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# Leiden Guidelines

## on the Use of Digitally Derived Evidence in International Criminal Courts and Tribunals

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## I. Introduction

Digitally Derived Evidence (DDE) is increasingly used in international criminal courts and tribunals to prosecute perpetrators of international crimes. Advanced digital tools, including aerial photography, mobile devices, video, intercepted communications, amongst others, capture new and vast quantities of data, which can add supplementary and supporting data to existing evidence. For example, while an eyewitness account may provide relevant information regarding an event, a satellite image may unearth information that would otherwise be inaccessible. Furthermore, phone and computer records may provide data relevant to an individual's activities, or a video may be geo-located, allowing investigators to explore additional details that a witness may have forgotten.<sup>1</sup> Given the proliferation of digitally derived evidence and increasing reliance upon it for prosecutions, there is every possibility that digital evidence may become the primary evidence upon which some convictions are based. The use of DDE raises numerous challenges and legal questions and as such these Guidelines have been created to address the legal lacuna by examining the different evidentiary standards relating to DDE before the international criminal courts and tribunals.

The *Leiden Guidelines on the Use of Digitally Derived Evidence in International Criminal Courts and Tribunals* ("The Leiden Guidelines") are intended to assist practitioners by comprehensively outlining the essential elements which should be considered before submitting DDE to an international criminal court or tribunal. The Guidelines are aimed at legal practitioners and have been designed to be practical and easily accessible whilst also being sufficiently detailed and substantiated. A subsidiary goal of the Leiden Guidelines is knowledge management: recognising that DDE represents a developing area of legal practice, the Leiden Guidelines were designed to be flexible enough to accommodate future developments within its existing framework and structure.

### A. Definition of DDE

The term 'Digitally Derived Evidence' was coined by the DDE Project to encompass both 'digital evidence,' which is material that has been "born-digital" in the sense of originating from

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<sup>1</sup> International Bar Association, [Evidence Matters in ICC Trials](#) (August 2016) 20.

a “computer environment,” as well as ‘digitized evidence,’ which is analogue material that has been transferred to a digital format.<sup>2</sup> The concept is rooted in the following definitions:

#### **International Bar Association (IBA)**

‘Digital and technologically derived evidence, which means evidence taken from and created by digital devices and via technology, such as cameras, satellites and other ‘remote sensing technologies’ [...] We distinguish digital evidence, created by digital technology and itself the record or trace of an action or event used for the purpose of proceedings, from the digitization of documents and records for the purpose of storing, organizing and presenting evidence, as for example, with the ICC’s E-Court protocol.’<sup>3</sup>

#### **Human Rights Center, University of California, Berkeley School of Law**

‘Digital evidence is data that is created, manipulated, stored, or communicated by any device, computer or computer system or transmitted over a communication system, that is relevant to the proceeding.’<sup>4</sup>

DDE therefore reflects evidence that originates from electronic or digital technology, as well as evidence that would normally fall under another category of evidence but has been copied or preserved by being converted into a digital form.

## **B. Methodology**

The Guidelines are based on an in-depth analysis of the jurisprudence of the international criminal courts and tribunals. They draw on the findings set out in the DDE Project’s extensive **Case Summaries**, which track the trajectory of digital evidence from its first introduction to its final disposition, providing a deeper understanding of how courts and tribunals have applied their existing evidentiary regimes to digital evidence; as well as the report on **Extrapolations from Case Law on the Use of DDE**, which extracts key conclusions and findings from the Case Summaries. Practitioners can also consult the KGF’s publications **Prosecution of International Crimes Using DDE in National Courts**, **DDE in UN Human Rights Fact-Finding Missions**, and **DDE in International Criminal Law** for further insight. Available online from the [Leiden DDE Database](#), these companion documents provide

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<sup>2</sup> Braga Da Silva, R., *Updating the Authentication of Digital Evidence in the International Criminal Court*, *International Criminal Law Review* 1-24 (2021) [2].

<sup>3</sup> International Bar Association, *Evidence Matters in ICC Trials* (August 2016) 19.

<sup>4</sup> Alexa Koenig and others, *Digital Fingerprints: Using Electronic Evidence to Advance Prosecutions at the International Criminal Court* (Human Rights Center, UC Berkeley School of Law 2014) fn 2, citing Stephen Mason, *International Electronic Evidence* (British Institute of International and Comparative Law 2008).

practitioners with a detailed level of analysis from which they will have the flexibility to expand on points of interest and relevant information further. The authors hope these materials will help legal practitioners navigate the evidentiary application of DDE through what is a vast quantity of case law and material.

The focus of the Leiden Guidelines is on the International Criminal Court (ICC)'s practice and guidance, recognising the ICC's position as the permanent international criminal judicial body in comparison with other tribunals (such as the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY, ICTR), the International Residual Mechanism for Criminal Tribunals (IRMCT or MICT), the Special Court for Sierra Leone (SCSL), and the Special Tribunal for Lebanon (STL)), which are temporary entities with a more limited mandate. Nevertheless, the Leiden Guidelines recognise that there may be situations where another court or tribunal was required to deal with DDE more extensively. Thus, for some guidelines, those courts other than the ICC were given a more central role in the process of guideline formation. Where appropriate, and with recognition of the fact that practitioners and international courts and tribunals frequently draw from domestic decisions when seeking guidance on novel legal issues, relevant national jurisprudence has been incorporated to provide further depth, detail, and perspective.

### C. Structure of the Leiden Guidelines

The Leiden Guidelines address each type of DDE separately in order to take into account their technological and legal particularities. Each section begins with a definition of the DDE category. In so far as is possible, the definitions adopted in the Leiden Guidelines attempt to be reflective of the practice at the international courts and tribunals, even if usage is not always consistent.

Every international court and tribunal has procedural and evidentiary rules, which are comprehensively laid out in a number of documents.<sup>5</sup> The Leiden Guidelines seek to supplement these rules, which should always be complied with, by describing their application to the various types of DDE. The Guidelines furthermore complement the ICC's E-court

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<sup>5</sup> The Guidelines reference a number of international criminal courts and tribunals: [ICC: Statute, Rules of Procedure and Evidence, Regulations of the Court, Unified Technical Protocol](#); [ICTY: Statute, Rules of Procedure and Evidence, Practice Directions](#); [ICTR: Statute, Rules of Procedure and Evidence, Practice Directions](#); [IRMCT: Statute, Rules of Procedure and Evidence, Practice Directions](#); [SCSL: Statute, Rules of Procedure and Evidence](#); [STL: Statute, Rules of Procedure and Evidence](#).

Protocol, which provides the technical standards by which digital evidence should be prepared and provided to the Court.<sup>6</sup>

The Leiden Guidelines draw upon the ICC's approach to evidence, as set out by the ICC Trial Chamber in *Bemba*:

'[F]or an item to be admitted into evidence it must satisfy the three-part test under which it must (i) be relevant to the case; (ii) have probative value; and (iii) be sufficiently relevant and probative as to outweigh any prejudicial effect its admission may cause. Further, [the] determination on the admissibility into evidence of an item has no bearing on the final weight to be afforded to it, which will only be determined by the Chamber at the end of the case when assessing the evidence as a whole.'<sup>7</sup>

The three limbs of the ICC's approach to evidence are briefly defined below and seek to cover the admissibility issues which might arise. Despite this, application of these principles, even at the ICC, has not been uniform. The Court's approach towards the determination of weight, assessed as a whole, is often difficult to discern. Each Guideline, therefore, offers keywords to help identify the relevant evidentiary principles.

**Relevance.** Pursuant to Articles 64(9) and 69(4) of the [Rome Statute](#),<sup>8</sup> the Court may rule on the relevance of any piece of evidence. Evidence is relevant if it makes the existence of a fact at issue more or less probable.<sup>9</sup> It is a relational concept, connecting the evidence in question with the asserted fact sought to be proven or disproven, thus delineating the purpose of the evidence in the trial; this is expressed as the need for evidence to be 'material' to the issue or case.<sup>10</sup> The Court has the discretion to exclude evidence it deems irrelevant, although in practice the threshold for exclusion has been high.<sup>11</sup>

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<sup>6</sup> [ICC E-court Protocol](#).

<sup>7</sup> *Prosecutor v Bemba* ([Decision on the admission into evidence of items deferred in the Chamber's "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64\(9\) of the Rome Statute" \(ICC-01/05-01/08-2299\)](#)) ICC-01/05-01/08 (27 June 2013) TC [9].

<sup>8</sup> Cf. Rule 89(C) of the [ICTY](#) and [ICTR](#) Rules of Procedure and Evidence, Rule 105(C) of the [IRMCT Rules of Procedure and Evidence](#), Rule 149(C) of the [STL Rules of Procedure and Evidence](#).

<sup>9</sup> 'Article 69(4)', *Commentary on the Law of the International Criminal Court* (2017), citing *Prosecutor v Katanga and Ngudjolo Chui* ([Decision on the Bar Table Motion of the Defence of Germain Katanga](#)) ICC-01/04-01/07-3184 (21 October 2011) (TC II) [16].

<sup>10</sup> Kai Ambos, [Treatise on International Criminal Law: International Criminal Procedure](#), vol 3 (OUP 2016) 457.

<sup>11</sup> Kai Ambos, [Treatise on International Criminal Law: International Criminal Procedure](#), vol 3 (OUP 2016) 457.

**Probative Value.** Often used interchangeably with the concept of weight, evidence is probative if it tends to prove or disprove an asserted fact. In other words, evidence that is probative has the quality or function of demonstrating the existence of a fact.<sup>12</sup> To be considered probative, evidence must reach a certain threshold. Usually at the admissibility stage, the tendering party only needs to show that the evidence has prima facie probative value.<sup>13</sup> An assessment of probative value is based on the indicia of reliability of the evidence, which can relate to the form, content, or origin of the evidence, such as the appearance of documents, corroboration by other evidence already admitted, or the place of discovery.<sup>14</sup> One important aspect of reliability is authentication: the tendering party should demonstrate that the evidence is genuine.<sup>15</sup>

**Prejudice.** Pursuant to Article 69(4) of the Rome Statute, the Court is to take into account any prejudice that may be caused by evidence to a fair trial or to a fair evaluation of the testimony of a witness.<sup>16</sup> The accused's right to a fair and impartial trial is thus protected under this provision.<sup>17</sup> However, the Court is only required to take prejudice, potential or actual, into account and does not have to declare the evidence inadmissible.<sup>18</sup> The assessment of prejudice is relative, balanced against the probative value of the evidence, collectively affecting the weight the Court should give the evidence.<sup>19</sup> This discretion is subject to the mandatory inadmissibility of evidence obtained by means which violate the Rome Statute or internationally recognised human rights if it casts substantial doubt on the reliability of the evidence or whose admission would be antithetical to and would seriously damage the integrity

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<sup>12</sup> Christopher Gosnell, 'Admissibility of Evidence' in Karim A A Khan, Caroline Buisman and Christopher Gosnell (eds), [Principles of Evidence in International Criminal Justice](#) (OUP 2010) 385.

<sup>13</sup> Christopher Gosnell, 'Admissibility of Evidence' in Karim A A Khan, Caroline Buisman and Christopher Gosnell (eds), [Principles of Evidence in International Criminal Justice](#) (OUP 2010) 385.

<sup>14</sup> Christopher Gosnell, 'Admissibility of Evidence' in Karim A A Khan, Caroline Buisman and Christopher Gosnell (eds), [Principles of Evidence in International Criminal Justice](#) (OUP 2010) 386; Nikita Mehandru and Alexa Koenig, 'Open Source Evidence and the International Criminal Court' (*Harvard Human Rights Journal*, April 2019); *Prosecutor v Katanga and Ngudjolo Chui* ([Decision on the Confirmation of Charges](#)) ICC-01/04-01/07-717 (30 September 2008) (PTC I) [78].

