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [69]-[70].

³⁴⁹ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [70].

³⁵⁰ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [70].

In this section:



5

Cases have been extrapolated



1

Stage of proceedings covered – Trial



2

International Criminal Courts and Tribunals considered – ICC, ICTY

INTERCEPTED COMMUNICATION (INTERCEPTS)



INTERCEPTED COMMUNICATION (INTERCEPTS)

International Criminal Court (ICC)

Prosecutor v Dominic Ongwen (ICC-02/04-01/15)

PRE-TRIAL

#*provenance* #*chainofcustody* #*reliability*

EXTRAPOLATION

- A detailed explanation of the process of interception and analysis can overcome shortcomings in the interception process.³⁵¹

⊗ The arguments of the Prosecution

1. The Prosecution submitted records compiled and maintained by authorities concerning the interception of LRA radio communications, indicating the relevance and probative value of each individual item.³⁵² The Prosecution explained the shortcomings in the interception process; however, in the Prosecution's opinion, it did not "affect the integrity of this evidence."³⁵³ These shortcomings related to: (1) the recording equipment of the intercepts, which was rudimentary in nature; (2) record-keeping, which was not always meticulous; and (3) corroboration between the different sources of intercept, which was not always consistent.³⁵⁴ Rather, the Prosecution submitted that the shortcomings proved that the material the radio operators produced was distinct and independently compiled.³⁵⁵

2. It submitted that the evidence was "unaffected by human memory's fallibility and free of the bias or motivations that could taint witness testimony,"³⁵⁶ and that "[i]ts sources are too diverse and its nature too voluminous to be anything other than genuine and highly probative evidence."³⁵⁷

⊗ The arguments of the Defence

³⁵¹ *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, lines 1-8.

³⁵² *Prosecutor v Ongwen* ([Transcript Confirmation of Charges](#)) ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (PTC II) 33, lines 14-17; 44, lines 8-24.

³⁵³ ³⁵³ *Prosecutor v Ongwen* ([Transcript Confirmation of Charges](#)) ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (PTC II) 44, lines 8-24.

³⁵⁴ *Prosecutor v Ongwen* ([Transcript Confirmation of Charges](#)) ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (PTC II) 44, lines 8-24.

³⁵⁵ *Prosecutor v Ongwen* ([Transcript Confirmation of Charges](#)) ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (PTC II) 45, lines 2-4.

³⁵⁶ *Prosecutor v Ongwen* ([Transcript Confirmation of Charges](#)) ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (PTC II) 45, lines 7-8.

³⁵⁷ *Prosecutor v Ongwen* ([Transcript Confirmation of Charges](#)) ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (PTC II) 45, lines 9-10.

3. The Defence did not challenge the reliability of the intercept evidence and, in fact, itself relied on the said evidence.³⁵⁸

⊗ **The Court's Response**

4. “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,” and had provided statements of witnesses involved at all levels of interception operations, the Chamber held the intercepted evidence to be reliable.³⁵⁹

TRIAL

**#provenance #chainofcustody #reliability #corroboration #fairtrialrights
#probativevalue**

EXTRAPOLATION

- **Videos not in a working language of the Court should be translated into one of the working languages of the Court and made available to the Chamber.**³⁶⁰

⊗ **The arguments of the Prosecution**

1. The Prosecution argued that the intercept evidence comprised 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 is implicitly imbued with indicia of reliability.”³⁶¹ Hence, the chain of custody of the intercept evidence was also secure.³⁶²

2. 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.³⁶³ Moreover, the Prosecution argued “the consistency across the breadth of the intercept evidence demonstrates its accuracy and reliability.”³⁶⁴

3. The Prosecution highlighted that the intercept evidence was “too voluminous and its sources too diverse to be anything other than genuine, contemporaneous and highly probative evidence.”³⁶⁵

³⁵⁸ *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].

³⁵⁹ *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].

³⁶⁰ *Prosecutor v Ongwen* (Decision on Defence Request regarding the Evidentiary Regime) ICC-02/04-01/15-1546 (19 June 2019) (TC IX) [1].

³⁶¹ *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].

³⁶² *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].

³⁶³ *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].

³⁶⁴ *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].

³⁶⁵ *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].

4. The Prosecution additionally argued that the evidence was mutually corroborative of other Prosecution evidence, such as the intercept witnesses,³⁶⁶ and former LRA fighters who confirmed “independently the accuracy of the content of sound recordings of LRA radio communications”.³⁶⁷

⊗ **The arguments of the Defence**

5. 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 could greatly impact Mr. Ongwen’s fair trial rights”.³⁶⁸

6. Furthermore, the radio transmissions were far from the only form of communication used, meaning that these materials are not a complete record of LRA communications.³⁶⁹ Furthermore, as admitted by the Prosecution, the sound recording of LRA radio communications do not reflect entire communications, thus, according to the Defence, making it impossible to contextualise the said communications.³⁷⁰ The recordings submitted were incomplete, with gaps created through the “operational limitations of the [Uganda People’s Defence Force] or political decisions” or “systematic issues” of a technical nature.³⁷¹

7. The Defence furthermore put forth that the “Prosecution’s assertion that there is a secure chain of custody is misleading and inadequate,” as “there are allegations that the public and family members were invited to the secured facility, thus opening up the possibility of potentially tainted evidence.”³⁷²

8. The Defence highlighted that, as State organs of a belligerent party, the various military and law enforcement institutions of the Government of Uganda which provided the evidence could not be considered as a neutral independent source, especially since much of the evidence was 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.³⁷³

9. Moreover, according to the Defence, “there are several human factors that are clearly discernible from the statements which introduce major gaps, and potentially errors, into the collection process. These gaps and errors undermine the probative nature of [...] radio recordings and associated rough notes and faxes.”³⁷⁴ The Defence argued that other technical limitations systematically impact upon the completeness of the record and thus its probative value, such as power-outages and patchy power.³⁷⁵

10. In its closing brief, the Defence challenged the reliability of the intercept evidence by submitting that:

³⁶⁶ *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].

³⁶⁷ *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].

³⁶⁸ *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].

³⁶⁹ *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) [23].

³⁷⁰ *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) [35].

³⁷¹ *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) [35].

³⁷² *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) [25].

³⁷³ *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].

³⁷⁴ *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].

³⁷⁵ *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].

- a. most of the material is irrelevant and the failure to translate, transcribe it, or attempt to attribute other speakers has deprived the Trial Chamber of context;
- b. the Prosecution did not authenticate the recordings which should bar their admission;
- c. in any case, the original intercept recordings are unreliable evidence;
- d. particularly due to the failure to conduct an authentication procedure, the body of recordings was plausibly tampered with prior to being provided to the Prosecution by one party to the LRA conflict, and therefore the prejudice of admission outweighs their probative value;
- e. the ‘enhancement’ may have further contributed to the unreliability of the evidence;
- f. the testimonial and Rule 68 process of attribution processes were flawed as a result; and
- g. the in-court attribution witnesses themselves are not credible or reliable.”³⁷⁶

⊗ The Court’s Response

11. The Chamber pointed out that the objections raised by the Defence mostly relate to “the relevance and probative value” of the intercepted evidence at hand.³⁷⁷ In line with the Court’s general approach to admitting evidence, the Chamber said it saw “no reason for exceptionally considering these objections at this point in time”.³⁷⁸

12. The Chamber considered that the Prosecution’s Request could be granted “in full conformity with the accused’s rights related to notice and trial preparations, despite the volume of items submitted.”³⁷⁹ The Chamber established this by emphasizing that deferring considerations of the standard of evidence does not deprive the Defence or accused of an opportunity to challenge the evidence brought forward.³⁸⁰ It also based itself on the fact that the Defence “is in a position to formulate challenges to the evidence submitted” and also “has the entirety of the trial to examine Prosecution witnesses on interception related materials, call witnesses of its own and submit evidence itself”.³⁸¹

13. Further on, the Chamber declared that it would not apply the jurisprudential requirements set out for prima facie assessments of documentary materials prior to their admission.³⁸² The Chamber considered that “prima facie rulings on the standard evidentiary criteria would not provide the Defence with any meaningful additional clarity on how the Prosecution or Chamber will ultimately rely upon the submitted evidence”.³⁸³ The Chamber also emphasised that deferring considerations of the standard evidentiary criteria does not deprive the Defence of the opportunity to challenge them.³⁸⁴ It pointed out that if the Prosecution were to rely on any of the submitted

³⁷⁶ *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) [225].

³⁷⁷ *Prosecutor v Ongwen* ([Decision on Prosecution Request to Submit Interception Related Evidence](#)) ICC-02/04-01/15-615 (1 December 2016) (TC IX) [22].

³⁷⁸ *Prosecutor v Ongwen* ([Decision on Prosecution Request to Submit Interception Related Evidence](#)) ICC-02/04-01/15-615 (1 December 2016) (TC IX) [22].

³⁷⁹ *Prosecutor v Ongwen* ([Decision on Prosecution Request to Submit Interception Related Evidence](#)) ICC-02/04-01/15-615 (1 December 2016) (TC IX) [25].

³⁸⁰ *Prosecutor v Ongwen* ([Decision on Prosecution Request to Submit Interception Related Evidence](#)) ICC-02/04-01/15-615 (1 December 2016) (TC IX) [23].

³⁸¹ *Prosecutor v Ongwen* ([Decision on Prosecution Request to Submit Interception Related Evidence](#)) ICC-02/04-01/15-615 (1 December 2016) (TC IX) [23].

³⁸² *Prosecutor v Ongwen* ([Decision on Prosecution Request to Submit Interception Related Evidence](#)) ICC-02/04-01/15-615 (1 December 2016) (TC IX) [8].

³⁸³ *Prosecutor v Ongwen* ([Decision on Prosecution Request to Submit Interception Related Evidence](#)) ICC-02/04-01/15-615 (1 December 2016) (TC IX) [25].

³⁸⁴ *Prosecutor v Ongwen* ([Decision on Prosecution Request to Submit Interception Related Evidence](#)) ICC-02/04-01/15-615 (1 December 2016) (TC IX) [23].

evidence “in a manner which the Defence could not reasonably anticipate”, this could be resolved by giving the Defence “an opportunity to raise further evidentiary objections” or “in the Chamber’s ultimate assessment of the potentially prejudicial effect of relying upon the evidence”.

14. The Chamber, thus, recognized the ‘submission’ but not ‘admission’ of the intercept evidence and deferred consideration of the Defence’s objections until the judgment.³⁸⁵

15. In the Trial Judgment, the Chamber found no basis to hold that the reliability of the evidence obtained through requests for assistance made to the Government of Uganda was impaired. It stated, “It is natural that a State may possess evidence in relation to crimes allegedly committed on its territory, and it is the duty of the Prosecution to seek access to such evidence through the appropriate statutory avenues. The Defence does not allege any specific irregularity, and its argument is based exclusively on the mere fact that the Government of Uganda is the LRA’s adversary in the conflict. No irregularity has also become apparent during the trial. As such, the suggestion is speculative and therefore rejected.”³⁸⁶ The Chamber’s ultimate general conclusion was to find that “the intercept materials are reliable and the Defence arguments without merit.”³⁸⁷

³⁸⁵ *Prosecutor v Ongwen* ([Decision on Prosecution Request to Submit Interception Related Evidence](#)) ICC-02/04-01/15-615 (1 December 2016) (TC IX) [26].

³⁸⁶ *Prosecutor v Ongwen* ([Trial Judgment](#)), ICC-02/04-01/15 (4 February 2021) (TC IX) [849].