<sup>15</sup> Christopher Gosnell, 'Admissibility of Evidence' in Karim A A Khan, Caroline Buisman and Christopher Gosnell (eds), [Principles of Evidence in International Criminal Justice](#) (OUP 2010) 386.

<sup>16</sup> cf The provisions for the exclusion of evidence whose probative value is substantially outweighed by the need to ensure a fair trial: Rule 89(D) of the [ICTY Rules of Procedure and Evidence](#), Rule 105(D) of the [IRMCT Rules of Procedure and Evidence](#), Rule 149(C) of the [STL Rules of Procedure and Evidence](#).

<sup>17</sup> Christopher Gosnell, 'Admissibility of Evidence' in Karim A A Khan, Caroline Buisman and Christopher Gosnell (eds), [Principles of Evidence in International Criminal Justice](#) (OUP 2010) 421.

<sup>18</sup> Christopher Gosnell, 'Admissibility of Evidence' in Karim A A Khan, Caroline Buisman and Christopher Gosnell (eds), [Principles of Evidence in International Criminal Justice](#) (OUP 2010) 421.

<sup>19</sup> Wolfgang Schomburg and Jan Christoph Nemitz, 'International Criminal Courts and Tribunals, Procedure', *Max Planck Encyclopedias of International Law* (February 2019) [25].

of the proceedings (Article 69(7) of the Rome Statute).<sup>20</sup> Certain types of DDE, for example, raise particular concerns about the human right to privacy, as will be discussed in greater detail within the Guidelines.

## D. Scope of the Leiden Guidelines

The rules and practice surrounding the use of DDE in international criminal courts and tribunals continue to develop. Digital technology is being used more widely and frequently, not only in the investigation and prosecution of international crimes, but also in their commission. It follows that clearer and more comprehensive discussion of DDE-related considerations is produced as cases proceed to trial. However, this process has not yet occurred in relation to some specific categories of DDE, such that the authors were unable to draw meaningful or authoritative guidelines from the practice of the international criminal courts and tribunals. Accordingly, the Guidelines do not cover the use of social media posts or emails as types of DDE in international criminal proceedings:

**Social Media Posts.** Social media posts have been used in international criminal proceedings. The ICC Trial Chamber in *Bemba et al* admitted screenshots of social media profiles,<sup>21</sup> while the Defence in *Taylor* were permitted to show a social media post to a witness<sup>22</sup> and had the social media post marked for identification.<sup>23</sup> More recently, the *Al-Werfalli* case is significant in terms of social media evidence,<sup>24</sup> as the ICC Pre-Trial Chamber based its findings on, *inter alia*, social media posts.<sup>25</sup> However, none of the Chambers discussed the admissibility of social media evidence or specific evidentiary requirements and as such, no authoritative guidelines could be reasonably deduced or formulated.

**Emails.** Emails have also been tendered as evidence in international criminal proceedings. The MICT Trial Chamber in *Nzabonimpa et al* admitted and relied upon emails as

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<sup>20</sup> cf The narrower provisions which do not stipulate the norm which must be violated: Rule 95 of the [ICTY](#) and [ICTR](#) Rules of Procedure and Evidence, Rule 117 of the [IRMCT Rules of Procedure and Evidence](#), Rule 162 of the [STL Rules of Procedure and Evidence](#).

<sup>21</sup> *Prosecutor v Bemba et al* ([Public redacted version of the "Prosecution's Fifth Request for the Admission of Evidence from the Bar Table"](#), 27 November 2015, ICC-01/05-01/13-1498-Conf) ICC-01/05-01/13-1498-Red (30 November 2015) (TC VII) [17]; *Prosecutor v Bemba et al* ([Decision on 'Prosecution's Fifth Request for the Admission of Evidence from the Bar Table'](#)) ICC-01/05-01/13-1524 (14 December 2015) (TC VII) [12].

<sup>22</sup> *Prosecutor v Taylor* ([Transcript](#)) SCSL-03-01-T (9 August 2010) (TC II) 45783, lines 11-12.

<sup>23</sup> *Prosecutor v Taylor* ([Transcript](#)) SCSL-03-01-T (9 August 2010) (TC II) 45795, lines 19-28.

<sup>24</sup> Emma Irving, '[And So It Begins... Social Media Evidence In An ICC Arrest Warrant](#)' (*Opinio Juris*, 17 August 2017).

<sup>25</sup> *Prosecutor v Al-Werfalli* ([Warrant of Arrest](#)) ICC-01/11-01/17-2 (15 August 2017) (PTC I) [3].

evidence of witness interference,<sup>26</sup> and the Defence in *Taylor* presented an email as an item of additional evidence to substantiate the grounds of appeal before the SCSL.<sup>27</sup> However, in both cases, the emails were tendered together with other types of evidence. Any discussion of evidentiary issues was not specific to emails, and as such no guidelines could reasonably be deduced or formulated.

There was, nevertheless, sufficient guidance from the international criminal courts and tribunals to formulate Guidelines for the following categories of DDE: (A.) Videos, (B.) Photographs, (C.) Aerial and satellite images, (D.) Intercepts, (E.) Call data records, and (F.) Audio recordings.

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<sup>26</sup> *Prosecutor v Nzabonimpa et al* ([Judgement](#)) MICT-18-116-T (25 June 2021) (Single Judge) [39].

<sup>27</sup> *Prosecutor v Taylor* (Defence motion to present additional evidence pursuant to Rule 115 (Public with public Annexes A-E, G-K and confidential Annex F)) SCSL-03-01-A (30 November 2012) (AC) [8]. The motion was dismissed because the Defence had failed to direct the evidence to a specific finding of fact, as required by Rule 115 of the [SCSL Rules of Procedure and Evidence: Prosecutor v Taylor \(Decision on Defence motion to present additional evidence pursuant to Rule 115\)](#) SCSL-03-01-A (18 January 2013) (AC) [11].

## II. The Leiden Guidelines

### A. Videos

#### Definition

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The international courts and tribunals do not define the concept of videos. However, in general terms, video recordings are commonly referred to as ‘audio-visual material’<sup>28</sup> and as such, videos can be defined as ‘visual multimedia source[s] through which a series of images forms a moving picture. The video transmits a signal to a screen and processes the order in which the screen captures should be shown. Videos usually have audio components that correspond with the pictures being shown on the screen.’<sup>29</sup>

#### A.1. Instead of excerpts, videos should be submitted in their entirety.

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Keywords: procedure; excerpts

Submission of videos in full, alongside their respective transcripts and translations, assist the Court in contextualising the segments of the video that have been identified as most relevant by the tendering party.<sup>30</sup> The ICC Trial Chamber in *Ntaganda* admitted a full video broadcast instead of only the excerpts submitted by the Defence in order to provide context to the security situation portrayed by the video in its entirety.<sup>31</sup>

**Excerpts.** If, nevertheless, a party seeks to tender excerpts, the tendering party should also clearly indicate whether the full footage was available and who extracted the segments of the video.<sup>32</sup> The opposing party may tender additional excerpts to assist the Court in contextualising the segments sought to be admitted.<sup>33</sup> The ICC Trial Chamber in *Ntaganda*

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<sup>28</sup> For example, *Prosecutor v Ntaganda* ([Decision on the conduct of proceedings](#)) ICC-01/04-02/06-619 (2 June 2015) (TC VI) [56].

<sup>29</sup> ‘video’, (Business Dictionary) <<http://www.businessdictionary.com/definition/video.html>> accessed 25 July 2020.

<sup>30</sup> *Prosecutor v Ntaganda* ([Decision on second Defence request for admission of evidence from the bar table](#)) ICC-01/04-02/06-136 (21 February 2018) (TC VI) [10].

<sup>31</sup> The Defence tendered the following excerpts: ‘From time stamps 22:57 to 23:38; 24:02 to 24:29; 25:55 to 27:42; 29:54 to 30:18; 32:40 to 33:05; 36:58 to 39:01; and 47:35 to 48:46’. *Prosecutor v Ntaganda* ([Decision on second Defence request for admission of evidence from the bar table](#)) ICC-01/04-02/06-136 (21 February 2018) (TC VI) [10], fn 28.

<sup>32</sup> *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].

<sup>33</sup> *Prosecutor v Ntaganda* ([Decision on requests for admission of evidence related to sentencing from the bar table](#)) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [15]. In *Prosecutor v Šefik Alić* ([Verdict](#)) X-KRŽ-06/294 (11 April 2008) (Section I for War Crimes) 4, the Court of Bosnia and Herzegovina (BiH) relied on the longer video recording of the relevant operation presented by the Defence. The Defence

granted the Prosecution's request to admit extensions of video excerpts that had been tendered by the Defence in order to illustrate the reason behind the presence of community leaders at an event depicted in the video excerpts.<sup>34</sup>

**A.2. A video and its associated transcripts and translations must be seen as forming integral parts of the same evidence.**

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Keywords: procedure; transcripts; translation

Transcript and translation documents are written records designed to faithfully reflect the contents of the video for better comprehension.<sup>35</sup> Consequently, each document and the video are treated as parts of the same evidence. The formal submission of a video automatically includes recognising the formal submission of associated transcripts and translations which have been duly disclosed.<sup>36</sup> Similarly, it would be inconsistent to impose restrictions on one part but not the others.<sup>37</sup> The ICC Trial Chamber in *Katanga and Ngudjolo Chui* granted a request to apply the same protective measures to the transcript and translation of a video that the Prosecution had been authorised to apply to the video itself.<sup>38</sup> To facilitate the presentation of the evidence in court, the tendering party should, as early as practicable, indicate the segments of the video, transcript, and translation which it intends to use.<sup>39</sup> The parties should also consult and resolve any disagreements about the transcripts or translations.<sup>40</sup> No transcript is

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challenged the video presented by the Prosecution, on the basis that it did not include scenes that were very important for the accused's case.

<sup>34</sup> *Prosecutor v Ntaganda* ([Decision on requests for admission of evidence related to sentencing from the bar table](#)) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [14].

<sup>35</sup> *Prosecutor v Bemba et al* ([Decision on 'Prosecution's Fifth Request for the Admission of Evidence from the Bar Table'](#)) ICC-01/05-01/13-1524 (14 December 2015) (TC VII) [7].

<sup>36</sup> *Prosecutor v Bemba et al* ([Decision on 'Prosecution's Fifth Request for the Admission of Evidence from the Bar Table'](#)) ICC-01/05-01/13-1524 (14 December 2015) (TC VII) [7]. Nonetheless, the Trial Chamber stated that it is preferable to formally submit a video and associated transcripts and translations so there is no confusion as to their status.

<sup>37</sup> *Prosecutor v Katanga and Ngudjolo Chui* ([Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions \(ICC-01/04-01/07-1260\)"](#)) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [18].

<sup>38</sup> *Prosecutor v Katanga and Ngudjolo Chui* ([Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions \(ICC-01/04-01/07-1260\)"](#)) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [17].

<sup>39</sup> *Prosecutor v Ntaganda* ([Decision on the conduct of proceedings](#)) ICC-01/04-02/06-619 (2 June 2015) (TC VI) [57].