³⁸⁷ *Prosecutor v Ongwen* ([Trial Judgment](#)), ICC-02/04-01/15 (4 February 2021) (TC IX) [615].

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

TRIAL

#privacy #prejudice #authenticity #reliability #righttoprivacy

EXTRAPOLATION

- **If intercepted communication evidence is collected in violation of privacy, the violation casts a substantial doubt on the reliability of evidence and raises the question of whether the admission of such evidence would be antithetical to and/or seriously damage the integrity of the proceedings.³⁸⁸**
- **Using independent counsel assigned by a Pre-Trial Judge to review intercepted communication to exclude potential privileged communication does not violate the privacy rights of the person(s) recorded in the intercept.³⁸⁹**
- **Transmission to the Prosecutor of recordings of the Accused’s non-privileged telephone calls from the ICC Detention Centre do not violate the Accused’s right to privacy where the interception and transmission of the recordings had a basis in law;³⁹⁰ were necessary;³⁹¹ and were proportionate to the objective.³⁹²**

⊗ The arguments of the Prosecution

1. The Prosecution denied any violations of Article 69(7) of the Rome Statute concerning evidence obtained by means that would constitute a violation of the Rome Statute or of internationally recognized human rights.³⁹³ According to the Prosecution, the collection of

³⁸⁸ *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].

³⁸⁹ *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) [454].

³⁹⁰ *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].

³⁹¹ *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].

³⁹² *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].

³⁹³ *Prosecutor v Bemba et al* ([Public redacted version of “Prosecution’s Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69\(7\) of the Rome Statute”, 22 April 2016, ICC-01/05-01/13-1833-conf](#)) ICC-01/05-01/13-1833-Red (1 June 2016) (TC VII) [72].

intercepts was ‘judicially authorised’ by the ICC and also the national court.³⁹⁴ The Prosecution added that ‘the validity of the Pre-Trial Judge’s authorisation had been litigated.’³⁹⁵

2. The Prosecution furthermore asserted that the Defence’s argument that the interception lacked a legal basis (due to the fact that Kilolo’s number was absent “in a RFA before the interception was initiated”) can be disproven by the “final RFAs and email correspondence between the Prosecution and Dutch authorities, which the Defence of Mr Bemba has received.”³⁹⁶

3. Furthermore, when Independent Counsel was engaged to screen intercepted calls and exclude any potentially privileged communication³⁹⁷ the Prosecution asserted that the appointment of Independent Counsel for such protection of privileged communication does not breach international human rights law or the Rome Statute.³⁹⁸ The Prosecution noted that the Independent Counsel was not a substitute for the Prosecution, but was rather appointed to “safeguard against the transmission of privileged information to the Prosecution, acting under the Single Judge’s mandate and supervision.”³⁹⁹

4. With regard to calls intercepted from the ICC Detention Centre, the Prosecution asserted the recordings bear sufficient indicia of reliability and authenticity for admission: “they were obtained in accordance with judicial authorization”;⁴⁰⁰ participation in the conversations was not challenged;⁴⁰¹ a plausible challenge cannot be sustained (the calls were placed from the phone extension of Mr Bemba);⁴⁰² “other evidence independently corroborates the reliability and accuracy of the Recordings”;⁴⁰³ the synchronization issue is minimal and “does not affect the understanding of the conversations, or make them unintelligible.”⁴⁰⁴

³⁹⁴ *Prosecutor v Bemba et al* ([Public redacted version of “Prosecution’s Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69\(7\) of the Rome Statute”](#), 22 April 2016, ICC-01/05-01/13-1833-conf) ICC-01/05-01/13-1833-Red (1 June 2016) (TC VII) [34].

³⁹⁵ *Prosecutor v Bemba et al* ([Public redacted version of “Prosecution’s Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69\(7\) of the Rome Statute”](#), 22 April 2016, ICC-01/05-01/13-1833-conf) ICC-01/05-01/13-1833-Red (1 June 2016) (TC VII) [34].

³⁹⁶ *Prosecutor v Bemba et al* ([Public redacted version of “Prosecution’s Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69\(7\) of the Rome Statute”](#), 22 April 2016, ICC-01/05-01/13-1833-conf) ICC-01/05-01/13-1833-Red (1 June 2016) (TC VII) [34].

³⁹⁷ *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) [455].

³⁹⁸ *Prosecutor v Bemba et al* ([Public redacted version of “Prosecution’s Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69\(7\) of the Rome Statute”](#), 22 April 2016, ICC-01/05-01/13-1833-conf) ICC-01/05-01/13-1833-Red (1 June 2016) (TC VII) [42].

³⁹⁹ *Prosecutor v Bemba et al* ([Public redacted version of “Prosecution’s Consolidated Response to Defence Motions Seeking Exclusion of Evidence under Article 69\(7\) of the Rome Statute”](#), 22 April 2016, ICC-01/05-01/13-1833-conf) ICC-01/05-01/13-1833-Red (1 June 2016) (TC VII) [42].

⁴⁰⁰ *Prosecutor Bemba et al* ([Public redacted version of “Prosecution’s Second Request for the Admission of Evidence from the Bar Table”](#), 31 July 2015, ICC-01/05-01/13-1113-Conf) ICC-01/05-01/13-1113-Red (6 August 2015) (TC VII) [18].

⁴⁰¹ *Prosecutor Bemba et al* ([Public redacted version of “Prosecution’s Second Request for the Admission of Evidence from the Bar Table”](#), 31 July 2015, ICC-01/05-01/13-1113-Conf) ICC-01/05-01/13-1113-Red (6 August 2015) (TC VII) [19].

⁴⁰² *Prosecutor Bemba et al* ([Public redacted version of “Prosecution’s Second Request for the Admission of Evidence from the Bar Table”](#), 31 July 2015, ICC-01/05-01/13-1113-Conf) ICC-01/05-01/13-1113-Red (6 August 2015) (TC VII) [20].

⁴⁰³ *Prosecutor Bemba et al* ([Public redacted version of “Prosecution’s Second Request for the Admission of Evidence from the Bar Table”](#), 31 July 2015, ICC-01/05-01/13-1113-Conf) ICC-01/05-01/13-1113-Red (6 August 2015) (TC VII) [21].

⁴⁰⁴ *Prosecutor Bemba et al* ([Public redacted version of “Prosecution’s Second Request for the Admission of Evidence from the Bar Table”](#), 31 July 2015, ICC-01/05-01/13-1113-Conf) ICC-01/05-01/13-1113-Red (6 August 2015) (TC VII) [24].

⊗ The arguments of the Defence

5. According to the Defence of Mr. Bemba, in addition to Article 69(7) of the Rome Statute, international human rights law requires that “the intercepted communications must be conducted in accordance with the law.”⁴⁰⁵ The Defence argued that the interceptions of the Kilolo Number between August and September 2013 were indeed illegal on the basis that “(i) the Prosecution did not formally request the interception of this number and (ii) certain key discussions in the interception of this number were not recorded in writing.”⁴⁰⁶ The Defence referred to a relevant Dutch legal provision.⁴⁰⁷

6. The Defence furthermore argued that during the time that “the Independent Counsel was engaged in the confidential Dutch interception process, he liaised with the ICC Prosecution directly.”⁴⁰⁸ The Defence claimed that the Independent Counsel “received a list of codes, formulated by the Prosecution, in order to determine which calls were “relevant”, and [which] should be transmitted to the ICC.”⁴⁰⁹ The Defence of Mr. Bemba argued that neither the Dutch Investigative Judge nor Pre-Trial Chamber Single Judge would be able to verify the findings and recommendation of the Independent Counsel, and this would mean that the Defence “had no ability to obtain a remedy concerning these violations before the Dutch Court’s or Pre-Trial Chamber.”⁴¹⁰

7. With regard to the calls intercepted from the ICC Detention Centre, the Defence argued that the inclusion of them in the record of the accused’s conversations violates the accused’s right to remain silent, as well as respect for his private life.⁴¹¹

8. The Defence furthermore asserted that there was an uncertainty in the allocation of the numbers as listed in the records and unreliability of the conversations. It argued that the Prosecution had to demonstrate, for each audio conversation which it attributed 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 taken part in the conversation.⁴¹² The Defence furthermore argued that, due to synchronization issues with sentences spoken simultaneously, that it was impossible to know the true order in which sentences were marked for translation in the transcripts and translations and as such they were not able to rule out whether the Prosecution’s submission was the true order and reflection of what was said or whether it was an “incriminating” distortion.⁴¹³

⁴⁰⁵ *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) [15].

⁴⁰⁶ *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) [21]; *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) [22].

⁴⁰⁷ *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].

⁴⁰⁸ *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) [53].

⁴⁰⁹ *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) [53].

⁴¹⁰ *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) [28].

⁴¹¹ *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) [42].

⁴¹² *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) [14].

⁴¹³ *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) [21].

⊗ The Court's Response

9. The Chamber had to first consider “whether the evidence was collected in violation of the Court’s statutory scheme or internationally recognised human rights.” If a violation had occurred, the Chamber would then have to consider if the violation “casts substantial doubt on the reliability of the evidence’ or whether the admission of the evidence ‘would be antithetical to and would seriously damage the integrity of the proceedings.”⁴¹⁴ The Court noted that “the internationally recognised human right at issue is the right to privacy, which may not be interfered with except “in accordance with the law.”⁴¹⁵

10. The Chamber considered, as regards a violation of internationally recognised human rights, that “the actions of the Dutch Prosecution in requesting interception of the Kilolo Number and the Dutch Investigative Judge in authorising the interception do not appear to be so manifestly unlawful that they amount to a failure to act ‘in accordance with the law’ for purposes of Mr Kilolo’s right to privacy.”⁴¹⁶

11. The Trial Chamber furthermore rejected the arguments of Mr Kilolo’s and Mr Bemba’s Defence with regard to Independent Counsel and noted that it had already affirmed the mandate of the Independent Counsel.⁴¹⁷ The Appeals Chamber later added that using Independent Counsel assigned by a Pre-Trial Judge to review intercepted communications to exclude potential privileged communications does not violate the right to privacy.⁴¹⁸

12. With regard to the calls intercepted from the ICC Detention Centre, the Court held that the Detention Centre Materials had not been obtained by means of violation of the accused’s right to privacy: the transmission to the Prosecutor of the recordings of the accused’s non-privileged telephone calls at the Detention Centre had a basis in law;⁴¹⁹ was necessary;⁴²⁰ and proportionate to its objective.⁴²¹

13. The Court furthermore considered that, in light of several considerations, it was not necessary for the Prosecution to provide further testimonial evidence on authenticity.⁴²² Indeed, “some communications and logs do have inherent indicia of authenticity”, such as “corporate watermarks of the telecommunications provider”;⁴²³ “the content of every communication in evidence matches the allegedly corresponding logs and attributed numbers”;⁴²⁴ “the case record is replete with further information confirming the authenticity and chain of custody of these

⁴¹⁴ *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].

⁴¹⁵ *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].

⁴¹⁶ *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].

⁴¹⁷ *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].

⁴¹⁸ *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) [454].

⁴¹⁹ *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].

⁴²⁰ *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].

⁴²¹ *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].

⁴²² *Prosecutor v Bemba et al* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) [225].

⁴²³ *Prosecutor v Bemba et al* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) [219].