<sup>40</sup> *Prosecutor v Ntaganda* ([Decision on the conduct of proceedings](#)) ICC-01/04-02/06-619 (2 June 2015) (TC VI) [57].

necessary if the purpose of the video is to demonstrate ambient sound;<sup>41</sup> the Defence in *Mladić* at the ICTY was not required to transcribe the ambient sound of a firefight in a video it tendered.<sup>42</sup>

**A.3. 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 and all parties within the time limit fixed by the Chamber.**

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Keywords: procedure; translation; translation accuracy; translation by counsel

**Translation.** Pursuant to Regulation 39(1) of the [Regulations of the Court](#), all documents and materials filed with the Registry shall be in a working language of the Court. If segments of the video are not in a working language of the Court, those segments must be translated into a working language of the Court before they can be deemed admissible.<sup>43</sup> The Prosecution has not complied with its disclosure obligations under Rule 77 of the [ICC Rules of Procedure and Evidence](#) until the translations have been provided to the Defence.<sup>44</sup> The translation requirement is based on the accused's right to be informed of the evidence upon which the Prosecution intends to rely, including the nature, cause and content of the charge.<sup>45</sup> Moreover, the Chamber must be in a position to fully understand the evidence upon which the parties intend to rely.<sup>46</sup>

**Accuracy of Translation.** Videos must be of a sufficient sound quality to facilitate translation. In *Mladić*, the ICTY Trial Chamber relied upon a video's English/French subtitles 'in order not to get stuck', although the sound quality in the Bosnian/Croatian/Serbian (BCS) original of the video was so poor that it risked inaccurate translation.<sup>47</sup> The Defence, however, was permitted to rely upon this video so the proceedings could continue, but it was instructed to find a better BCS version of the video.<sup>48</sup> In the absence of a coherent and intelligible version,

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<sup>41</sup> *Prosecutor v Mladić* ([Transcript](#)) IT-09-92 (19 September 2012) (TC) 2634.

<sup>42</sup> *Prosecutor v Mladić* ([Transcript](#)) IT-09-92 (19 September 2012) (TC) 2633-2634.

<sup>43</sup> *Prosecutor v Ongwen* ([Decision on Prosecution's Request to Submit 1006 Items of Evidence](#)) ICC-02/04-01/15-795 (28 March 2017) (TC IX) [9].

<sup>44</sup> *Prosecutor v Katanga and Ngudjolo Chui* ([Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions \(ICC-01/04-01/07-1260\)"](#)) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [11], [13].

<sup>45</sup> Articles 61(3) and 67(1) of the [Rome Statute](#).

<sup>46</sup> *Prosecutor v Lubanga* ([Decision on the Defence "Request to exclude video evidence which has not been disclosed in one of the working languages"](#)) ICC-01/04-01/06-676 (7 November 2006) (PTC I) 3.

<sup>47</sup> *Prosecutor v Mladić* ([Transcript](#)) IT-09-92 (19 September 2012) (TC) 2663.

<sup>48</sup> *Prosecutor v Mladić* ([Transcript](#)) IT-09-92 (19 September 2012) (TC) 2663.

the Trial Chamber ultimately found that the video did not bear ‘sufficient probative value for admission’.<sup>49</sup>

**Translation by Counsel.** Videos adduced from other sources and devoid of translation and transcription can be initially translated and transcribed by counsel, so long as they are translated and transcribed with accuracy. The videos should be translated afterwards by a third party (for example, an impartial translator);<sup>50</sup> the ICTY Trial Chamber in *Mladić* allowed Defence counsel to initially transcribe and translate a video of two film crews visiting a humanitarian refugee centre.<sup>51</sup>

**Time Limits.** Pursuant to Regulation 34 of the [Regulations of the Court](#), the translations should be submitted by the time limit fixed by the Chamber in order to be deemed admissible. The interest of the Court in receiving the transcripts and translations after the time limit in order to understand the original videos may outweigh their late submission.<sup>52</sup> Limited resources and the amount of labour required can constitute ‘good cause’ for the extension of a time limit under the first part of Regulation 35(2) of the [Regulations of the Court](#). However, after the lapse of a time limit, the fact that transcription and translation are time consuming is not considered an exceptional circumstance for an extension of the time limit under the second part of Regulation 35(2).<sup>53</sup> A video may be disclosed after the time limit to substitute the segments that overlap with a previously disclosed video if it is of superior quality but the Court may not admit additional material that does not overlap if the party does not justify late disclosure under Regulation 35(2).<sup>54</sup>

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<sup>49</sup> *Prosecutor v Mladić* ([Transcript](#)) IT-09-92 (27 November 2013) (TC) 20039.

<sup>50</sup> *Prosecutor v Mladić* ([Transcript](#)) IT-09-92 (19 September 2012) (TC) 2662.

<sup>51</sup> *Prosecutor v Mladić* ([Transcript](#)) IT-09-92 (19 September 2012) (TC) 2662. However, the video was ultimately not admitted for reasons unrelated to translation: *Prosecutor v Mladić* ([Transcript](#)) IT-09-92 (27 November 2013) (TC) 20039.

<sup>52</sup> *Prosecutor v Katanga and Ngudjolo Chui* ([Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions \(ICC-01/04-01/07-1260\)”](#)) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [15].

<sup>53</sup> *Prosecutor v Katanga and Ngudjolo Chui* ([Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions \(ICC-01/04-01/07-1260\)”](#)) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [6]-[8].

<sup>54</sup> *Prosecutor v Katanga and Ngudjolo Chui* ([Decision on the “Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions \(ICC-01/04-01/07-1260\)”](#)) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [20], [25].

**A.4. When a witness appears on a video that the party intends to tender into evidence, the video should be tendered through the witness during the examination-in-chief and not through the bar table.**

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Keywords: [procedure](#); [witness evidence](#)

It is more appropriate for videos to be tendered during the examination-in-chief of the witnesses who appear in the videos. If a party wishes to present a video to a witness, it must first establish that the witness has personal knowledge of the making of said recording or its contents. This can be achieved by playing a brief excerpt of the video, to the extent strictly necessary, for the witness to confirm their personal knowledge of it.<sup>55</sup> The 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.<sup>56</sup> With consideration for both the length of the videos and the procedure for having videos admitted through witnesses, the Court may grant additional time for the examination-in-chief of the witnesses.<sup>57</sup> The ICC Trial Chamber in *Ntaganda* granted a Defence request for an additional 15 minutes for the examination-in-chief of two witnesses so that the video could be tendered through them.<sup>58</sup>

**A.5. The Court can make an inference from the content of a video to the extent that it allows the Court to make a definite finding.**

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Keyword: [relevance](#); [inferences](#)

Once a video's prima facie authenticity has been established, the video may be admitted as real evidence.<sup>59</sup> If segments of a video are found to be inadmissible, the remainder of the information in the video may nevertheless be found to be admissible.<sup>60</sup> The ICTR Trial Chamber

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<sup>55</sup> *Prosecutor v Ntaganda* ([Decision on the conduct of proceedings](#)) ICC-01/04-02/06-619 (2 June 2015) (TC VI) [56].

<sup>56</sup> *Prosecutor v Ntaganda* ([Decision on the conduct of proceedings](#)) ICC-01/04-02/06-619 (2 June 2015) (TC VI) [56].

<sup>57</sup> *Prosecutor v Ntaganda* ([Decision on requests for admission of evidence related to sentencing from the bar table](#)) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [23].

<sup>58</sup> *Prosecutor v Ntaganda* ([Decision on requests for admission of evidence related to sentencing from the bar table](#)) ICC-01/04-02/06-2402 (13 September 2019) (TC VI) [23]. This was less than the total time of the video excerpts tendered, which came up to about 35 minutes: fns 57, 58.

<sup>59</sup> *Prosecutor v Katanga and Ngudjolo Chui* ([Decision on the Prosecutor's Bar Table Motions](#)) ICC-01/04-01/07-2635 (17 December 2010) (TC II) [24].

<sup>60</sup> *Prosecutor v Taylor* ([Decision on Prosecution Motion for Admission of BBC Radio Broadcasts](#)) SCSL-03-01-T-745 (25 February 2009) (TC II) [27]. This is derived from the SCSL's treatment of audio recordings, but it reasonably applies to videos as well.

in *Karemera et al* admitted videos which depicted violence and killings in Rwanda, but disregarded any accompanying comments made by journalists in the videos.<sup>61</sup>

Nevertheless, caution should be exercised when assessing a video since differences in personal perception may cause difficulties in reaching a definite finding.<sup>62</sup> It may not be possible to make a definite finding if a subject appears too briefly in the video.<sup>63</sup> The ICC Trial Chamber in *Lubanga* was not able to make a definite finding on the depiction of alleged child soldiers in a video where children who could be under the age of 15 appeared for just two seconds in a video.<sup>64</sup>

However, allowing for a wide margin of error, it is possible to make definite findings. The Court will rely on the video only to the extent that it can make a definite finding.<sup>65</sup> The ICC Trial Chamber in *Lubanga* relied on video evidence concerning child soldiers only to the extent that it could make a definite finding that it depicted children who were clearly under the age of 15.<sup>66</sup> A negative finding based on what was not shown in the video can also, in principle, be substantiated.<sup>67</sup> Pursuant to Rule 63(4) of the [ICC Rules of Procedure and Evidence](#), there is no strict legal requirement that the video has to be corroborated by other evidence for the Court to be able to rely on it and establish a specific fact.<sup>68</sup> The ICC Appeals Chamber in *Lubanga* affirmed that it was not unreasonable for the Trial Chamber to reach conclusions on the age of individuals based on the video evidence provided, given the absence of corroborating evidence.<sup>69</sup>

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<sup>61</sup> *Prosecutor v Karemera et al* ([Decision on the Prosecution's Motion for Admission of Certain Exhibits into Evidence](#)) ICTR-98-44-T [35].

<sup>62</sup> *Prosecutor v Lubanga* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/04-01/06-2842 (14 March 2012) (TC I) [643].

<sup>63</sup> *Prosecutor v Lubanga* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/04-01/06-2842 (14 March 2012) (TC I) [806], fn 2432.

<sup>64</sup> *Prosecutor v Lubanga* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/04-01/06-2842 (14 March 2012) (TC I) [806], fn 2432. The Trial Chamber observed that at 02:22:52-02:22:54 of the video, there were children who could be under the age of 15, but they appeared too briefly in the video to enable a definite finding.

<sup>65</sup> *Prosecutor v Lubanga* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/04-01/06-2842 (14 March 2012) (TC I) [644].

<sup>66</sup> *Prosecutor v Lubanga* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/04-01/06-2842 (14 March 2012) (TC I) [644].

<sup>67</sup> *Prosecutor v Haisam Omar Sakhanih* (Judgment) B 2259-17 (31 May 2017) (Svea Court of Appeal) 5.

<sup>68</sup> *Prosecutor v Lubanga* ([Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#)) ICC-01/04-01/06-3121-Red (1 December 2014) (AC) [218].

<sup>69</sup> *Prosecutor v Lubanga* ([Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#)) ICC-01/04-01/06-3121-Red (1 December 2014) (AC) [218].

**A.6. Videos can be admitted into evidence if relevance and prima facie authenticity is demonstrated by providing information about the date, the location, the events depicted, the author, the source, and/or the chain of custody.**

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Keyword: probative value; relevance; authenticity; chain of custody; admissibility

Pursuant to Article 69(4) of the [Rome Statute](#), the Court may rule on the relevance or admissibility of any evidence.

**Relevance.** The relevance of a video depends on the date, time, and/or location of its recording.<sup>70</sup> As such, the date, time, and location of the video must be stated as precisely as possible. A video is only disclosed from the moment the Defence can fully understand what its exact content is. It will only be possible for the Defence to fully understand the contents of a video after these details have been indicated.<sup>71</sup> Investigative techniques can be employed to identify these details.<sup>72</sup>

**Admissibility.** Prima facie authenticity must be demonstrated before videos can be admitted into evidence.<sup>73</sup> This may be indicated by providing information about the date, the author, the source, and/or the chain of custody.<sup>74</sup> In contrast, if the tendering party fails to provide any substantiation of, for example, the time when a video was shot, the video may be considered to have low probative value which might be outweighed by the prejudice that admission of the video would cause, resulting in the video not being admissible.<sup>75</sup> The Trial

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<sup>70</sup> *Prosecutor v Katanga and Ngudjolo Chui* ([Decision on the Prosecutor's Bar Table Motions](#)) ICC-01/04-01/07-2635 (17 December 2010) (TC II) [24].