⁴²⁴ *Prosecutor v Bemba et al* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) [220].

communications and logs”;⁴²⁵ the Registry, which either generated or received many of the materials challenged, “is a neutral organ charged, *inter alia*, with making the evidence available by storing and registering it” and as such, this information is “precisely the type of information which the Registry would acquire in the course of its administrative functions”.⁴²⁶ On the matter of reliability, the Court held that “the technical irregularities in recording conversations from and to the ICC Detention Centre, albeit significant, were not of such a scale as to exclude the evidence from the outset.”⁴²⁷

14. The Court ultimately held that the Detention Centre Materials had not been obtained by means of violation of the accused’s right to privacy on the basis that the transmission to the Prosecutor of the recordings of the Accused’s non-privileged telephone calls at the Detention Centre had a basis in law;⁴²⁸ was necessary;⁴²⁹ and proportionate to its objective.⁴³⁰

APPEAL

#reliability #relevance #admissibility

EXTRAPOLATION

- **Transcripts and translations remain admissible where they have been carried out by the Office of the Prosecution instead of the Registry.**⁴³¹
- **Not all mistakes in translations or transcripts of intercepted communication are material or affect the substance or understanding of the document.**⁴³²

⊗ The arguments of the Prosecution

1. In opposition to the Defence’s argument of unsatisfactory intercept translations, the Prosecution asserted the transcripts and translations of Mr. Babala’s intercepted Detention Centre

⁴²⁵ *Prosecutor v Bemba et al* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) [222].

⁴²⁶ *Prosecutor v Bemba et al* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) [223].

⁴²⁷ *Prosecutor v Bemba et al* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) [227].

⁴²⁸ *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].

⁴²⁹ *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].

⁴³⁰ *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].

⁴³¹ *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 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].

⁴³² *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].

calls were accurate and reliable.⁴³³ The Prosecution added that the Defence of Mr. Babala fails to show that it lacked objectivity in preparing them.⁴³⁴

2. Furthermore, counter to the Defence's concerns of errors in the intercept transcripts, the Prosecution argued that "alleged minor errors in transcripts or translations overlooks the fact that the Trial Chamber listened to the intercepted audio recordings" and conducted its own independent assessment.⁴³⁵ The Prosecution also added that the Defence of Mr. Babala fails to identify the errors that "materially affected the Conviction Decision" as well as fails to mention that in May 2015, the Prosecution corrected both "typographical" errors.⁴³⁶ In the Prosecution's view, the errors did not form "the basis of any finding in the Conviction Decision."⁴³⁷

⊗ The arguments of the Defence

3. The Defence of Mr Babala submits that the Trial Chamber erred when it relied on the English versions of the French translations, which was provided by the Prosecutor. According to the Defence, the Prosecution is "a biased party" to the proceedings, affecting its assessment and translation of the recordings of the Court's detention centre in their entirety.⁴³⁸

4. The Defence of Mr Babala furthermore argued that the Trial Chamber "disregarded the irregularities in the Prosecutor's transcripts and translations."⁴³⁹ The Defence added that even though the Trial Chamber held that "the sequence of utterance in the transcripts was unreliable, the Trial Chamber relied [on] words removed from context and a speaker's isolated utterances."⁴⁴⁰

5. With regard to intercepted calls from the ICC Detention Centre, Defence for Mr. Bemba challenged "the Trial Chamber's reliance on the Detention Centre Materials in the Conviction Decision on the grounds that this material is inadmissible under article 69 (7) of the Statute" because they "had been obtained by means of a violation of his internationally recognized human right to privacy at the detention centre within the meaning of article 69 (7) of the Statute, in that the Pre-Trial Single Judge's order to transmit the Detention Centre Materials to the Prosecutor entailed an unlawful interference with such right to privacy."⁴⁴¹

⁴³³ *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 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) [1337].

⁴³⁴ *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 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) [1337].

⁴³⁵ *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 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], fns 3264, 3265, citing *Prosecutor v Bemba et al (Judgment pursuant to Article 74 of the Statute)* ICC-01/05-01/13-1989-Red (19 October 2016) (TC VII) [216], [227].

⁴³⁶ *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 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) [1337].

⁴³⁷ *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 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) [1337].

⁴³⁸ *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 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) [1336].

⁴³⁹ *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 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) [1336].

⁴⁴⁰ *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 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) [1336].

⁴⁴¹ *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 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) [371].

⊗ The Court's Response

6. The Appeals Chamber held that “the transcriptions and translations of the conversations had been carried out by the Office of the Prosecutor and not by the Registry was not in itself a reason not to take them into account.”⁴⁴² The Chamber added that this was a well-known fact to the parties, and that the parties could still “challenge the accuracy of transcription or translation.”⁴⁴³

7. The Appeals Chamber agreed with the Trial Chamber's judgment. It held that the Trial Chamber had determined that even with technical issues surrounding the audio recordings, it could rely on their transcripts and translations provided that these were ‘corroborated by other evidence.’⁴⁴⁴

8. The Appeals Chamber also noted that the Trial Chamber conducted ‘its own independent assessment of the evidence’ when determining the relevance of intercepted telephone communications.⁴⁴⁵ This includes listening to the audio recording and reviewing the corresponding material such as the transcriptions and translations of audio recordings.⁴⁴⁶

9. The Appeals Chamber added that “not all mistakes are material or affect the substance or understanding of a document” and parties must indicate “how the mistakes materially affect the content of the document in question.”⁴⁴⁷

10. With regard to the Detention Centre materials, the Appeals Chamber refuted the Defence Counsel for 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.⁴⁴⁸ The intercepted conversations were received “in the course of normal functioning (administrative activities)” of the Detention Center.⁴⁴⁹

⁴⁴² *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 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].

⁴⁴³ *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 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].

⁴⁴⁴ *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].

⁴⁴⁵ *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].

⁴⁴⁶ *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].

⁴⁴⁷ *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].

⁴⁴⁸ *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 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].

⁴⁴⁹ *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 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].

11. The Court stated that “[T]he monitoring regime at the detention centre cannot in any way be qualified as an act of “covert surveillance” as this regime is explicitly spelled out and the detained persons duly informed of its existence”.⁴⁵⁰

12. The Court furthermore held that “the surveillance of his non-privileged telephone communications at the detention centre was not ordered by the Pre-Trial Single Judge, but is specifically provided for by the ordinary detention regime applicable at the detention centre of this Court”.⁴⁵¹ 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) Rome Statute.⁴⁵²

International Criminal Tribunal for the Former Yugoslavia (ICTY)

Prosecutor v Radislav Krstic (IT-98-33)

TRIAL

#authenticity #reliability #corroboration #expert

EXTRAPOLATION

- 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,⁴⁵³ including clarifying the process of the intercepts’ recording and transcription by calling witnesses who carried out the intercepts or took part in their collation.⁴⁵⁴
- 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,⁴⁵⁵ and a comparison taking place, and/or where surrounding events or unrelated witness evidence corroborates the intercepted material.⁴⁵⁶ It is more likely the intercept evidence will be accepted as reliable where corroborating evidence is of a high level of

⁴⁵⁰ *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 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) [375].

⁴⁵¹ *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 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].

⁴⁵² *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 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].

⁴⁵³ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [4], [107].

⁴⁵⁴ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [116].

⁴⁵⁵ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [108].

⁴⁵⁶ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [208], [345].

documentable detail that could not have been completely manufactured.⁴⁵⁷

- 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 as from those who helped assemble it.⁴⁵⁸
- 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.⁴⁵⁹

⊗ The arguments of the Prosecution

1. Intercept material was provided to the 'OTP intercept project' for collation and fact-checking.⁴⁶⁰ A former OTP employee, Ms. Frease, testified that the intercept evidence was handled by a team of analysts, investigators, translators and others with language skills, who collected, assembled, analysed and translated the material that had been provide to the OTP in its original Bosnian/Croatian/Serbian form and established procedures to test the material's accuracy.⁴⁶¹ The Prosecution furthermore arranged a number of Bosnian Muslim witnesses "who were involved in intercepting and transcribing the VRS [radio] conversation, [and who] testified before the Trial Chamber about the methods employed."⁴⁶²

2. The Prosecution furthermore tendered into evidence a number of exhibits aiming to authenticate all intercepts used at trial.⁴⁶³ (Many of the exhibits tendered by the Prosecution under this category refer to specific intercepts submitted in rebuttal).⁴⁶⁴

⊗ The arguments of the Defence

3. The Defence argued that the exhibits to authenticate the intercepts were improper rebuttal evidence, as the Defence had made no previous challenge to the intercepts' authenticity.⁴⁶⁵ The Defence did, however, consistently challenge the reliability of the intercepts throughout the trial.⁴⁶⁶

4. 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

⁴⁵⁷ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [116].

⁴⁵⁸ *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].

⁴⁵⁹ *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* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [115-116].

⁴⁶⁰ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [106].

⁴⁶¹ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [106].

⁴⁶² *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [107].

⁴⁶³ *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].

⁴⁶⁴ *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].

⁴⁶⁵ *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].

⁴⁶⁶ *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].

argued, the intercepts were filled with assumptions as to what had been said during the course of the conversation.”⁴⁶⁷

5. Finally, the Defence asserted through the testimony of General Radinovic, the Defence military expert called during the trial, “that radio intercepts were highly unreliable sources of information.”⁴⁶⁸ 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”.⁴⁶⁹

⊗ The Court’s Reasoning

6. The Chamber found that the intercepts were admitted in rebuttal without challenge to their authenticity.⁴⁷⁰ The exhibits tendered to authenticate the intercepts were therefore excluded.⁴⁷¹ However, because the Defence challenged the reliability of the evidence throughout the trial, the Chamber found that the Prosecution was “entitled to adduce additional evidence in rebuttal to prove that the intercepts are a reliable source of information.”⁴⁷² The testimony of Witness Frease “about the process used by the OTP to compile, authenticate and assess the reliability of the intercepts” [...] ⁴⁷³ “[was] thus admitted to the extent that it relates to the reliability of the intercepts generally.”⁴⁷⁴ 8. The Trial Chamber used “records of VRS radio communications that were intercepted by the Army of Bosnia Herzegovina (“ABiH”)” to corroborate survivors’ testimonies.⁴⁷⁵

7. In response to General Radinovic’s argument, the Trial Chamber accepted that the OTP did in fact diligently check and cross-reference the intercept material as part of the OTP ‘intercept project.’⁴⁷⁶ “In order to determine whether the material was reliable and genuine, the OTP looked at the 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 [...] Although, at times, the OTP was unable to determine the significance of some aspects of the conversations, there was no information in the intercepted conversations that was completely at odds with the other evidence uncovered by the OTP.”⁴⁷⁷ The Trial Chamber furthermore considered that the “testimony of Mr. Butler [Prosecution military expert witness] “provided corroboration of the careful consideration given to the intercept evidence during the course of the OTP’s investigation.”⁴⁷⁸

8. On the whole, the Trial Chamber considered “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.

⁴⁶⁷ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [111].

⁴⁶⁸ *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].

⁴⁶⁹ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [114].

⁴⁷⁰ *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].

⁴⁷¹ *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].

⁴⁷² *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].

⁴⁷³ *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].

⁴⁷⁴ *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].

⁴⁷⁵ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [4].

⁴⁷⁶ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [114].

⁴⁷⁷ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [114].

⁴⁷⁸ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [115].