<sup>71</sup> *Prosecutor v Katanga and Ngudjolo Chui* ([Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions \(ICC-01/04-01/07-1260\)"](#)) ICC-01/04-01/07-1336 (27 July 2009) (TC II) [11].

<sup>72</sup> For example, in *Prosecutor v Haisam Omar Sakhanh* before the [Stockholm District Court \(Case B 3787-16\)](#) and the [Svea Court of Appeal \(B 2259-17\)](#), the Courts were able to determine the time the video was taken based on the time of sunrise and sunset on the day, the length of shadows observable, and the time of publication of the video online. Practitioners may find the [Berkeley Protocol on Digital Open Source Investigations](#) and [Bellingcat Guides](#) useful resources on the matter.

<sup>73</sup> *Prosecutor v Bemba* ([Public redacted version of "Decision on the Prosecution's application for admission of materials into evidence pursuant to Article 64\(9\) of the Rome Statute" of 6 September 2012](#)) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [81].

<sup>74</sup> *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) [22].

<sup>75</sup> *Prosecutor v Ntaganda* ([Decision on Prosecution's request for admission of documentary evidence](#)) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [63].

Chamber in *Ntaganda* declined to admit a video where the Prosecution was only able to provide the date the video had been broadcast, but not the date the video had been shot.<sup>76</sup>

**Open Source Videos of Media Broadcasts.** Features such as dates of emission, logos of TV programmes and images and/or voices of interviewees are sufficient indicia of reliability, originality, and integrity, which can lead the Court to accord higher probative value and, as a result, higher weight to a video. Greater weight can be accorded if these elements are shown during the entire duration of the video and if they are uninterrupted.<sup>77</sup> To show with sufficient clarity and specificity the relevance and probative value of open source videos, and how they fit into the case,<sup>78</sup> the tendering party may also provide verifiable information about where the video can be obtained or, if it is no longer publicly available, the date and location from which it was obtained.<sup>79</sup> If the video emanates from a well-known international news outlet, its availability on the official website of the news outlet is an indication of reliability.<sup>80</sup> In *Mladić*, the ICTY Prosecution requested the admission of open source television news reports from the bar table.<sup>81</sup> The Defence objected to the reports' admission on the grounds that the author was unknown. This rendered the Defence unable to challenge him or her on the content of the material as well as it being unclear whether the source heard the information from others.<sup>82</sup> The Trial Chamber found that the Defence submissions were insufficient to successfully challenge the reports' probative value, or to preclude admission pursuant to Rule 89 (D) of the [ICTY Rules of Procedure and Evidence](#).<sup>83</sup> The ICTY Trial Chamber was satisfied that the Prosecution had shown with sufficient clarity and specificity the relevance and probative value of each of these reports, successfully demonstrating how the reports fit into their case.<sup>84</sup>

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<sup>76</sup> *Prosecutor v Ntaganda* ([Decision on Prosecution's request for admission of documentary evidence](#)) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [63].

<sup>77</sup> *Prosecutor v Bemba* ([Public redacted version of "Decision on the Prosecution's application for admission of materials into evidence pursuant to Article 64\(9\) of the Rome Statute" of 6 September 2012](#)) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [81].

<sup>78</sup> *Prosecutor v Mladić* ([Decision on Prosecution Motion for Admission of Documents from the Bar Table \(Municipalities Component\)](#)) IT-09-92 (11 February 2014) (TC) [9].

<sup>79</sup> *Prosecutor v Katanga and Ngudjolo Chui* ([Decision on the Prosecutor's Bar Table Motions](#)) ICC-01/04-01/07-2635 (17 December 2010) (TC II) [24].

<sup>80</sup> *Prosecutor v Bemba* ([Public Redacted version of "Third Decision on the prosecution and defence requests for the admission of evidence", ICC-01/05-01/08-2864 of 6 November 2013](#)) ICC-01/05-01/08-2864-Red (22 June 2016) (TC III) [80].

<sup>81</sup> *Prosecutor v Mladić* ([Decision on Prosecution Motion for Admission of Documents from the Bar Table \(Municipalities Component\)](#)) IT-09-92 (11 February 2014) (TC) [1].

<sup>82</sup> *Prosecutor v Mladić* ([Decision on Prosecution Motion for Admission of Documents from the Bar Table \(Municipalities Component\)](#)) IT-09-92 (11 February 2014) (TC) [7].

<sup>83</sup> 'A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial'; cf Article 69(4) of the [Rome Statute](#).

<sup>84</sup> *Prosecutor v Mladić* ([Decision on Prosecution Motion for Admission of Documents from the Bar Table \(Municipalities Component\)](#)) IT-09-92 (11 February 2014) (TC) [8].

**A.7. Video evidence of interviews conducted during an armed conflict by a party to the conflict may not be objective and reliable and therefore low probative value may be attached to the video.**

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Keywords: [probative value](#); [armed conflict evidence](#); [interviews](#)

This Guideline refers to interviews conducted by, not with, a party to the conflict. Interviewees' statements taken by a party to the conflict during an armed conflict may be driven by fear, even if there is no corroborating evidence of intimidation or coercion.<sup>85</sup> The ICC Pre-Trial Chamber in *Bemba* attached low probative value to an interview that was produced by the Movement for the Liberation of the Congo (MLC) at a time when the Central African Republic was still under attack and the MLC had been a party to the conflict.<sup>86</sup> The consideration of the objectivity and reliability of the interviewee applies equally to interviews tendered by the Prosecution.

**A.8. The consent of witnesses and others affected by the work of the Court whose image is depicted in video evidence is required.**

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Keywords: [prejudice](#), [privacy](#), [consent](#)

Pursuant to Article 68(1) of the [Rome Statute](#), the Court shall 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 consent of the individual may constitute a violation of their right to privacy and/or private life.<sup>87</sup> Prior to the disclosure of the evidence, the individuals concerned should be consulted, if possible, to ensure that no unaddressed issues, for example security risks, occur.<sup>88</sup> A high degree of care should be taken to not unnecessarily link individuals to the Court: evidence which depicts an individual's image should

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<sup>85</sup> *Prosecutor v Bemba* ([Decision pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo](#)) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [104].

<sup>86</sup> *Prosecutor v Bemba* ([Decision pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo](#)) ICC-01/05-01/08-424 (15 June 2009) (PTC II) [104].

<sup>87</sup> *Prosecutor v Bemba* ([Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents](#)) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [85]. This Guideline is derived from the ICC's treatment of photographic evidence, but it applies to videos as well.

<sup>88</sup> *Prosecutor v Bemba* ([Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents](#)) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [86].

only be used when no acceptable alternative investigative approach is available.<sup>89</sup> Once evidence has been disclosed pursuant to Article 67(2) of the [Rome Statute](#) or Rules 76 or 77 of the [ICC Rules of Procedure and Evidence](#), a party or participant does not have to make an advanced discrete application if the evidence is to be shown during investigations.<sup>90</sup>

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<sup>89</sup> *Prosecutor v Bemba* ([Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents](#)) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [87].

<sup>90</sup> *Prosecutor v Bemba* ([Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents](#)) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [87].

## B. Photographs

### Definition

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Photographs are widely used within international criminal proceedings, but despite their common usage, courts and tribunals have not undertaken to provide a widespread definition at this stage. Photographs often fall under the broad definition of documentary evidence which includes ‘anything in which information of any description is recorded’<sup>91</sup> and can be defined as ‘picture[s] made using a camera, in which an image is focused on to light-sensitive material and then made visible and permanent by chemical treatment, or stored digitally’.<sup>92</sup>

#### **B.1. The Court can make an inference from the content of a photograph to the extent that it allows the Court to make a definite finding.**

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**Keywords:** [relevance](#); [inferences](#)

This Guideline is derived from the ICC’s treatment of video evidence, but it can reasonably be applied to photographs as well. Caution should be exercised when considering a photograph since differences in personal perception can cause difficulties in making a definite finding.<sup>93</sup> The Court will rely on the photograph only to the extent that it can make such a definite finding.<sup>94</sup> The ICC Trial Chamber in *Lubanga* found that a reliable distinction can be drawn between individuals of different ages, based solely on the individuals’ appearance.<sup>95</sup> Pursuant to Rule 63(4) of the [ICC Rules of Procedure and Evidence](#), there is no strict legal requirement that a photograph has to be corroborated by other evidence for the Court to be able to rely on it and establish a specific fact.<sup>96</sup>

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<sup>91</sup> *Prosecutor v Musema* ([Judgement And Sentence](#)) ICTR-96-13-A (27 January 2000) (TC I) [53]; *Prosecutor v Karemera et al* ([Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence](#)) ICTR-98-44-T (25 January 2008) (TC III) [5].

<sup>92</sup> ‘Photograph’ ([Lexico](#)) accessed 12 January 2022.

<sup>93</sup> *Prosecutor v Lubanga* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/04-01/06-2842 (14 March 2012) (TC I) [643].

<sup>94</sup> *Prosecutor v Lubanga* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/04-01/06-2842 (14 March 2012) (TC I) [644].

<sup>95</sup> *Prosecutor v Lubanga* ([Judgment pursuant to Article 74 of the Statute](#)) ICC-01/04-01/06-2842 (14 March 2012) (TC I) [718].

<sup>96</sup> *Prosecutor v Lubanga* ([Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#)) ICC-01/04-01/06-3121-Red (1 December 2014) (AC) [218].

**B.2. Photographs can be admitted into evidence if prima facie authenticity is demonstrated by providing information about the date, the location, the events depicted, the author, the source, and/or the chain of custody.**

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Keywords: probative value; relevance; authenticity; chain of custody; admissibility

Based on Article 69(4) of the [Rome Statute](#) and Rules 63 and 64 of the [ICC Rules of Procedure and Evidence](#), regarding the Court's authority to rule on the relevance, probative value and admissibility of any evidence, photographs should be accompanied by reliable information on their date, location and events depicted. If the Court does not receive such information, photographs' relevance to issues in the case and probative value cannot be determined.<sup>97</sup> The ICC Trial Chamber in *Ntaganda* noted that since six photographs brought by the Prosecution were not dated, their relevance and probative value surrounding issues in the case could not be determined.<sup>98</sup> It added that when photographs are dated, the parties seeking admission should provide evidence from which the Court can conclude that the dates are correct and fall within the temporal scope of the charges.<sup>99</sup> The ICC Trial Chamber in *Ntaganda* also noted that certain dated photographs could have some relevance, including photos dated ambiguously (such as '08/07 2003', which could be interpreted as either the 8<sup>th</sup> of July or August 7<sup>th</sup>) or by a range ('January-February 2003'), but in the absence of any further reliable information as to the date, location and events depicted in the photographs, it could not admit them into evidence due to lack of probative value.<sup>100</sup>

Likewise, the ICTR Trial Chamber in *Karamera* found that a photographic piece of evidence did not have sufficient indicia of authenticity as it did not contain any reliable information: for example, it did not bear any official stamp, signature, seal, date, nor was there any corroborating evidence, indication of the chain of custody and/or information regarding the author. The Trial Chamber thus found the origin of the photograph doubtful.<sup>101</sup> The ICC

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<sup>97</sup> *Prosecutor v Ntaganda* ([Decision on Prosecution's request for admission of documentary evidence](#)) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [68]. In Case 09/748003-18 & 09/748003-19 *Prosecutor v Oussama Achraf Akhlafa* ECLI:EN:RBDHA:2019:7430, the Dutch District Court in The Hague noted that "determining the date on which a particular image was taken is potentially an interesting element in the context of a criminal investigation". Though it does not establish it as a guideline, it does mirror the importance of photographic evidence being dated.

<sup>98</sup> *Prosecutor v Ntaganda* ([Decision on Prosecution's request for admission of documentary evidence](#)) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [68].

<sup>99</sup> *Prosecutor v Ntaganda* ([Decision on Prosecution's request for admission of documentary evidence](#)) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [68].

<sup>100</sup> *Prosecutor v Ntaganda* ([Decision on Prosecution's request for admission of documentary evidence](#)) ICC-01/04-02/06-1838 (28 March 2017) (TC VI) [68].

<sup>101</sup> *Prosecutor v Karamera 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].

Trial Chamber in *Bemba* also discussed this when considering two photographs, stating that since the Prosecution had not provided ‘any information or evidence to support their authenticity and reliability’, their probative value was ‘outweighed by their potential unfair prejudice to a fair trial’.<sup>102</sup>

### **B.3. The content of photographs can be corroborated by witnesses present at the moment they were taken.**

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**Keywords:** [relevance](#), [probative value](#); [witnesses](#); [contemporaneity](#)

Where photographic evidence is of poor quality or it is unclear who took them and/or how they were developed, consistent testimonies from credible witnesses who were at the site can corroborate the content of the photographs.<sup>103</sup> The ICC Trial Chamber in *Ntaganda* noted the consistency of evidence from photographs taken from credible witnesses, and the consistent testimony from seven witnesses, with which it was able to satisfy itself that the photographs did indeed depict the aftermath of a massacre.<sup>104</sup>

**Unreliable Expert Testimony.** An expert witness’ testimony is unreliable if it is based on conclusions drawn from photographs displaying obvious limitations in terms of reliability.<sup>105</sup> In *Mladić*, the ICTY Trial Chamber was presented with multiple photographs of the allegedly same crater: one was taken initially by a war correspondent during the conflict in the 1990s, and then others were subsequently taken by Defence experts in 2010. The Trial Chamber found the Defence expert’s conclusions drawn from the photographs were unreliable because of the limitations of the photographs in terms of their reliability.<sup>106</sup> Firstly, the Chamber found that the photographs did not in fact depict the same crater, nor the same floor tiles which were depicted in the initial photograph.<sup>107</sup> Secondly, editing software was used on the Defence expert’s photographs to place each photograph in a vertical position and remove deformations

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<sup>102</sup> *Prosecutor v Bemba* ([Public Redacted Version of “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64\(9\) of the Rome Statute” of 6 September 2012](#)) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [159].

<sup>103</sup> *Prosecutor v Ntaganda* ([Judgment](#)) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [282].

<sup>104</sup> *Prosecutor v Ntaganda* ([Judgment](#)) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [282].

<sup>105</sup> *Prosecutor v Mladić* ([Judgment, Volume II of V](#)) IT-09-92 (22 November 2017) (TC) [2170]; *Prosecutor v Mladić* ([Judgment, Volume II of V](#)) IT-09-92 (22 November 2017) (TC) [2039], fn 8717.

<sup>106</sup> *Prosecutor v Mladić* ([Judgment, Volume II of V](#)) IT-09-92 (22 November 2017) (TC) [2170].

<sup>107</sup> *Prosecutor v Mladić* ([Transcript](#)) IT-09-92 (22 September 2015) (TC) 39145.

caused by the angle of photography.<sup>108</sup> Exposure to such software undermined the reliability of photographs as they were no longer submitted in their original form.

#### **B.4. The consent of witnesses and others affected by the work of the Court whose image is depicted in photographic evidence is required.**

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Keywords: prejudice; privacy; consent

Pursuant to Article 68(1) of the [Rome Statute](#), the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Circulation of photographs of witnesses and others affected by the work of the Court without consent from the individuals may constitute a violation of their human right to privacy and/or private life.<sup>109</sup> Prior to disclosure of the photographs, the individuals concerned should be consulted, if possible, to ensure that no unaddressed issues, for example security risks, occur.<sup>110</sup> Once a photograph has been disclosed pursuant to Article 67(2) of the [Rome Statute](#) or Rules 76 or 77 of the [ICC Rules of Procedure and Evidence](#), a party or participant does not have to make an advanced discrete application if the photograph is to be shown during investigations.<sup>111</sup> The ICC Trial Chamber in *Bemba* determined that doing so would render the investigation ineffective.<sup>112</sup> Nevertheless, a very high degree of care should be taken to avoid unnecessarily identifying individuals in photographic evidence before the Court.<sup>113</sup> Such photographs should only be used when no acceptable alternative investigative approach is available.<sup>114</sup>

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<sup>108</sup> *Prosecutor v Mladić* ([Transcript](#)) IT-09-92 (1 October 2015) (TC) 39599.

<sup>109</sup> *Prosecutor v Bemba* ([Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents](#)) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [85].

<sup>110</sup> *Prosecutor v Bemba* ([Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents](#)) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [86].

<sup>111</sup> *Prosecutor v Bemba* ([Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents](#)) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [87].

<sup>112</sup> *Prosecutor v Bemba* ([Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents](#)) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [87].

<sup>113</sup> *Prosecutor v Bemba* ([Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents](#)) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [87].

<sup>114</sup> *Prosecutor v Bemba* ([Public Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents](#)) ICC-01/05-01/08-813-Red (20 July 2010) (TC III) [87].

## C. Aerial and Satellite Images

### Definition

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Although Courts and Tribunals do not provide a standardised definition of this type of DDE, the term 'satellite images' has been used to describe digitally transmitted images taken by artificial satellites orbiting the Earth<sup>115</sup> and the term 'aerial images' has been used to describe images taken from the sky by aircrafts or drones (also known as Unmanned Aerial Vehicles (UAVs)).<sup>116</sup>

**C.1. Where forensic evidence including aerial and satellite images is voluminous, it may be entered into evidence via expert reports summarising the forensic evidence.**

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**Keywords:** procedure; experts; forensic evidence; summary report

Pursuant to Rule 92 *bis* (A) of the [ICTY Rules of Procedure and Evidence](#), evidence of a witness in the form of a written statement may be admitted in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of an accused as charged in the indictment. An example of the rule's application would be if evidence in question is of a cumulative nature in that other witnesses will give, or have given, oral testimony of similar facts. This allows investigators to produce summary reports which are derived from multiple sources and aims to give background evidence to the forensic examinations, thereby contextualising and reducing the apparent complexity of their findings.<sup>117</sup> 'To facilitate matters and to speed up the process',<sup>118</sup> the ICTY in *Krstić* authorised an investigator with the Office of the Prosecutor to testify in a summary form about the findings of forensic experts who had conducted examinations of various grave sites in 1996, 1998 and 1999 'associated with the take-over of Srebrenica'.<sup>119</sup>

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<sup>115</sup> Sean Kotz, 'What is the Difference between Satellite Imagery and Aerial Photography?' (*Sciencing*, 13 March 2018) <<https://sciencing.com/up-date-satellite-pictures-look-at-13825.html>> accessed 13 January 2022.

<sup>116</sup> Johnson M Houston and Piehler G Kurt, *Encyclopedia of Military Science* (SAGE Publications 2013).

<sup>117</sup> *Prosecutor v Krstić* ([Judgement](#)) IT-98-33-T (2 August 2001) (TC) [71]-[79]; Dean Manning, [Srebrenica Investigation: Summary of Forensic Evidence - Execution Points and Mass Graves](#) (16 May 2000) 00950901-00951041.

<sup>118</sup> *Prosecutor v Krstić* ([Transcript](#)) IT-98-33-T (26 May 2000) (TC) 3542.

<sup>119</sup> *Prosecutor v Krstić* ([Transcript](#)) IT-98-33-T (26 May 2000) (TC) 3541; *Prosecutor v Krstić* ([Judgment](#)) IT-98-33-T (2 August 2001) (TC) [71].

**C.2. Aerial and satellite images admitted during former witness testimony are admissible if they form an inseparable and indispensable part of that testimony.**

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Keywords: procedure; former testimony; experts; witnesses

Pursuant to Rule 92 *bis* (D) of the [ICTY Rules of Procedure and Evidence](#),<sup>120</sup> 'a Chamber may admit a transcript of evidence given by a witness in proceedings before the Tribunal which goes to proof of a matter other than the acts and conduct of the accused'. Although Rule 92 *bis* (D) does not explicitly provide for the admission of exhibits admitted during former testimony, these exhibits are admissible pursuant to this rule so long as they form an inseparable and indispensable part of the testimony (whether expert or not).<sup>121</sup> Aerial and satellite images are an inseparable and indispensable part of the testimony if the witness discusses them 'in his or her written statement or transcript and if that written statement would become incomprehensible or have lesser probative value without [the] admission' of such images.<sup>122</sup>

**Indexes.** Aerial and satellite images admitted during former witness testimony should be tendered with an index. The index should indicate the exact title or exhibit number for each former exhibit to identify the exact exhibits from the previous case.<sup>123</sup> The ICTY in *Blagojević and Jokić* postponed the admission of aerial images that had been previously tendered and admitted at the ICTY during related witness testimony of previous ICTY trials until an index of proposed exhibits could be provided.<sup>124</sup>

**Former Expert Testimony.** Further considerations apply to former expert testimony: aerial and satellite images attached to former expert testimony are admissible if such testimony is also highly relevant to the case and is open to cross-examination by the Defence. Pursuant to Rule 94 *bis* of the [ICTY Rules of Procedure and Evidence](#),<sup>125</sup> it should be determined whether

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<sup>120</sup> cf Rule 68(2) of the [ICC Rules of Procedure and Evidence](#).

<sup>121</sup> *Prosecutor v Blagojević and Jokić* ([First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 bis](#)) IT-02-60-T (12 June 2003) (TC I) [30].

<sup>122</sup> *Prosecutor v Hadžić* ([Decision on Prosecution Omnibus Motion for Admission of Evidence pursuant to Rule 92bis and Prosecution Motion to Admit Gh-139's Evidence pursuant to Rule 92 bis](#)) IT-04-75-T (24 January 2013) (TC) [21].

<sup>123</sup> *Prosecutor v Blagojević and Jokić* ([First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 bis](#)) IT-02-60-T (12 June 2003) (TC I) [31].

<sup>124</sup> *Prosecutor v Blagojević and Jokić* ([First Decision on Prosecution's Motion for Admission of Witness Statements and Prior Testimony Pursuant to Rule 92 bis](#)) IT-02-60-T (12 June 2003) (TC I) [32].

<sup>125</sup> cf Rule 68(3) of the [ICC Rules of Procedure and Evidence](#).

the expert was a live witness whose report is 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.<sup>126</sup> Once it is shown that the authors of all reports qualify as experts, that the evidence has probative value and relevance, and that the evidence helps provide a complete picture, former expert evidence can be admitted (including the images attached to the reports).<sup>127</sup> The ICTY in *Blagojević and Jokić* applied Rule 94 *bis* and, once satisfied that the report's author, D. Manning, was an expert fulfilling all the aforementioned requirements, admitted the expert evidence (including the aerial images attached to it).<sup>128</sup>

### **C.3. Aerial and satellite images should be contemporaneous to the events they purport to be showing.**

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**Keywords:** [relevance](#); [contemporaneity](#)

Where there exists an extensive period of time between when the images were taken and when the events occurred, and where testimony of a witness acknowledges that changes could have arisen between the occurrence of the event and the time at which the aerial images were taken,<sup>129</sup> the ICC Trial Chamber in *Ntaganda* found that it is 'not in a position to establish beyond reasonable doubt' that what is shown on the image occurred as a result of the event under consideration.<sup>130</sup> The Trial Chamber determined that images taken more than a month after an attack are 'of limited use to establish whether, and if so how, any destruction took place during the events that are subject to the charges'.<sup>131</sup>

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<sup>126</sup> *Prosecutor v Blagojević and Jokić* ([Decision on Prosecution's Motions for admission of expert statements](#)) IT-02-60-T (7 November 2003) (TC I) [30].