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.’ The Trial Chamber accepted 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.”⁴⁷⁹

9. The Trial Chamber held that “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” and that in the specific cases where “the intercepts tendered by the Prosecution were extremely fragmented, with numerous gaps where transcribers were unable to determine what was being said with precision [...] the Trial Chamber has obviously not been able to draw any firm conclusions from the intercepts.”⁴⁸⁰

Prosecutor v Dragan Jokić (IT-02-60-T)

TRIAL

**#reliability #authenticity #probativevalue #chainofcustody #corroboration
#relevance**

EXTRAPOLATION

- **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.**⁴⁸¹
- **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.**⁴⁸²
- **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.**⁴⁸³
- **Where there is a large amount of documentary and testimonial evidence concerning the process of collection of intercept evidence and its collation and cross-checking before a court, there is no**

⁴⁷⁹ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [116].

⁴⁸⁰ *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [116].

⁴⁸¹ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [21].

⁴⁸² *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [22].

⁴⁸³ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [24].

⊗ The arguments of the Prosecution

1. The Prosecution sought the admission of intercepted communication of the VRS radio communication, alongside the admission of handwritten notes in which the intercepts were transcribed and an annotated index of the intercepts.⁴⁸⁵ The Prosecutor submitted that the chain of custody rule is but a variant of the principle that real evidence must be authenticated prior to its admission.⁴⁸⁶

2. The Prosecution noted the accuracy and reliability of the intercepts and the corresponding handwritten transcripts was established by the testimony of witnesses who worked as intercept supervisors and operators in the ABiH and the SDB during the war and who referred to the procedures used to monitor, record, transcript and transmit to command headquarters VRS communications.⁴⁸⁷ The Prosecution also argued that under the Guidelines on the Standards Governing the Admission of Evidence, 23 April 2003,⁴⁸⁸ there is no prohibition on admitting the intercepts on the basis that each operator has not been called to testify at trial.⁴⁸⁹ The Prosecution furthermore 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 with information obtained from other sources including “aerial imagery and seized documents.⁴⁹⁰

3. The Prosecution disagreed with the Defence’s assertion that the lack of original audio recordings failed to comply with the best evidence rule. The Prosecutor furthermore 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.⁴⁹¹

4. The Prosecution also sought to have a number of intercepts previously admitted and testified to from the *Krstić* case admitted as evidence by judicial notice under Rule 94(B) of the Rules of Procedure and Evidence.⁴⁹²

⊗ The arguments of the Defence

5. The Defence argued that the Prosecution’s lack of original audio failed to make a prima facie case of reliability. The Defence argued the Prosecution was rather offering hearsay evidence to

⁴⁸⁴ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [25].

⁴⁸⁵ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [4].

⁴⁸⁶ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [7].

⁴⁸⁷ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [5].

⁴⁸⁸ *Prosecutor v Blagojević and Jokić* (Decision adopting the Draft Guidelines on the Standards Governing the Admission of Evidence) IT-02-60-PT (23 April 2003) (TC I).

⁴⁸⁹ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [7].

⁴⁹⁰ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [6].

⁴⁹¹ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [12].

⁴⁹² *Prosecutor v Blagojević and Jokić* (Prosecution’s Notice Regarding the Agreement of the Parties on Judicial Notice) IT-02-60-T (6 August 2003) (TC II) Tab C – Documents to which Jokić Objects, 18851-18854; Tab D – Documents to which Blagojević Objects 18845-18848.

prove the content of transmissions that had been allegedly transcribed by unknown personnel, by personnel with a history of unreliable transcriptions, or through the use of substandard equipment with little training.⁴⁹³ On that basis, the Defence argued it would not be possible to test the accuracy of the recordings, equipment, transcriptions, or the voice identifications. The Defence further argued that the Prosecution could have obtained alternative corroborating evidence to prove the authenticity and reliability of the intercept evidence, and the absence thereof was in and of itself suspect.⁴⁹⁴

6. The Defence cited the fact that national jurisdictions have adopted strict attitudes towards audio recordings due to the ease of tampering and asserted that courts should insist on a complete foundation of operators' qualifications, equipment in working condition, custody of the tape and identification of the speakers on the tape; testimonial evidence alone is insufficient.⁴⁹⁵

7. Furthermore, based on Rule 95 of the Rules of Procedure and Evidence, the Defence submitted that the methods used to obtain the evidence not only cast substantial doubt on its reliability, but also the admission of the evidence would seriously damage the integrity of the proceedings.⁴⁹⁶

⊗ The Court's Response

8. The Chamber examined the reliability and probative value of each item of evidence separately. The Trial Chamber found all the materials were relevant in accordance with Rule 89(C) as they related directly to events the indictment alleges unfolded at the relevant time in 1995 and concern alleged communications between units in the VRS chain of command.⁴⁹⁷

9. With regard to the intercepts, the Trial Chamber noted the witnesses gave virtually identical descriptions of procedures for monitoring intercepting, transcribing and processing intercepted VRS communications. It furthermore rejected the Defence's suggestion the intercepts were transcribed by unknown personnel.⁴⁹⁸ The Trial Chamber noted many personnel had obtained civil and military professional levels of radio certification or were experienced army signalmen.⁴⁹⁹ The Trial Chamber additionally rejected the Defence's contention of a history of unreliable transcriptions, as the operators would, with their colleagues' assistance, re-listen to recorded conversation until unclear portions could be deciphered. Where the intercepts remained unintelligible, the operators would indicate this in the transcript with three dots. Accuracy was critical and speculation was not accepted.⁵⁰⁰

10. The Trial Chamber examined the evidence of Stephanie Frease, the ex-member of the OTP intercept project and the work to establish the reliability of intercepts by cross-referencing them and examining the internal consistency between the handwritten notebooks and computer print

⁴⁹³ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [9].

⁴⁹⁴ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [10].

⁴⁹⁵ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [11].

⁴⁹⁶ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [11].

⁴⁹⁷ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [19].

⁴⁹⁸ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [21].

⁴⁹⁹ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [22].

⁵⁰⁰ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [23].

outs. The Trial Chamber noted that several communications were intercepted with only slight variation by units at different locations, rendering the intercepts “absolutely reliable.”⁵⁰¹

11. Regarding original audio, the Trial Chamber noted neither party is under an obligation to tender perfect evidence and that, 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.⁵⁰² Ultimately, the Trial Chamber ruled the intercepts were prima facie reliable and have probative value under the Rules. Trial Chamber did not examine the claim that there was substantial doubt as to their reliability due to the methods used to obtain them.⁵⁰³

12. Regarding the handwritten notebooks, the Trial Chamber found they did not have probative value in their current state because they had not been translated into English.⁵⁰⁴ Regarding the index of intercepts processed by the SDB, the Trial Chamber did not see any reason to doubt the exhibits’ reliability.⁵⁰⁵

13. Regarding the handwritten intercept notes, the Trial Chamber was satisfied that the methods employed by the intercept operators was sufficient to produce reliable transcripts. However, the Trial Chamber determined that only those parts that had been translated could be deemed relevant and to have probative value.⁵⁰⁶

⁵⁰¹ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [24].

⁵⁰² *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [25].

⁵⁰³ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [26].

⁵⁰⁴ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [27].

⁵⁰⁵ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [28].

⁵⁰⁶ *Prosecutor v Blagojević and Jokić* ([Decision on the Admission into Evidence of Intercept-Related Materials](#)) IT-02-60-T (18 December 2003) (TC I Section A) [29].

TRIAL

#chainofcustody #reliability #authentication #corroboration

EXTRAPOLATION

- 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.⁵⁰⁷

⊗ The arguments of the Prosecution

1. The Prosecution described the prima facie relevance of every intercepted communication.⁵⁰⁸ The Prosecution argued that the evidence is authentic, accurate and reliable,⁵⁰⁹ which is supported by the testimony of 28 intercept operators and supervisors.⁵¹⁰ Moreover, the Prosecution submitted that the chain of custody as established by the evidence in the case was clear.⁵¹¹

2. Further the Prosecution argued that the uncontradicted testimony of the Prosecution Analyst validated intercepted communications, as did “several witnesses who acknowledged intercepts in which they were either involved or had knowledge of the subject matter.”⁵¹² The Prosecution submitted that “despite extensive challenges to the admissibility of this evidence, the Defence made ample use of, and tendered many intercepts.”⁵¹³ The Prosecution explained the procedure of the intercept recording, wherein the “intercepted communications were transcribed contemporaneously. Operators were not permitted to speculate about matters or add anything to intercepted material. Furthermore, operators did not engage in analysis that in any way altered the nature of the intercepted conversations. Once dispatched, transcribed intercepts could not be, and were not, revised.”⁵¹⁴

⊗ The arguments of the Defence

3. The Defence of Popović stated that the notebooks, printouts, and diskettes are not “real-time products”:⁵¹⁵ “the evidence proffered by the Prosecution as intercepts had not been properly

⁵⁰⁷ *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [78].

⁵⁰⁸ *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [7].

⁵⁰⁹ *Prosecutor v Popović 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) [1175].

⁵¹⁰ *Prosecutor v Popović 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) [1177].

⁵¹¹ *Prosecutor v Popović 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) [1177].

⁵¹² *Prosecutor v Popović 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) [1178].

⁵¹³ *Prosecutor v Popović 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) [1178].

⁵¹⁴ *Prosecutor v Popović 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) [1180].

⁵¹⁵ *Prosecutor v Popović et al* ([Defence Notice of Filing Public Redacted Version of Vujadin Popovic’s Final Brief](#)) IT-05-88-T (28 July 2010) (TC) [141].

named. In Defence's view of the name correspond with just the real-time intercepted conversations."⁵¹⁶ The Defence stated that the Prosecution did not explain "the standards and protocols related to the procedure with saving and archiving intercept materials and in particular the tapes with recorded conversations."⁵¹⁷ Relying on its expert witness, 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 "long after the events in question".⁵¹⁸

4. The Defence for Beara submitted that the intercepts were not reliable and authentic.⁵¹⁹ It challenged them on the basis that they were provided by the security agencies of one of the parties of the conflict to inculcate the members of the VRS and used to prosecute them many years after they were recorded.⁵²⁰ The Defence also criticised "inadequacies in the level of training of the intercept operations, the procedures they followed and the equipment they used."⁵²¹ The Prosecution did not adequately authenticate the intercepts and their chain of custody was "woefully short".⁵²² Thus, the intercepts lack probative value, and their admission hindered the accused's right to fair trial and damaged the integrity of the proceedings.⁵²³

5. The Defence for Nikolić argued that "the Prosecution must not be allowed to construct events on the basis of an intercept in the absence of any corroborating proof."⁵²⁴ It argued that "the Prosecution's failure to adduce audio recordings for the vast majority of the intercepts made them inadmissible. [...] [A]ny individual intercept would only be admissible if confirmed by a witness that was a party to the transcribed conversation or was present and heard at least one of the parties speaking. The Defence relies on the evidence of Defence expert Buro Rodic to claim that 106 of the 213 tendered intercepts cannot be authentic. Questioning the intercept operator witness's ability to identify speakers by voice recognition, citing the incomplete or incomprehensible nature of some of the intercepts, and asserting that the intercepts are largely uncorroborated, the Defence for Nikolic argued that 198 of the 213 tendered intercepts must be rejected by the Trial Chamber because 'the Prosecution has failed to make a prima facie case regarding the necessary reliability.'"⁵²⁵

6. The Defence for Pandurevic submitted that "the computer printouts and notebooks have many obvious weaknesses."⁵²⁶ Further, it stated that "the records of these conversations do not have the evidentiary force, for example, of video tape, which "speaks for itself."⁵²⁷ It advised the Trial Chamber to exercise great caution before accepting intercepts as accurate without

⁵¹⁶ *Prosecutor v Popović et al* ([Defence Notice of Filing Public Redacted Version of Vujadin Popovic's Final Brief](#)) IT-05-88-T (28 July 2010) (TC) [138].

⁵¹⁷ *Prosecutor v Popović et al* ([Defence Notice of Filing Public Redacted Version of Vujadin Popovic's Final Brief](#)) IT-05-88-T (28 July 2010) (TC) [142].

⁵¹⁸ *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [10].

⁵¹⁹ *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [12].

⁵²⁰ *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [12].

⁵²¹ *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [13].

⁵²² *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [13].

⁵²³ *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [13].

⁵²⁴ *Prosecutor v Popović et al* ([Public Redacted Version of The Final Trial Brief on Behalf Of Drago Nikolić](#)) IT-05-88-T (30 July 2010) (TC II) [1199].

⁵²⁵ *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [15].

⁵²⁶ *Prosecutor v Popović et al* ([Pandurevic Notice of Filing a Public Redacted Version of The Pandurevic Final Trial Brief](#)) IT-05-88-T (26 July 2010) (TC) [20].

⁵²⁷ *Prosecutor v Popović et al* ([Pandurevic Notice of Filing a Public Redacted Version of The Pandurevic Final Trial Brief](#)) IT-05-88-T (26 July 2010) (TC) [20], fn 15.

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.”⁵²⁸

⊗ The Court’s Response

7. The Trial Chamber admitted the intercepts as *prima facie* relevant and probative.⁵²⁹

8. The Chamber admitted the evidence despite noting: “discrepancies between some of the original handwritten versions of the intercepts and the electronically typed versions, and that some of the handwritten versions lack specific dates. The Trial Chamber recognises that several of the conversations are incomplete and that for many of them one or more of the participants is unidentified. The Trial Chamber understands that intercept operators who believed they could recognise the voices of certain participants were basing that belief on prior experience with a voice and not with a specifically known individual.”⁵³⁰

9. In the final judgement, “the Trial Chamber remained satisfied, particularly in light of the evidence given by the intercept operators, that the intercepts are a contemporaneous record of intercepted VRS communications. It is satisfied that there is no deficiency in the chain of custody of the intercept materials and finds there is no evidence in support of the Defence allegation that the intercepts were either fabricated or tampered with. The Trial Chamber finds that the evidence of Defence Expert Đuro Rodić failed to raise a reasonable doubt in this respect.”⁵³¹

Prosecutor v. Zdravko Tolimir (IT-05-88/2)

TRIAL

#authenticity #reliability #corroboration #hearsay #chainofcustody

EXTRAPOLATION

- Reliability and authenticity of intercepts may be amplified by the overwhelming weight of other corroborative evidence.⁵³² Such corroboration is even more significant when it is sourced from independent sources.⁵³³
- Relevance of intercepts may not be tested when there is no relevant translation and this may affect their admissibility.⁵³⁴
- Following specific instructions and practices in intercepting and recording communications increases intercepts’ reliability.⁵³⁵

⁵²⁸ *Prosecutor v Popović et al* ([Pandurevic Notice of Filing a Public Redacted Version of The Pandurevic Final Trial Brief](#)) IT-05-88-T (26 July 2010) (TC) [20].

⁵²⁹ *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [78].

⁵³⁰ *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [75].

⁵³¹ *Prosecutor v Popović et al* ([Judgement Volume I](#)) IT-05-88-T (10 June 2010) (TC II) [65].

⁵³² *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [63], [66].

⁵³³ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-A (8 April 2015) (AC) [59], [61].

⁵³⁴ *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].

⁵³⁵ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [64].

- The intercepts may be considered hearsay evidence, but their reliability may be increased if they are presented alongside strong corroborative evidence and a clear chain of custody.⁵³⁶
- A lack of enough time for the opposing party to challenge the admission of intercept evidence may have implications for the Accused’s fair trial rights, and on that basis the admission of the intercept may be denied.⁵³⁷
- When there is no English translation provided and available in eCourt, the Court is unable to test the intercepts’ relevance.⁵³⁸

⊗ The arguments of the Prosecution

1. The Prosecution put forward that the 28 intercept operators and supervisors, as well as Stefanie Frease, all provided credible and detailed testimony establishing the reliability, accuracy and authenticity of hundreds of intercepts.⁵³⁹ 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.⁵⁴⁰

2. Frease testified that there is a theoretical possibility that the intercepts were tampered with before coming into OTP possession.⁵⁴¹ 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”.⁵⁴²

⊗ The arguments of the Defence

3. The Defence questioned the reliability of the intercepts on the basis that the OTP contacted the United States in order to obtain intercepts, but at the time the OTP investigators could not itself verify the reliability of the intercepts.⁵⁴³ 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.⁵⁴⁴ 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).⁵⁴⁵

⁵³⁶ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [64].

⁵³⁷ *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].

⁵³⁸ *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].

⁵³⁹ *Prosecutor v Tolimir* ([Prosecution Notice of Re-filing of Public Redacted Final Trial Brief](#)) IT-05-88/2-T (28 November 2012) (TC) [831].

⁵⁴⁰ *Prosecutor v Tolimir* ([Prosecution Notice of Re-filing of Public Redacted Final Trial Brief](#)) IT-05-88/2-T (28 November 2012) (TC) [832].

⁵⁴¹ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [66].

⁵⁴² *Prosecutor v Tolimir* ([Transcript](#)) IT-05-88/2-T (13 September 2010) (TC II) 5299, lines 2-11.

⁵⁴³ *Prosecutor v Tolimir* ([Public Redacted Version of Defence Final Trial Brief](#)) IT-05-88/2-T (1 October 2012) (TC II) [132].

⁵⁴⁴ *Prosecutor v Tolimir* ([Public Redacted Version of Defence Final Trial Brief](#)) IT-05-88/2-T (1 October 2012) (TC II) [134]-[135].

⁵⁴⁵ *Prosecutor v Tolimir* ([Public Redacted Version of Defence Final Trial Brief](#)) IT-05-88/2-T (1 October 2012) (TC II) [136].

4. The Defence also argued that intercepts should not be relied on because they could be purposefully used to spread disinformation, and without other supporting evidence such as video or audio recording the intercepts are deprived of context.⁵⁴⁶

⊗ **The Court's Response**

5. 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 to support the reliability and authenticity of the intercepts.⁵⁴⁷

6. Furthermore, the intercepts can be considered hearsay evidence, but their reliability was increased by the fact they were presented with strong corroborative evidence and were accompanied with a chain of custody.⁵⁴⁸

APPEAL

#authenticity #reliability #corroboration

⊗ **The arguments of the Prosecution**

1. On appeal, the Prosecution's arguments did not deviate from those at trial.

⊗ **The arguments of the Defence**

2. The Defence challenged the intercepted communication presented by the Prosecution that showed the activity of the Accused, claiming the intercepts to be unreliable evidence. The Defence asserted the Prosecution was unable to prove the events that occurred during and after the evacuation of Bosnian Muslims.⁵⁴⁹ In general, for all the intercepts, the Defence submitted that the fact that some intercepts were corroborated by other sources does not justify the Trial Chamber treating all intercepts as authentic and reliable.⁵⁵⁰ This reliability was presumed by the judicial notice of the adjudicated facts.⁵⁵¹

⊗ **The Court's Response**

3. The Appeal Chamber found that Tolimir's Defence could not substantiate the claim that an intercept is unreliable.⁵⁵² It dismissed the Accused's appeal asserting the intercepts are unreliable based on factors that include: the intercepts' corroboration by other independent sources, the procedures employed in producing the intercepts, and methods promoting reliability, such as the instructions issued to the intercept operators and the practices they followed.⁵⁵³ 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 agreed with the approach taken by the Trial Chamber in assessing the reliability of intercepts.⁵⁵⁴

⁵⁴⁶ *Prosecutor v Tolimir* ([Public Redacted Version of Defence Final Trial Brief](#)) IT-05-88/2-T (1 October 2012) (TC II) [140]-[141].

⁵⁴⁷ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [63], [66].

⁵⁴⁸ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [65].

⁵⁴⁹ *Prosecutor v Tolimir* ([Public Redacted Version Of The Consolidated Appeal Brief](#)) IT-05-88/2-A (28 February 2014) (AC) [321].

⁵⁵⁰ *Prosecutor v Tolimir* ([Public Redacted Version Of The Consolidated Appeal Brief](#)) IT-05-88/2-A (28 February 2014) (AC) [27].

⁵⁵¹ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-A (8 April 2015) (AC) [42].

⁵⁵² *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-A (8 April 2015) (AC) [373].

⁵⁵³ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-A (8 April 2015) (AC) [59], [61].

⁵⁵⁴ *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-A (8 April 2015) (AC) [59].

International Criminal Tribunal for Rwanda (ICTR)

Prosecutor v Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera (ICTR-98-44-T)

TRIAL

#relevance #authentication #probativevalue

EXTRAPOLATION

- Radio broadcasts are self-authenticating if they bear sufficient indicia of their source.⁵⁵⁵
- Where the exhibit is a transcript of a radio broadcast previously admitted in the same case, a *prima facie* showing of the authenticity of the transcript under consideration is satisfied.⁵⁵⁶
- 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.⁵⁵⁷
- 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.⁵⁵⁸

⊗ The arguments of the Prosecution

1. Seeking admission of certain intercepts of radio broadcast, the Prosecution argued that there was never any challenge to the authenticity of the radio broadcast material in the case of *Karemera et al.* It noted that copious amounts of disclosed schedules exist to show the receipt of

⁵⁵⁵ *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].

⁵⁵⁶ *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].

⁵⁵⁷ *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].

⁵⁵⁸ *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].

the material from various reliable sources and/or its use in other trials,⁵⁵⁹ and argued that a glance at the transcripts suggests the material is plainly *prima facie* authentic.⁵⁶⁰

⊗ **The arguments of the Defence**

2. In general, the Defence did not contest the broadcasts. However, it argued that the Prosecutor's assertion that the intercepts were self-authenticating could not be sustained as the defendants did not have an opportunity so far to present their views on these broadcasts.⁵⁶¹

3. The Defence found the source of certain intercepts to be unclear or that it was not indicated.⁵⁶² Furthermore, the translated version of one of the intercepts was not communicated to the Defence.⁵⁶³

4. With regard to intercepts formerly admitted in previous trials, the Defence argues that 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 prejudice the document's probative value and even less its relevance for the present case.⁵⁶⁴

⊗ **The Court's Response**

5. The Trial Chamber found the radio broadcasts to be self-authenticating. Moreover, the Chamber noted that some of these materials were issued by the Ministry of Information and, as such, provided 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.⁵⁶⁵ With regard to most of the items that had been partially admitted in a previous case, the Chamber highlighted that it had already made the assessment of the admissibility requirements and decided at the present stage to admit them in their entirety without any further consideration.⁵⁶⁶

6. Certain intercepts previously admitted were found by the Trial Chamber in this instance to lack sufficient indicia of authenticity. The origin of these documents was doubtful, the author of the documents was unknown, and they had no indications as to the chain of custody.⁵⁶⁷ With regard to Tab 8 (Annex B), the Trial Chamber found that it appeared *prima facie* authentic as it originated from OTP. However, in determining admissibility, the Chamber also assessed the items' relevance and probative value. The Chamber was of the view that the admission into evidence of some of

⁵⁵⁹ *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].

⁵⁶⁰ *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].

⁵⁶¹ *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].

⁵⁶² *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.

⁵⁶³ *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.

⁵⁶⁴ *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].

⁵⁶⁵ *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].

⁵⁶⁶ *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, 39].