<sup>127</sup> *Prosecutor v Blagojević and Jokić* ([Decision on Prosecution's Motions for admission of expert statements](#)) IT-02-60-T (7 November 2003) (TC I) [35].

<sup>128</sup> *Prosecutor v Blagojević and Jokić* ([Decision on Prosecution's Motions for admission of expert statements](#)) IT-02-60-T (7 November 2003) (TC I) [35].

<sup>129</sup> *Prosecutor v Ntaganda* ([Judgment](#)) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [454].

<sup>130</sup> *Prosecutor v Ntaganda* ([Judgment](#)) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [454], fn 1293.

<sup>131</sup> *Prosecutor v Ntaganda* ([Judgment](#)) ICC-01/04-02/06-2359 (8 July 2019) (TC VI) [569], fn 1748.

#### C.4. Aerial and satellite images can be used to corroborate other evidence.

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Keywords: [relevance](#); [corroboration](#)

Aerial and satellite images can be used to corroborate other evidence such as forensic evidence,<sup>132</sup> witness testimony,<sup>133</sup> and the reliability of intercept communications.<sup>134</sup> The ICTY in *Krstić* found that aerial images of a purported grave site corroborated real evidence and a forensic report showing disturbances in the grave soil demonstrated that the bodies of those massacred had been exhumed and moved to secondary grave sites.<sup>135</sup>

#### C.5. Insufficient authentication goes to the weight of aerial and satellite images rather than their admissibility.

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Keywords: [probative value](#); [admissibility](#); [relevance](#); [authentication](#); [chain of custody](#)

Manipulation and distortion of aerial and satellite images do not necessarily affect their admissibility.<sup>136</sup> The ICTY in *Popović* disagreed with the Defence's argument that the aerial images in that case could not be admitted because their dates had been removed, they 'were misrepresented to the United Nations, the Security Council, and the public' as proving the purported existence of weapons of mass destruction was unrelated to the case, and there were differences in corroborating testimony:<sup>137</sup> such reasons go to weight (i.e., probative value) rather than the criteria necessary for admission.<sup>138</sup>

**Method of Creation.** Lack of information regarding the method of creation of aerial and satellite images does not necessarily impair their probative value. Pursuant to Rule 70 of the [ICTY Rules of Procedure and Evidence](#),<sup>139</sup> a party may provide information to the Prosecutor on a confidential basis. Where evidence is lacking as to the origin of aerial and satellite images, 'the method of their creation, the manner of their editing, how to interpret them or whether they were delivered to the Prosecution in their original form or previously modified', their

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<sup>132</sup> *Prosecutor v Krstić* ([Judgment](#)) IT-98-33-T (2 August 2001) (TC) [223].

<sup>133</sup> *Prosecutor v Krstić* ([Judgment](#)) IT-98-33-T (2 August 2001) (TC) [222].

<sup>134</sup> *Prosecutor v Krstić* ([Judgment](#)) IT-98-33-T (2 August 2001) (TC) [114].

<sup>135</sup> *Prosecutor v Krstić* ([Judgment](#)) IT-98-33-T (2 August 2001) (TC) [223].

<sup>136</sup> *Prosecutor v Popović et al* ([Transcript](#)) IT-05-88-T (TC II) (6 February 2008) 21095.

<sup>137</sup> *Prosecutor v Popović et al* ([Transcript](#)) IT-05-88-T (TC II) (6 February 2008) 21171.

<sup>138</sup> *Prosecutor v Popović et al* ([Transcript](#)) IT-05-88-T (TC II) (7 February 2008) 21187.

<sup>139</sup> cf Rule 81 of the [ICC Rules of Procedure and Evidence](#).

credibility is safeguarded if accompanied by expert reports locating the places/individuals depicted.<sup>140</sup>

**Errors.** The overall weight of aerial and satellite images is not adversely affected by technical errors or the markings and removal of certain data such as site code or coordinates, particularly when authenticated by witness/expert corroboration.<sup>141</sup> The ICTY in *Popović* found that the erasure of certain dates, marked initially in white and subsequently with a coloured pen, did not deprive aerial images depicting an alleged burial and reburial operation of their weight, particularly in light of extensive expert evidence.<sup>142</sup>

**C.6. With adequate witness/expert corroboration, aerial and satellite images should be considered authentic and reliable and due weight should be accorded to them.**

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**Keywords:** probative value; relevance; testimony; corroboration; experts

Witness testimony can corroborate the interpretation or authenticity of aerial and satellite images.<sup>143</sup> Witness/expert corroboration is adequate if, for example, it establishes that the aerial and satellite images concerned could not be altered by anyone or it explains why dates have been added to or removed from them.<sup>144</sup> Adequate witness/expert corroboration also includes the testimonies of the investigators about the use of such images, or complementary forensic and anthropological reports.<sup>145</sup> As a result of expert identification and forensic analysis, the aerial images of the graves dug following the Srebrenica massacre were relied upon by the ICTY in *Blagojević and Jokić* to find that there had been attempts to move the graves to secondary sites.<sup>146</sup>

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<sup>140</sup> *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [69]-[70].

<sup>141</sup> *Prosecutor v Popović et al* ([Judgement Volume I](#)) IT-05-88-T (10 June 2010) (TC II) [75].

<sup>142</sup> *Prosecutor v Popović et al* ([Judgement Volume I](#)) IT-05-88-T (10 June 2010) (TC II) [72]-[75].

<sup>143</sup> *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [70].

<sup>144</sup> *Prosecutor v Popović et al* ([Judgement Volume I](#)) IT-05-88-T (10 June 2010) (TC II) [73]; *Prosecutor v Popović et al* ([Transcript](#)) IT-05-88-T (7 February 2008) (TC II) 21187.

<sup>145</sup> *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [70]. In Case 09/748004-09 *Prosecutor v Basebya* ECLI:NL:RBDHA:2013:8710 [7], the Dutch District Court in The Hague relied on aerial photographs depicting the Defendant's neighbourhood which experts used to determine the nature of the Defendant's living environment.

<sup>146</sup> *Prosecutor v Blagojević and Jokić* ([Judgment](#)) IT-02-60-T (17 January 2005) (TC I Section A) [382].

## D. Intercepts

### Definition

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Intercepts fall under documentary evidence and can be characterised as ‘anything in which information of any description is recorded.’<sup>147</sup> Intercepts are audio communications intercepted using technical equipment<sup>148</sup> which are transcribed into writing, audiotapes or any other type of digital records.<sup>149</sup>

**D.1. Intercepts can be tendered from the bar table if they are relevant and probative, and can be used to reduce the number of witnesses required, and/or corroborate other intercepts.**

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**Keywords:** procedure; relevance; probative value; bar table; witnesses

Pursuant to Rule 89(C) of the [ICTY Rules of Procedure and Evidence](#),<sup>150</sup> ‘a Chamber may admit any relevant evidence which it deems to have probative value’. In *Mladić*, the ICTY Trial Chamber found that admission of intercepts from the bar table requires that the Prosecution show the tendered material be relevant and probative, and that it fit into the case. As the Chamber had already taken judicial notice of the authenticity of the intercepts seized from the Mladić family residence, their relevance was established. Their probative value was enhanced by the fact that they had been recovered by the Serbian authorities. The absence of direct and precise time and date references did not deprive them of their relevance and probative value, although the Trial Chamber noted that additional evidentiary efforts may be required to give the intercepts the full weight that could be afforded to them.<sup>151</sup>

**Witnesses.** Pursuant to Rule 65 *ter* (E)(i) and (ii) of the [ICTY Rules of Procedure and Evidence](#),<sup>152</sup> a pre-trial judge may order the Prosecutor to file the final version of the Prosecutor’s pre-trial brief and, importantly, the list of witnesses the Prosecutor intends to call not less than six weeks before the Pre-Trial Conference. In *Mladić*, the ICTY Trial Chamber

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<sup>147</sup> *Prosecutor v Musema* ([Judgement And Sentence](#)) ICTR-96-13-A (27 January 2000) (TC I) [53]; *Prosecutor v Karemera et al* ([Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence](#)) ICTR-98-44-T (25 January 2008) (TC III) [5].

<sup>148</sup> Diletta Marchesi, ‘[Intercepted Communications in the Ongwen Case: Lessons to Learn on Documentary Evidence at the ICC](#)’ 2021 International Criminal Law Review.

<sup>149</sup> *Prosecutor v Musema* ([Judgement And Sentence](#)) ICTR-96-13-A (27 January 2000) (TC I) [53].

<sup>150</sup> cf Article 69(4) of the [Rome Statute](#).

<sup>151</sup> *Prosecutor v Mladić* ([Decision on Prosecution Motion to Admit Evidence from the Bar Table: Excerpts from Mladic's Audio Tapes](#)) IT-09-92 (18 September 2013) (TC) [9].

<sup>152</sup> cf Rule 121(3) of the [ICC Rules of Procedure and Evidence](#).

found that counsel could file a bar table motion for its intercept operator evidence in advance of calling witnesses for that section of its case, and by doing so reducing the number of witnesses that needed to be called upon to testify about intercept evidence.<sup>153</sup>

**Bar Table Intercepts Tendered to Corroborate Other Intercepts.** Intercepts tendered from the bar table need not be admitted if only used to explain the probative value and the relevance of other intercepts. In *Mladić*, the ICTY Prosecution tendered 153 intercepts from the bar table (called the ‘Bar Table Intercepts’) for the purpose of proving the chain of custody of five intercepts whose admission was sought. It then filed a notice which contained, as a confidential annex thereto, a table setting out the probative value and the relevance of the Bar Table Intercepts (‘Table’).<sup>154</sup> The Defence objected to the admission of the Table.<sup>155</sup> However, the Chamber found that the Defence’s objections to the admissibility of the Table were unfounded since the Prosecution was not seeking to tender that document into evidence but was merely using it in order to explain the probative value and the relevance of each of the Bar Table Intercepts.<sup>156</sup>

## **D.2. The probative value of intercepts may be enhanced by tendering the original audio recordings.**

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**Keywords:** [probative value](#); [prejudice](#)

Pursuant to Rules 89(C) and (D) of the [ICTY Rules of Procedure and Evidence](#),<sup>157</sup> evidence must have probative value which should not be substantially outweighed by the need to ensure a fair trial. In its evaluation of the probative value of intercept evidence the ICTY Trial Chamber in *Mladić* considered that the Prosecution had tendered the original audio recordings in addition to their BCS transcripts and the corresponding English translations. Additional factors evaluated by the Trial Chamber included the Prosecution’s indication that ‘[t]he voices on the audio tape recordings have been identified as the Accused by OTP staff’, that the information in the intercepts was confirmed by witness John Wilson, and that the Defence did not object to the intercepts’ origins. The ICTY Trial Chamber found that these factors enhanced the

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<sup>153</sup> *Prosecutor v Mladić* ([Transcript](#)) IT-09-92 (3 May 2012) (TC) 372.

<sup>154</sup> *Prosecutor v Mladić* ([Decision on the Admission of Intercepts and Authentication Charts](#)) IT-09-92 (6 February 2014) (TC) [1], [3].

<sup>155</sup> *Prosecutor v Mladić* ([Decision on the Admission of Intercepts and Authentication Charts](#)) IT-09-92 (6 February 2014) (TC) [3].

<sup>156</sup> *Prosecutor v Mladić* ([Decision on the Admission of Intercepts and Authentication Charts](#)) IT-09-92 (6 February 2014) (TC) [8].

<sup>157</sup> cf Article 69(4) of the [Rome Statute](#).

probative value of the intercepts, such that it was not substantially outweighed by the need to ensure a fair trial.<sup>158</sup>

**Original Intercepted Audio Recordings.** It is not necessary for the Court to have access to the original audio recordings of intercepts when enough evidence surrounding the intercepts already exists.<sup>159</sup> This mirrors the ‘best evidence rule’, meaning that ‘the Trial Chamber will rely on the best evidence available in the circumstances’.<sup>160</sup> The ICTY Trial Chamber in *Blagojević and Jokić* dismissed the Defence’s arguments, which claimed that ‘the Prosecutor should have submitted the original audio recordings [...] in order to prove the reliability and authenticity of the intercepts’.<sup>161</sup> The Trial Chamber established that, given the corroborative testimonial evidence and the very large amount of documentary evidence, it would not be necessary to have access to the original intercept.<sup>162</sup> The Defence further argued that many domestic jurisdictions ‘view tape recordings with scepticism because they can be tampered with’.<sup>163</sup> The Trial Chamber responded to this by noting that, indeed, certain domestic jurisdictions might be sceptical about the reliability of tape recorded material, but that the ICTY’s provisions are ‘more generous’ on the matter.<sup>164</sup>

### **D.3. Reliability and authenticity of intercepts may be amplified by the weight of other corroborative evidence.**

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**Keywords:** [relevance](#); [probative value](#); [reliability](#); [authenticity](#)

Intercepts can have a high degree of validity regarding the conversations recorded when the weight of other evidence supports their reliability and authenticity.<sup>165</sup> The ICTY Trial Chamber

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<sup>158</sup> *Prosecutor v Mladić* ([Decision on Prosecution Motion for Admission of Documents from the Bar Table](#)) IT-09-92 (19 July 2013) (TC) [11]-[12].

<sup>159</sup> *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].

<sup>160</sup> *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]; *Prosecutor v Martić* ([Decision Adopting Guidelines on the Standards Governing the Admission of Evidence](#)) IT-95-11-T (19 January 2006) (TC I) [7].

<sup>161</sup> *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].

<sup>162</sup> *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].

<sup>163</sup> *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].

<sup>164</sup> *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].

<sup>165</sup> *Prosecutor v Tolimir* ([Judgement](#)) IT-05-88/2-T (12 December 2012) (TC II) [63], [66].

in *Tolimir* held, concerning intercepted radio communications, that independent corroboration and overwhelming weight of other evidence served to establish the intercepts' reliability and authenticity in spite of a theoretical possibility that the intercepts had been tampered with.<sup>166</sup>

**Internal Means of Corroboration.** Intercepts are more likely to be deemed reliable by a Court when they can be authenticated, cross checked and corroborated through internal means such as multiple operators intercepting the same message.<sup>167</sup> The authenticity and reliability of the communication is supported by the fact that two or more intercept operators have monitored the same conversation, with only slight or no variations from each other.<sup>168</sup> This also applies when operators work from different locations.<sup>169</sup> This was found to be the case by two different ICTY Trial Chambers, in *Krstić* and *Blagojević and Jokić*, when single conversations were monitored by different intercept operators from different locations.<sup>170</sup> Consequently, where corroborating evidence is of a high level of documentable detail that could not have been completely manufactured, it is more likely the intercept evidence will be accepted as reliable.

**Forensic Reports.** An intercept whose authenticity cannot be confirmed with certainty may nevertheless be admitted if a forensic report states that there are no traces of it having been tampered with.<sup>171</sup> The ICTY Trial Chamber in *Župljanin* found that, while a forensic report analysing a telephone intercept of a conversation had clearly said that its authenticity could not be confirmed with any degree of full certainty, the report did observe that there were no traces of it having been tampered with. Once the witness confirmed that it was his voice on the intercept and that he was speaking to the accused, the intercept could be admitted.<sup>172</sup>

**Ambiguous and/or Cryptic Content.** Where the relevance of several intercepts, considered individually, is questionable on the basis of their ambiguous and/or cryptic content,

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<sup>166</sup> *Prosecutor v Tolimir* ([Judgment](#)) IT-05-88/2-T (12 December 2012) (TC II) [64]-[66].

<sup>167</sup> *Prosecutor v Krstić* ([Judgment](#)) IT-98-33-T (2 August 2001) (TC) [108]; *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].

<sup>168</sup> *Prosecutor v Krstić* ([Judgment](#)) IT-98-33-T (2 August 2001) (TC) [108]; *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].

<sup>169</sup> *Prosecutor v Krstić* ([Judgment](#)) IT-98-33-T (2 August 2001) (TC) [108]; *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].

<sup>170</sup> *Prosecutor v Krstić* ([Judgment](#)) IT-98-33-T (2 August 2001) (TC) [108]; *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].

<sup>171</sup> *Prosecutor v Župljanin* ([Transcript](#)) IT-08-91 (30 October 2009) (TC) 2339-2342.

<sup>172</sup> *Prosecutor v Župljanin* ([Transcript](#)) IT-08-91 (30 October 2009) (TC) 2339-2342.

the Trial Chamber may nevertheless take a comprehensive approach and admit them: in *Mladić*, it found that the intercepts related to the Srebrenica section of the Prosecution's case, some of which were ambiguous on their own, constituted a contemporaneous, chronological record of events on the ground and demonstrated a network of interaction and exchange of information concerning the alleged crimes charged in the Indictment.<sup>173</sup> As a result, they were relevant. However, the weight the Chamber will ultimately attribute to every individual intercept it admits into evidence can only fully be assessed following further contextualization, for example by witnesses who were either participants in the intercepts or otherwise have a sufficient basis to provide such contextual testimony.<sup>174</sup> In their absence, it appears that the intercepts will merely be afforded less weight, but still admitted. Moreover, it remains open to the Defence to challenge their authenticity.<sup>175</sup>

**Witness Testimony.** Judges may have a prima facie basis to admit intercepts and their transcripts where their authenticity and chain of custody can be demonstrated through witness testimony by the person who intercepted the communication. The witness must be able to testify that they recognise the intercept and its transcripts, and that they are able to identify it as the same one they had recorded.<sup>176</sup> The ICTR Trial Chamber in *Renzaho* found that the tape of an intercepted phone call (recorded by a journalist),<sup>177</sup> on which the accused allegedly talked of 'extermination', could be admitted. The Defence argued that it was not known how the intercept was made and where it originally came from, and this therefore cast 'doubt and ambiguity as to the authenticity of [the] tapes'.<sup>178</sup> In response, the ICTR Trial Chamber considered the testimony of the journalist, who testified that he recognised the intercept and its transcript when this was shown to him during examination-in-chief, and he was also able to identify that the intercept in question was the same as the one he had made in 1994. The Court considered that the testimony provided a prima facie basis to admit the tape and the transcripts.<sup>179</sup>

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<sup>173</sup> *Prosecutor v Mladić* ([Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment](#)) IT-09-92 (2 May 2013) (TC) [24].

<sup>174</sup> *Prosecutor v Mladić* ([Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment](#)) IT-09-92 (2 May 2013) (TC) [29].

<sup>175</sup> *Prosecutor v Mladić* ([Decision on Prosecution's Bar Table Motion for the Admission of Intercepts: Srebrenica Segment](#)) IT-09-92 (2 May 2013) (TC) [29]-[30].

<sup>176</sup> *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-T (20 March 2007) (TC I) 5.

<sup>177</sup> *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (2 March 2007) (TC I) 7.

<sup>178</sup> *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (8 January 2007) (TC I) 47.

<sup>179</sup> *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-T (20 March 2007) (TC I) [13].

D.4. Relevance of intercepts, which are not in a working language of the Court, may not be assessed when there is no relevant and accurate translation. Not all mistakes in translations or transcripts are material or affect the substance and understanding of the document.

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Keywords: [relevance](#); [probative value](#); [prejudice](#); [translation](#); [transcription](#)

The relevance of an intercept cannot be demonstrated if there is no translation available. The ICTY Trial Chamber in *Tolimir* held that since there was no English translation uploaded to the eCourt system, the Court was unable to assess the relevance of two intercepts.<sup>180</sup>

**Transcripts and Translations of Detention Center Intercepts by the Defence or Prosecutor instead of a Third Party.** Transcripts and translations of conversations from the Court's Detention Centre carried out by a party to the case does not inherently make them inadmissible.<sup>181</sup> The ICC Appeals Chamber in *Bemba et al* established this as a well-known fact, and rejected the Defence's argument that the Chamber erred when relying on transcripts and translations provided by the Prosecutor, 'a biased party to the proceedings, affecting its assessment of the recordings from the Detention Centre in its entirety.'<sup>182</sup> The Appeals Chamber held that the Office of the Prosecutor (OTP)'s role in the transcriptions and translations was 'not in itself a reason not to take them into account' and the parties could still challenge the accuracy of the transcription and translation.<sup>183</sup>

**Accuracy of Translation.** An intercept can be tendered once the Prosecution and the Defence agree about the accuracy of the text of its transcript and translation.<sup>184</sup> In *Mladić*, the Trial Chamber confirmed that even if the parties disagree on how to interpret the words spoken, this does not deprive the intercepted conversations of their relevance for the case.

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<sup>180</sup> *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].

<sup>181</sup> *Prosecutor v Bemba et al* ([Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute"](#)) ICC-01/05-01/13-2275-Red (8 March 2018) (AC) [1339].

<sup>182</sup> *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].

<sup>183</sup> *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) [1339].

<sup>184</sup> *Prosecutor v Mladić* ([Transcript](#)) IT-09-92 (27 August 2012) (TC) 1657.

The argument regarding interpretation goes to the weight, not admissibility (which is to be assessed at a later stage) in light of the totality of the evidence.<sup>185</sup>

**Mistakes in Translations and Transcriptions.** Not all mistakes in translations or transcripts of intercepted communication are material or impact the substance or understanding of the document.<sup>186</sup> Typographical mistakes do not make transcripts or translations of communication inadmissible if they are corroborated by other evidence.<sup>187</sup> The ICC Appeals Chamber in the *Bemba et al* case noted that when conducting its own assessment, the Chamber listens to the audio recordings together with the transcripts and translations and they are not evaluated in isolation.<sup>188</sup>

**D.5. For intercepts to have probative value, it may have to be shown that whoever obtained the admitted intercepts had the technical means to intercept communications.**

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**Keywords:** probative value; hardware; technical skill

State of the art equipment is not required to intercept communications worthy of probative value. In *Mladić*, the ICTY Trial Chamber found that there was no evidence to support the Defence's assertion that the Army of the Republic of Bosnia and Herzegovina (ABiH), the Serbian State Security Services (SDB), and the Croatian authorities were unable to intercept the Army of the Republika Srpska (VRS) communications<sup>189</sup> solely because they 'lacked the necessary expertise and technological capacity to intercept VRS communications'.<sup>190</sup> To that end, a Defence witness testified that a distinction must be made between professional military

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<sup>185</sup> *Prosecutor v Mladić* ([Decision on Prosecution Motion to Admit Evidence from the Bar Table: Excerpts from Mladic's Audio Tapes](#)) IT-09-92 (18 September 2013) (TC) [9].