⁵⁶⁷ *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].

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.⁵⁶⁸

In this section:



7

Cases have been extrapolated



3

Stage of proceedings covered
– Pre-trial, Trial and Appeal



3

International Criminal
Courts and Tribunals
considered – ICC, ICTY,
ICTR

⁵⁶⁸ *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].

CALL DATA RECORDS



CALL DATA RECORDS

Call Data Records (CDRs) are metadata that does not contain the content of any communications but provides information about them, e.g., source and destination phone number; date and time of phone calls and text messages; type of communication; duration of phone calls; the IMEI number⁵⁶⁹ of the hand set relevant to the communications; and the cell sectors⁵⁷⁰ engaged at the beginning and end of a call.

The metadata about the Call Data Records is put into **Call Sequence Tables (CSTs)**, which are “a readable and searchable format from which relevant extracts have been made for the convenience of the Trial Chamber.”⁵⁷¹

Special Tribunal for Lebanon (STL)

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

TRIAL

#righttoprivacy #authorship #voluminousdata

EXTRAPOLATION

- **Call Sequence Tables must be made in a readable format with an extraction of relevant data only.**⁵⁷²
- **Call Data Records (CDRs, “Primary Material”) may be necessary to present before the Court and so should be at the disposal of the tendering Party to prove the reliability of the Call Sequence Tables (CSTs, “Secondary material”).**⁵⁷³
- **Experts and analysts must be prepared to testify regarding the data generation process, storage and retrieval from Call Data Records (“Primary Material”) to Call Sequence Tables.**⁵⁷⁴

⁵⁶⁹ The International Mobile Station Equipment Identity (“IMEI”) is a unique number that every mobile phone handset possesses: *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].

⁵⁷⁰ “[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].

⁵⁷¹ *Prosecutor v Ayyash et al* ([Transcript](#)) STL-11-01/T/TC (16 January 2014) (TC) 48.

⁵⁷² *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) [113].

⁵⁷³ *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) [112]-[113].

⁵⁷⁴ *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) [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 UNIIC and STL’s Prosecution](#)) STL-11-01/T/TC (6 May 2015) (TC) [115].

- Contextual evidence surrounding the chain of custody of CSTs must be provided in order to support the CSTs reliability, integrity, value and authenticity.⁵⁷⁵
- CDRs must be obtained in a manner compatible with international human rights standards. Their acquisition cannot constitute a violation of the right to privacy and must serve a legitimate aim.⁵⁷⁶
- CSTs may be used to connect members of a group and to establish that the perpetrators acted as a group.⁵⁷⁷
- Special experts are necessary to ensure thorough understanding of technical aspects of the case (such as CDRs and CSTs).⁵⁷⁸

⊗ The arguments of the Prosecution

1. The Prosecution put forth that CSTs may be used to connect members of the group and to establish that the perpetrators acted as a group.⁵⁷⁹ The Prosecution sought submission of five groups of CSTs, identified by the colors Red, Green, Purple, Blue and Yellow. The Prosecution submitted that the CSTs bear a sufficient indicium of reliability, and were verified for consistency and accuracy against previous versions of CDRs.⁵⁸⁰ The Prosecution noted that 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.”⁵⁸¹ The reliability and probative value of the CSTs were furthermore corroborated by other evidence, including witness testimony.⁵⁸²

2. With regard to indicia of reliability and potential prejudice to the Accused’s fair trial rights in light of the voluminous nature of the total data, the Prosecution argued that “the practice of

⁵⁷⁵ *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) [113], [115].

⁵⁷⁶ *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].

⁵⁷⁷ *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) [8], [16] and [114].

⁵⁷⁸ *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].

⁵⁷⁹ *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) [8], [16], [23], [25], [33], [41].

⁵⁸⁰ *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) [9], [19], [27], [34], [43].

⁵⁸¹ *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) [9].

⁵⁸² *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) [25]-[26].

tendering an extract of a large record has been accepted by the International Criminal Tribunal for the former Yugoslavia (ICTY).”⁵⁸³

⊗ **The arguments of the Defence**

3. The Defence asserted the Prosecution’s motions to tender into evidence the CSTs were premature “because 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.”⁵⁸⁴ The Counsel for Mr. Ayash 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”.⁵⁸⁵

4. The Defence furthermore submitted that the CSTs “should be tendered through the witnesses who produced them,” on the basis that CSTs “have no probative value without the explanations provided by their author,” nor can the reliability of the CSTs be ascertained.⁵⁸⁶ The Defence contended that Prosecution witnesses must be cross-examined as discrepancies in one specific CST raises serious doubts about the reliability of the range of CSTs and their underlying CDRs.⁵⁸⁷

5. The Defence moreover argued that the admission of the CSTs would seriously damage the integrity of the proceedings as they were 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.”⁵⁸⁸

⊗ **The Court’s Response**

6. The Trial Chamber agreed with the Defence that the Trial Chamber has to be satisfied with the reliability of the primary material, the CDRs, before it can admit into evidence the secondary material, the CSTs.⁵⁸⁹ However, the Trial Chamber stressed that “the [CDRs] [...] themselves are voluminous, and, without extraction of the relevant data into a readable format, meaningless.”⁵⁹⁰

⁵⁸³ *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) [11, 19].

⁵⁸⁴ *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) [50].

⁵⁸⁵ *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) [51].

⁵⁸⁶ *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) [54], [56].

⁵⁸⁷ *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) [57].

⁵⁸⁸ *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) [61].

⁵⁸⁹ *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) [68].

⁵⁹⁰ *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) [113].

7. With consideration of the Pre-Trial Judge’s statement underlining the importance of appointing an expert with a special knowledge on technical aspects of the case, as there is “the need for the judges to have a thorough understanding of those aspects,”⁵⁹¹ the Trial Chamber decided to defer its decision on the admissibility of the CSTs until the Prosecution has called at least one witness “who can provide information on: (i) the provenance of the underlying [CDRs] (including the gathering, retrieval and storage of this data), and (ii) the production of the [CSTs].”⁵⁹² Indeed, the CSTs were admitted only after the Trial Chamber examined the statements made by witnesses of the Prosecution on the generation, storage and retrieval of data from the CDRs.⁵⁹³

8. The Trial Chamber found the transfer of the CDRs did not violate international human rights law nor the right to privacy, as two Security Council Resolutions provided the necessary legal framework of cooperation between the STL and the Lebanese authorities, thus authorizing the transfer of the CDRs to the STL. The transfer of data from CDRs to CSTs was necessary because without these records, the Prosecutor could not have constructed his case and filed an indictment against the first four, and subsequently the fifth, Accused. Therefore, the transfer of data into a different format was proportionate to this legitimate aim, i.e. investigation of the attack of 14 February 2005.⁵⁹⁴

APPEAL

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EXTRAPOLATION

- **The collection and transfer of CDRs will not constitute a violation of international human rights standards regarding privacy if the collection and transfer are provided for by law, necessary, and proportionate.**⁵⁹⁵

⊗ **The arguments of the Prosecution**

1. The Prosecution submitted that the interference with the privacy of the Accused and the Lebanese population was “neither unlawful nor arbitrary”⁵⁹⁶ and submitted the same arguments it had in the Trial Chamber justifying the admission of CDRs and CSTs.

⁵⁹¹ *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].

⁵⁹² *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) [115].

⁵⁹³ *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) 17, Disposition.

⁵⁹⁴ *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) [109].

⁵⁹⁵ *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].

⁵⁹⁶ *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].

⊗ **The arguments of the Defence**

2. 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 United Nations International Independent Investigation Commission [UNIIC] and to the Prosecution. Defence Counsel for Mr Oneissi submitted 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.

⊗ **The Court's Response**

3. The Appeals Chamber upheld the view of the Trial Chamber and dismissed the Appeal by counsel for Mr. Oneissi with respect to both issues on Appeal:

4. The first issue concerned whether “the Trial Chamber erred in concluding that the Commissioner of the UNIIC and the Prosecutor of the Special Tribunal for Lebanon could legally request and obtain [CDRs] from Lebanese telecommunications companies Alfa and MTC without either Lebanese or international judicial authorization.”⁵⁹⁷ The Appeals Chamber found that the “Trial Chamber did not err in holding that the UNIIC and the Prosecutor could legally request and obtain CDRs without judicial authorization” as “such authorization was not required under their respective governing legal instruments.”⁵⁹⁸

5. The second issue was whether the Trial Chamber erred 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 162.⁵⁹⁹ The Appeals Chamber held that “[w]hen balancing the right to privacy with the legitimate interest of the Lebanese public and the international community to properly investigate the specific crimes under the Tribunal’s jurisdiction and the right of the Lebanese to security, the absence of judicial control did not violate any international human rights standard on the right to privacy.”⁶⁰⁰

6. The Appeal’s Chamber agreed with the Defence submission at trial that it “has to be satisfied of the reliability of the underlying data.”⁶⁰¹ 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).⁶⁰²

7. 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 required under their respective legal instruments. The Security Council Resolutions which established both the STL and

⁵⁹⁷ *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].

⁵⁹⁸ *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].

⁵⁹⁹ *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].

⁶⁰⁰ *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) [60].

⁶⁰¹ *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) [68].

⁶⁰² *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) [67]-[69].

the UNIIIC 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.⁶⁰³

8. The Lebanese government requested the establishment of the STL at their own request to create independent external organs who could carry out impartial investigations into the terrorist attack and assassination of former Prime Minister Hariri on the 14 February 2005, as well as other connected and associated crimes.⁶⁰⁴

9. Moreover, the Appeals Chamber found the transfer of CDR and ergo CST evidence was proportionate to the legitimate aim.⁶⁰⁵ 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.⁶⁰⁶

10. The Appeals Chamber held that the interference with the privacy of the Accused and the Lebanese population was “neither unlawful nor arbitrary.”⁶⁰⁷ 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.”⁶⁰⁸ The Appeals Chamber reiterated the importance of ensuring restrictions on the right to privacy remain proportionate.

11. In closing, the Appeals Chamber found that there was no violation of international standards on human rights, particularly with regard to privacy protection concerns mentioned above, which would have potentially contravened Rule 162 (A) and (B) of the STL Rules of Procedure and Evidence.

International Criminal Court (ICC)

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

TRIAL

#voluminousdata #expertwitness #admissibility

⁶⁰³ *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].

⁶⁰⁴ *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].

⁶⁰⁵ *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].

⁶⁰⁶ *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).

⁶⁰⁷ *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].

⁶⁰⁸ *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].

EXTRAPOLATION

- **The experts' capacity to testify on the authenticity and reliability of the call data records, as part of materials relied on in their report, does not prevent the submission of evidence and can be addressed in the cross-examination.**⁶⁰⁹
- **The unintelligibility of the call data records does not prevent their admission into evidence as they can be made legible by technical experts.**⁶¹⁰

⊗ **The arguments of the Prosecution**

1. The Prosecution argued that the submission of experts' materials, including CDRs, by the Prosecution under Rule 68(3) is not prejudicial to, nor inconsistent with, the rights of the accused.⁶¹¹ The Prosecution stated that this is due to the fact that the experts will be asked to confirm the accuracy of their report and any eventual clarifications when they appear before the Chamber.⁶¹²

⊗ **The arguments of the Defence**

2. The Defence opposed the submission of the CDRs, and discs in which they were stored, as the underlying data to the experts' report under Rule 68(3).⁶¹³ It argued that the experts were not in a position to testify as to the authenticity and reliability of these items.⁶¹⁴

3. The Defence also objected to the expert witnesses' expertise, arguing that the expert report was Euro-centric and premised on the assumption that the CDRs were authentic.⁶¹⁵

4. The Defence further argued that CDRs were largely unintelligible without further analysis.⁶¹⁶

⊗ **The Court's Reasoning**

5. The Chamber concluded that the matters raised by the Defence do not prevent the submission of the CDRs and that these matters can be duly addressed in the cross-examination,

⁶⁰⁹ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 13, para. 31.

⁶¹⁰ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 13, para. 31.

⁶¹¹ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 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", ICC-01/12-01/18-1136-Conf, T. Ch. X, 2 November 2020, at 6, para. 14.

⁶¹² *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 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", ICC-01/12-01/18-1136-Conf, P-T. Ch. X, 2 November 2020, at 6, para. 14.

⁶¹³ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 12, para. 27.

⁶¹⁴ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 12, para. 27.

⁶¹⁵ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 13, para. 30.

⁶¹⁶ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 13, para. 31.

which remains unaffected.⁶¹⁷ The Chamber determined that it is through technical experts that such data becomes legible for the purpose of trial proceedings.⁶¹⁸ It stated that this is in line with the approach taken by the Chamber, which adopted 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.”⁶¹⁹

Prosecutor v. Jean-Pierre Bemba Gombo (ICC-01/05-01/08)

TRIAL

#authenticity #corroboration #provenance

EXTRAPOLATION

- **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.⁶²⁰ such as technical errors or discrepancies in some of the data.⁶²¹**

⊗ The arguments of the Defence

1. The Defence objected to the admission of CAR-OTP-0055-0893 [a telephone record] on the basis that the record fell “predominantly outside the time period relevant to the charges” and the Prosecution had “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.”⁶²² The Defence furthermore 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.”⁶²³

⊗ The Court’s Response

2. The Chamber ultimately admitted the record, finding it to be relevant because it was discussed and identified by the witness. The Chamber held that the record may help to

⁶¹⁷ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 13, para. 31.

⁶¹⁸ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 13, para. 31.

⁶¹⁹ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Second Decision on the introduction of prior recorded testimonies pursuant to Rule 68(3) of the Rules, ICC-01/12-01/18, T. Ch. X, 17 February 2021, at 13, para. 31.

⁶²⁰ *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].

⁶²¹ *Prosecutor v. Popovic et al.*, Public Redacted Judgment, Volume I, Case No. IT-05-88-T, Chamber II, 10th June, 2010, Para 75. (Available at, <https://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf>)

⁶²² *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) [162].

⁶²³ *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) [162].

“contextualise and understand” the testimony of a certain witness (Witness 178), and that its admission would not prejudice the Defence.⁶²⁴

In this section:



3

Cases have been extrapolated



2

Stage of proceedings covered
– Trial, Appeal



2

International Criminal
Courts and Tribunals
considered – STL, ICC

⁶²⁴ *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) [163].

VISUAL AIDS



VISUAL AIDS

International Criminal Court (ICC)

Prosecutor v. Dominic Ongwen (ICC-02/04-01/15)

TRIAL

#evidentiaryvalue #timely

EXTRAPOLATION

- Visual aids might become evidence in the course of proceedings.⁶²⁵
- Visual aids need to be disclosed in a timely manner in order to safeguard the Accused's fair trial rights.⁶²⁶

⊗ The arguments of the Prosecution

1. The Prosecution proposed to rely on and to have available to the Defence, representatives of the victims, and the Chamber electronic visual representations of the four attack locations derived from the use of drone photography/video and three-dimensional laser scanning.⁶²⁷ It provided that “this material is not of primary evidential value. It does not go to the acts and conduct of the Accused or any other material aspect of the matters at issue in the trial. Realistically its disclosure will not generate any additional investigative burden on the Defence.”⁶²⁸

2. According to the Prosecution, the material was simply a visual aid, but acknowledged that it is “bound to become evidence. It will be shown to witnesses [...] so they can describe to the Bench where the attackers came from, where a particular event occurred. And their comments on it, markings on it if it be, if that be done, will then become part of their evidence [...] the simplest thing would be for it to be in evidence from the start.”⁶²⁹ Therefore, the Prosecution requested the Chamber to permit service of the evidence no later than 10 working days before the commencement of the trial.⁶³⁰

3. Subsequently, 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 at least five days before the start of trial.⁶³¹

⁶²⁵ *Prosecutor v Ongwen* ([Transcript](#)) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX) 19, lines 22-23.

⁶²⁶ *Prosecutor v Ongwen* ([Transcript](#)) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX) 19-20.

⁶²⁷ *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].

⁶²⁸ *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].

⁶²⁹ *Prosecutor v Ongwen* ([Transcript](#)) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX) 19, lines 22-23.

⁶³⁰ *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].

⁶³¹ *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].

⊗ **The arguments of the Defence**

4. The Defence requested the Court to order the disclosure of the electronic visual representations, in accordance with the general rules.⁶³² It argued for the disclosure so as to prepare a challenge to the reliability of the impugned evidence and to the veracity of the witness testimonies.⁶³³

5. The Defence stated that “it’s our understanding that they’re just visual aids as they’re not actually going to be evidence in and of itself. Now, if it is going to be used as actual evidence, we would like to have it as soon as possible, but if they’re just being used as visual aids, it’s a lot different.”⁶³⁴

⊗ **The Court’s Reasoning**

6. As the Prosecution and Defence agreed on the timeline for disclosure, the Court did not pronounce on the evidentiary value of the evidence. Rather, it merely noted the nature of the electronic visual presentation and the position of the parties to it.⁶³⁵

Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07)

TRIAL

#probativevalue #fairtrialrights

EXTRAPOLATION

- **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 value.**⁶³⁶

⊗ **The arguments of the Prosecution**

1. The Prosecution sought late admission of a digital 360° visual representation of the Institut de Bogoro.⁶³⁷ According to the Prosecution, adding the representation as a whole was useful and relevant: it would allow the Chamber, the parties and the participants to visualize the places described by witnesses during the proceedings to come.⁶³⁸

⁶³² *Prosecutor v Ongwen* ([Transcript](#)) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX) 20, lines 17-21.

⁶³³ *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].

⁶³⁴ *Prosecutor v Ongwen* ([Transcript](#)) ICC-02/04-01/15-T-25-ENG (23 May 2016) (TC IX) 19, lines 14-17.

⁶³⁵ *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].

⁶³⁶ *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].

⁶³⁷ *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) [3].

⁶³⁸ *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].

⊗ **The arguments of the Prosecution**

2. The Defence for Mr. Katanga did not raise any objection to the addition to the List of Evidence of the material in question.⁶³⁹

⊗ **The Court’s Response**

3. The Court allowed the late admission of the visual aid.⁶⁴⁰ It stated that the visual aid “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.”⁶⁴¹ It added its assessment that the “Defences’ right to have adequate time and facilities to prepare is not in any way jeopardised by the late submission.”⁶⁴²

In this section:



2

Cases have been extrapolated



1

Stage of proceedings covered
– Trial



1

International Criminal
Courts and Tribunals
considered – ICC

⁶³⁹ *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].

⁶⁴⁰ *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.

⁶⁴¹ *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].

⁶⁴² *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].

AUDIO RECORDINGS



AUDIO RECORDINGS

International Criminal Court (ICC)

Prosecutor v. Jean-Pierre Bemba Gombo (ICC-01/05-01/08)

TRIAL

#reliability #excerpt #authenticity #probativevalue #prejudice #chainofcustody
#relevance #originality #integrity

EXTRAPOLATION

- 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.⁶⁴³
- 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.⁶⁴⁴
- Audio recordings tendered into evidence should be from the full recording and not an excerpt thereof.⁶⁴⁵
- Audio recordings should be contemporaneous with the time period relevant to the charges.⁶⁴⁶
- Evidence verifying the voice of the person recorded should be provided.⁶⁴⁷
- Audio recordings should be tendered along with their date, circumstances and context in which they were created.⁶⁴⁸

⁶⁴³ *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].

⁶⁴⁴ *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].

⁶⁴⁵ *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].

⁶⁴⁶ *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].

⁶⁴⁷ *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].

⁶⁴⁸ *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].

⊗ **The argument of the Prosecution**

1. The Prosecution argued that 10 audio recordings of RFI broadcasts “bear *indicia* of reliability” and that “they were made contemporaneously to the events covered in the charges and RFI is a reputable organization.”⁶⁴⁹ 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”.⁶⁵⁰

2. For the audio recording of a monologue attributed to the Secretary-General of the Mouvement de Libération du Congo (MLC), the Prosecution argued that the recording is relevant to and probative of the accused's duty to prevent crimes.⁶⁵¹

⊗ **The argument of the Defence**

3. The Defence opposed “the admission of all 10 [audio recordings of RFI broadcasts], 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.”⁶⁵²

4. Regarding the audio recording of a monologue attributed to the Secretary-General of the MLC, the Defence objected “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.”⁶⁵³

⊗ **The Court's Response**

5. The Court recalled that it expressed in its previous findings a “preference for the admission of whole documents or recordings rather than excerpts”; that “recordings that have not been authenticated in court can still be admitted, as in-court authentication is but one factor for the Chamber to consider when determining an item's authenticity and probative value”; and “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.”⁶⁵⁴

6. The Court held that one of the recordings of RFI broadcasts 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.”⁶⁵⁵ The Chamber noted that

⁶⁴⁹ *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].

⁶⁵⁰ *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].

⁶⁵¹ *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].

⁶⁵² *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].

⁶⁵³ *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].

⁶⁵⁴ *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) [120].

⁶⁵⁵ *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].

“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.”⁶⁵⁶ Since this information was absent, the probative value of the recording “was outweighed by its potentially prejudicial effect on a fair trial.”⁶⁵⁷

7. The Chamber held that another audio recording 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.”⁶⁵⁸ 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.⁶⁵⁹ It 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,” in particular to “corroborate other pieces of evidence.”⁶⁶⁰

8. The Court refused to admit the audio recording of a monologue attributed to the Secretary-General of the MLC because “[t]he recording is clearly an excerpt and not a full interview or even a full answer to a question on a relevant matter in this case” and “in the case at hand, the prosecution should have provided the recording in full and not just an excerpt thereof.”⁶⁶¹ 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 [Secretary-General of the MLC], nor did it produce any evidence to confirm the date, circumstances and context in which the recording was created.”⁶⁶² Since this information was absent, the probative value of the recording was “outweighed by its potentially prejudicial effect on a fair trial.”⁶⁶³

9. Other radio audio recordings did not contain the entirety of the respective programme, but the Chamber was satisfied that they were relevant to the charges where the “excerpts include the complete segment of the programme relevant to the CAR.”⁶⁶⁴

⁶⁵⁶ *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].

⁶⁵⁷ *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].

⁶⁵⁸ *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], [125], [127].

⁶⁵⁹ *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], [126], [128].

⁶⁶⁰ *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].

⁶⁶¹ *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].

⁶⁶² *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].

⁶⁶³ *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].

⁶⁶⁴ *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].

International Criminal Tribunal of Rwanda (ICTR)

Prosecutor v Tharcisse Renzaho (ICTR-97-31)

TRIAL

#authenticity #provenance #privacy

EXTRAPOLATION

- The Court will allow the Prosecution to vary its witness list after the trial has commenced to add a witness who is able to testify on the provenance of the audio recording in circumstances, if sufficient time has been given to the Defence to prepare for the testimony.⁶⁶⁵
- The Court will have *prima facie* basis to admit an audio recording and its transcriptions where its authenticity and provenance can be shown through the creator's witness testimony. 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 is the same one they had made.⁶⁶⁶
- 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.⁶⁶⁷

⊗ The argument of the Prosecution

1. The Prosecution sought to admit an audio tape and relevant transcripts, making a 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, "We believe [this is] 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."⁶⁶⁸ The audio tape was therefore of 'extreme probative value and great relevance.'⁶⁶⁹

2. In response to the Defence's argument that the witness testimony of the journalist who recorded the audio 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,⁶⁷⁰ the Prosecution stated that this was not a material fact requiring adequate notice. Rather, the Prosecution asserted the fact was 'evidence supporting [the Accused's] *mens rea*' and that 'evidence does not have to be

⁶⁶⁵ *Prosecutor v Renzaho* ([Decision on Prosecution Motion to Vary Witness List](#)) ICTR-97-31-0160 (16 February 2007) (TC I) [5]-[6].

⁶⁶⁶ *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-0163 (20 March 2007) (TC I) [13]; *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (2 March 2007) (TC I) 10-11.

⁶⁶⁷ *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-0163 (20 March 2007) (TC I) [15], fn 30, citing *Prosecutor v Brdjanin* ([Decision on the Defence "Objection to Intercept Evidence"](#)) IT-99-36-T (3 October 2003) (TC II) [53], see also [61], [63].

⁶⁶⁸ *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (8 January 2007) (TC I) 48, lines 19-25.

⁶⁶⁹ *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (8 January 2007) (TC I) 48, lines 30-31.

⁶⁷⁰ *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (2 March 2007) (TC I) 12, 15, 16.

cleared in the indictment, because the Accused is in no danger of a conviction in respect of this matter'.⁶⁷¹

⊗ **The argument of the Defence**

3. The Defence argued that it was not known how the recording was made and where it originally came from, and this therefore cast “doubt and ambiguity as to the authenticity of these tapes.”⁶⁷²

4. 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.⁶⁷³ 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.”

5. The Defence stated, “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.”⁶⁷⁴ 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.”⁶⁷⁵

6. Additionally, the Defence argued that the admission of the audio tape and its transcription would contravene Article 17 of the Covenant on Civil and Political Rights concerning the right to privacy since the telephone conversation was intercepted and therefore it was unknown whether it was obtained lawfully.⁶⁷⁶

7. The Defence furthermore sought to exclude the witness testimony of the journalist who recorded the audio 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.⁶⁷⁷

⊗ **The Court’s Response**

8. 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 (ICCPR), however the Court considered that these issues were separate from the testimony about the origin of the recording.⁶⁷⁸

9. The Court noted that none of the other witnesses could verify the provenance of the audio recording like the witness ADU (the journalist) purportedly could.⁶⁷⁹ It asserted that the testimony of the journalist would “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.”⁶⁸⁰

10. On the question of whether the journalist’s 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

⁶⁷¹ *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (2 March 2007) (TC I) 21, lines 8, 12-13.

⁶⁷² *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (8 January 2007) (TC I) 46-47.

⁶⁷³ *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (8 January 2007) (TC I) 49, 52.

⁶⁷⁴ *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (8 January 2007) (TC I) 49, lines 35-36.

⁶⁷⁵ *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (8 January 2007) (TC I) 50, line 28-29.

⁶⁷⁶ *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (22 January 2007) (TC I) 6-7.

⁶⁷⁷ *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (2 March 2007) (TC I) 12, 15, 16.

⁶⁷⁸ *Prosecutor v Renzaho* ([Decision on Prosecution Motion to Vary Witness List](#)) ICTR-97-31-0160 (16 February 2007) (TC I) [5].

⁶⁷⁹ *Prosecutor v Renzaho* ([Decision on Prosecution Motion to Vary Witness List](#)) ICTR-97-31-0160 (16 February 2007) (TC I) [4]-[5].

⁶⁸⁰ *Prosecutor v Renzaho* ([Decision on Prosecution Motion to Vary Witness List](#)) ICTR-97-31-0160 (16 February 2007) (TC I) [5].

evidence and did not amount to a material fact and need not be pleaded in the Amended Indictment.”⁶⁸¹

11. The Court did not agree with the Defence’s arguments that it was not known how the recording was made, that the authenticity of the recording had not been established and that its admission would contravene Rule 95.⁶⁸²

12. On the basis of the authenticity of the tape and its provenance, the Court considered the testimony of the journalist who testified and that he recognised the audio recording and its transcript in Kinyarwanda when this was shown to him during examination-in-chief, as well as the fact that 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 its transcriptions.⁶⁸³

13. 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 states, “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”), 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.”⁶⁸⁴

14. In determining this question, the Court observed established ICTY case law, in the case of *Prosecutor v. Brdjanin*.⁶⁸⁵ In that 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 paragraph 53 of the case: “[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.”⁶⁸⁶

15. It was further noted that, 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.⁶⁸⁷

⁶⁸¹ *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-0163 (20 March 2007) (TC I) [10].

⁶⁸² *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-0163 (20 March 2007) (TC I) [11]-[17].

⁶⁸³ *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-0163 (20 March 2007) (TC I) [13].

⁶⁸⁴ *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-0163 (20 March 2007) (TC I) [15].

⁶⁸⁵ *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-0163 (20 March 2007) (TC I) [15], fn 30, citing *Prosecutor v Brdjanin* ([Decision on the Defence “Objection to Intercept Evidence”](#)) IT-99-36-T (3 October 2003) (TC II) [53], see also [61], [63].

⁶⁸⁶ *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-0163 (20 March 2007) (TC I) [15], fn 30, citing *Prosecutor v Brdjanin* ([Decision on the Defence “Objection to Intercept Evidence”](#)) IT-99-36-T (3 October 2003) (TC II) [53], see also [61], [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 2 February 2000 in *Prosecutor v Kordić and Čerkez* ([Transcript](#)) IT-95-14/2-T (2 February 2000) (TC) 13694.

⁶⁸⁷ *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-0163 (20 March 2007) (TC I) [16].

16. 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.⁶⁸⁸ In any event, the Court considered that “this would not in itself lead to exclusion under human rights law or Tribunal case law.”⁶⁸⁹ 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.”⁶⁹⁰

17. 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.”⁶⁹¹ On the basis of the above, the audio recording and its transcriptions were admitted as evidence.

Special Court for Sierra Leone (SCSL)

Prosecutor v. Charles Ghankay Taylor (SCSL-03-01)

TRIAL

#relevance #authenticity #corroboration #prejudice #admissibility

EXTRAPOLATION

- **Opinion evidence contained in a radio broadcast (e.g., the reporter’s own opinions rather than facts) is inadmissible.**⁶⁹²
- **The fact that a radio broadcast may originate from a contested source will not necessarily affect its admissibility but may affect the weight given on it by the Court.**⁶⁹³
- **In the context of admissibility pursuant to Rule 92bis of the Court, audio clips of radio broadcasts should not go to proof of the acts and conduct of the accused.**⁶⁹⁴

⁶⁸⁸ *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-0163 (20 March 2007) (TC I) [16].

⁶⁸⁹ *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-0163 (20 March 2007) (TC I) [16], fn 31, citing *Prosecutor v Brdjanin* ([Decision on the Defence “Objection to Intercept Evidence”](#)) IT-99-36-T (3 October 2003) (TC II) [42]-[56].

⁶⁹⁰ *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-0163 (20 March 2007) (TC I) [16].

⁶⁹¹ *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-0163 (20 March 2007) (TC I) [17], fn 32, citing *Nyiramasuhuko v Prosecutor* ([Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence](#)) ICTR-98-42-A (4 October 2004) (AC) [6].

⁶⁹² *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].

⁶⁹³ *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].

⁶⁹⁴ *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].

⊗ **The arguments of the Prosecution**

1. The Prosecution argued that the audio clips of BBC radio broadcasts “corroborate and so lend weight to evidence on record.”⁶⁹⁵
2. The Prosecution also argued that since the audio clips originate from the BBC and were aired publicly, they do 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.”⁶⁹⁶ 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”⁶⁹⁷ because “the hearsay rule does not apply, but the issue of how much weight is given to this evidence is very much a matter for the Tribunal.”⁶⁹⁸
3. With regard 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. In addition, the CDs from which the BBC Clips were taken have sufficient indicia of authenticity as well. These original CDs also indicate the date of the Broadcast” and “are available for inspection and for production to the Trial Chamber if required.”⁶⁹⁹

⊗ **The arguments of the Defence**

4. The Defence argued that “if the [BBC Media] documents were admitted it would be essential to have available someone who could speak to the contents and relevance of the documents.”⁷⁰⁰ It stated, “Where the Prosecution does not intend to offer the documents through a witness, the Trial Chamber may not be able to decipher the context of the documents and thus determine their usefulness to the proceedings. A lack of context can render documents inadmissible as lacking sufficient indicia of reliability. As a precondition to admission, the Prosecution should have produced a witness to decipher, explain and provide context to the Documents.”⁷⁰¹
5. The Defence also argued that the audio clips’ 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.”⁷⁰²
6. Finally, the Defence argued that almost all “of the 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.”⁷⁰³

⁶⁹⁵ *Prosecutor v Taylor* ([Prosecution Motion for Admission of BBC Radio Broadcasts](#)) SCSL-03-01-T-689 (12 December 2008) (TC II) [8].

⁶⁹⁶ *Prosecutor v Taylor* ([Prosecution Motion for Admission of BBC Radio Broadcasts](#)) SCSL-03-01-T-689 (12 December 2008) (TC II) [9].

⁶⁹⁷ *Prosecutor v Taylor* ([Prosecution Motion for Admission of BBC Radio Broadcasts](#)) SCSL-03-01-T-689 (12 December 2008) (TC II) [10].

⁶⁹⁸ *Prosecutor v Taylor* ([Prosecution Motion for Admission of BBC Radio Broadcasts](#)) SCSL-03-01-T-689 (12 December 2008) (TC II) [10], fn 12, citing *Prosecutor v Kovačević* (Transcript) IT-97-24 (6 July 1998) (TC) 74-75.

⁶⁹⁹ *Prosecutor v Taylor* ([Prosecution Motion for Admission of BBC Radio Broadcasts](#)) SCSL-03-01-T-689 (12 December 2008) (TC II) [11].

⁷⁰⁰ *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) [8].

⁷⁰¹ *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) [9].

⁷⁰² *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) [12].

⁷⁰³ *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) [20].

⊗ The Court’s Response

7. The Trial Chamber held that Clip 14 (BBC Clip D0000528) was partially admitted because “cumulative evidence is not excluded by Rule 92bis and that the Defence objection regarding sources goes to weight not admissibility. However, while parts of the Clip are relevant, the Trial Chamber considers that the following parts consist 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.”⁷⁰⁴

8. The Trial Chamber admitted the remaining BBC Clips (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.”⁷⁰⁵

In this section:



3

Cases have been extrapolated



1

Stage of proceedings covered
– Trial



2

International Criminal
Courts and Tribunals
considered – ICC, ICTR,
SCSL

⁷⁰⁴ *Prosecutor v Taylor* ([Decision on Prosecution Motion for Admission of BBC Radio Broadcasts](#)) SCSL-03-01-T-745 (25 February 2009) (TC II) [27].

⁷⁰⁵ *Prosecutor v Taylor* ([Decision on Prosecution Motion for Admission of BBC Radio Broadcasts](#)) SCSL-03-01-T-745 (25 February 2009) (TC II) [28].