<sup>186</sup> *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].

<sup>187</sup> *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].

<sup>188</sup> *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) [1335].

<sup>189</sup> *Prosecutor v Mladić* ([Judgment, Volume IV of V](#)) IT-09-92 (22 November 2017) (TC) [5307].

<sup>190</sup> *Prosecutor v Mladić* ([Judgment, Volume IV of V](#)) IT-09-92 (22 November 2017) (TC) [5305].

grade and amateur grade manufactured devices: military devices are always more sensitive, and need to meet other challenges, like the configuration of the land, weather, and/or the way in which they are being used. Whilst the ABiH's equipment may not have been military grade, it was still able to hear participants that were far away.<sup>191</sup> As a result, the intercepts did have probative value; nonetheless, the Trial Chamber treated them with caution, and considered whether there was corroboration or further detail provided by other sources of evidence.<sup>192</sup>

#### D.6. A detailed explanation of the process of interception and its analysis can overcome shortcomings in the interception process.

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**Keywords:** [relevance](#); [hardware](#); [technical skill](#)

Where shortcomings or flaws exist, intercepts can still be considered reliable and admitted on account of a detailed explanation of the process of interception and analysis of the intercepted evidence.<sup>193</sup> The Pre-Trial Chamber of the ICC in *Ongwen* found intercepted radio communications were reliable<sup>194</sup> even though the intercepts were flawed due to shortcomings in the circumstances regarding the creation of the intercepts, for example that they had been recorded over 10 years ago with rudimentary equipment.<sup>195</sup> The Prosecution acknowledged these flaws and gave 'a detailed explanation of how the intercepts were acquired and studied [...] and also provided statements of nine witnesses involved at all levels of the [...] interception operations', leading the Chamber to admit the evidence.<sup>196</sup>

**Technical Irregularities.** When evaluating the reliability of audio recordings, the technical irregularities in recording conversations, albeit potentially significant, are not of such a scale as to exclude the evidence from the outset but rather warrant a case-by-case approach.<sup>197</sup> The ICC Trial Chamber in *Bemba et al* held that problems in synchronisation of speech caused by the ICC Detention Centre telephone system does not affect the Court's

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<sup>191</sup> *Prosecutor v Mladić* ([Transcript](#)) IT-09-92 (13 August 2015) (TC) 37746-37747.

<sup>192</sup> *Prosecutor v Mladić* ([Judgment, Volume IV of V](#)) IT-09-92 (22 November 2017) (TC) [5307].

<sup>193</sup> *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].

<sup>194</sup> *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].

<sup>195</sup> *Prosecutor v Ongwen* ([Transcript](#)) ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (PTC II) 44, lines 8-24.

<sup>196</sup> *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].

<sup>197</sup> *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].

evaluation of the evidence concerning specific topics, names and locations.<sup>198</sup> The ICC noted that the reliability of the recording depends on the type of information the Chamber is relying on, and that the Court does not rely on recordings in isolation but rather reviews all corresponding material together.<sup>199</sup>

**D.7. Transcripts of intercepts may be considered prima facie relevant and probative even when discrepancies exist between their handwritten and electronically typed versions.**

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Keywords: [relevance](#); [probative value](#); [transcription](#)

Pursuant to Rule 89(C) of the [ICTY Rules of Procedure and Evidence](#), despite possible discrepancies between original handwritten transcribed versions of intercepts and their respective electronically-typed transcribed versions, the Court may still consider these intercepts to be prima facie relevant and probative.<sup>200</sup> The ICTY Trial Chamber in *Popović et al* found intercepts as a whole to be prima facie relevant and probative, even though there were discrepancies between the handwritten and electronic versions.<sup>201</sup> The Defence had challenged the accuracy of the Prosecution's interpretation of the contents of the intercepts, given the discrepancies<sup>202</sup>, but the ICTY Trial Chamber ultimately decided that the evidence presented by the Prosecution established at least a *prima facie* level of relevance and probative value of the intercepts.<sup>203</sup>

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<sup>198</sup> *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].

<sup>199</sup> *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].

<sup>200</sup> *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [75], [78].

<sup>201</sup> *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [75], [78].

<sup>202</sup> *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [75].

<sup>203</sup> *Prosecutor v Popović et al* ([Decision on Admissibility of Intercepted Communications](#)) IT-05-88-T (7 December 2007) (TC II) [78].

**D.8. The collection of intercepted communication evidence will not constitute a violation of privacy if it is provided for by law, necessary, and proportionate.**

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Keywords: [prejudice](#); [privacy](#)

Pursuant to Article 69(7) of the [Rome Statute](#), evidence obtained in violation of the ICC's statutory scheme or international human rights is not admissible. The admission of such evidence would be antithetical to and would seriously damage the integrity of the proceedings. The collection of intercepted communication would not be considered a violation of the right to privacy if measures impacting this right are lawful, necessary and proportionate. The ICC Appeals Chamber in *Bemba et al* held that intercepted communication received in the course of normal, administrative activities of the ICC Detention Centre would not violate the human right to privacy.<sup>204</sup> The ICC Appeals Chamber affirmed the Pre-Trial Single Judge's decision to provide the judicial authorisation necessary for the Prosecution to receive the accused's non-privileged phone calls from the Detention Centre collected by the Registry, relying on Article 57(3)(a) of the Rome Statute as its legal basis.<sup>205</sup> The ICC Appeals Chamber added that the authorisation of the transmission of the telephone communications for the purpose of the Prosecution's investigations into possible offences under Article 70 of the Rome Statute was rooted in sufficient factual basis.<sup>206</sup>

**Illegally Obtained Intercepts.** Pursuant to Rule 95 of the [ICTR Rules of Procedure and Evidence](#), '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'.<sup>207</sup> Nevertheless, illegally obtained intercepts will not necessarily contradict the Rule. The ICTR Trial Chamber in *Renzaho* found that the tape of an intercepted call of Rwandan authorities (intercepted by Rwandan Patriotic Front (RFP) soldiers using a walkie-

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<sup>204</sup> *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].

<sup>205</sup> *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) [379] [381].

<sup>206</sup> *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) [390].

<sup>207</sup> cf Article 69(7) of the [Rome Statute](#).

talkie and simultaneously recorded by a journalist on a small Sony tape)<sup>208</sup> recorded 'by eavesdropping on an enemy's telephone calls during the course of a war' was 'certainly not within the conduct which is referred to in Rule 95'. However, the ICTR Trial Chamber determined it was not 'antithetical to and certainly would not seriously damage the integrity of the proceedings'.<sup>209</sup> The ICTR Trial Chamber found that the telephone call could be admitted, particularly in light of the fact that 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.<sup>210</sup> While there was no information about any Rwandan law that was applicable to calls intercepted in April 1994, when the recording was made, and hence whether the interception was illegal, the ICTR Trial Chamber considered that this 'would not in itself lead to exclusion [of the intercepts] under human rights law or Tribunal case law'.<sup>211</sup>

Similarly, the ICTY Trial Chamber in *Brdjanin* found that it could admit intercepts that the Defence alleged had been obtained illegally in contravention of domestic law.<sup>212</sup> While admission of illegally obtained intercepts might indeed contravene Rule 95 of the [ICTY Rules of Procedure and Evidence](#) (which is identical to Rule 95 of the [ICTR Rules of Procedure and Evidence](#))<sup>213</sup> and the right to privacy of those whose private conversations have been intercepted, such a right is not absolute.<sup>214</sup> It may be derogated from in times of emergency: that the intercepts had been obtained during the course of a war 'is an example *par excellence*'.<sup>215</sup> The ICTY Trial Chamber asserted that 'communications intercepted during an armed conflict are not as such subject to exclusion under Rule 95 and should therefore be admitted'.<sup>216</sup> Intercept obtained illegally are not, a priori, inadmissible: the manner and surrounding circumstances in which they are obtained, as well as their reliability and effect on

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<sup>208</sup> *Prosecutor v Renzaho* ([Transcript](#)) ICTR-97-31-T (2 March 2007) (TC I) 7.

<sup>209</sup> *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-T (20 March 2007) (TC I) [15]; *Prosecutor v Brdjanin* ([Decision on the Defence "Objection to Intercept Evidence"](#)) IT-99-36-T (3 October 2003) (TC II) [53].

<sup>210</sup> *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-T (20 March 2007) (TC I) [16].

<sup>211</sup> *Prosecutor v Renzaho* ([Decision on Exclusion of Testimony and Admission of Exhibit](#)) ICTR-97-31-T (20 March 2007) (TC I) [16].

<sup>212</sup> *Prosecutor v Brdjanin* ([Decision on the Defence "Objection to Intercept Evidence"](#)) IT-99-36-T (3 October 2003) (TC II) [5].

<sup>213</sup> *Prosecutor v Brdjanin* ([Decision on the Defence "Objection to Intercept Evidence"](#)) IT-99-36-T (3 October 2003) (TC II) [11].

<sup>214</sup> *Prosecutor v Brdjanin* ([Decision on the Defence "Objection to Intercept Evidence"](#)) IT-99-36-T (3 October 2003) (TC II) [30].

<sup>215</sup> *Prosecutor v Brdjanin* ([Decision on the Defence "Objection to Intercept Evidence"](#)) IT-99-36-T (3 October 2003) (TC II) [30].

<sup>216</sup> *Prosecutor v Brdjanin* ([Decision on the Defence "Objection to Intercept Evidence"](#)) IT-99-36-T (3 October 2003) (TC II) [53].

the integrity of the proceedings, will determine their admissibility.<sup>217</sup> The ICTY Trial Chamber, moreover, found that its jurisprudence had never endorsed the exclusionary rule as a matter of principle.<sup>218</sup> Particularly in situations of armed conflict, intelligence which may be the result of illegal activity may prove to be essential in uncovering the truth; particularly when this information is not available from other sources.<sup>219</sup> In applying the provisions of Rule 95, the Tribunal considered all the relevant circumstances and would exclude evidence only if the integrity of the proceedings would otherwise be seriously damaged.<sup>220</sup> As that was not the case here, the intercepts were admitted.<sup>221</sup>

**D.9. Using independent counsel assigned by a Pre-Trial Judge to review intercepted communication to exclude potential privileged communication does not violate the right to privacy.**

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Keywords: prejudice

Pursuant to Article 69(7) of the [Rome Statute](#), to avoid violations of privacy in the case of potential privileged intercepted communications, the Court may appoint independent counsel tasked with filtering the recordings collected before they are transmitted to the Prosecutor.<sup>222</sup> The ICC Appeals Chamber in *Bemba et al* held that using independent counsel to verify intercepted recordings by Dutch authorities did not violate the privacy of the accused.<sup>223</sup> The measures were taken with the view that independent counsel would 'ensure that recordings

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<sup>217</sup> *Prosecutor v Brdjanin* ([Decision on the Defence "Objection to Intercept Evidence"](#)) IT-99-36-T (3 October 2003) (TC II) [55].

<sup>218</sup> *Prosecutor v Brdjanin* ([Decision on the Defence "Objection to Intercept Evidence"](#)) IT-99-36-T (3 October 2003) (TC II) [55].

<sup>219</sup> *Prosecutor v Brdjanin* ([Decision on the Defence "Objection to Intercept Evidence"](#)) IT-99-36-T (3 October 2003) (TC II) [61].

<sup>220</sup> *Prosecutor v Brdjanin* ([Decision on the Defence "Objection to Intercept Evidence"](#)) IT-99-36-T (3 October 2003) (TC II) [61].

<sup>221</sup> *Prosecutor v Brdjanin* ([Decision on the Defence "Objection to Intercept Evidence"](#)) IT-99-36-T (3 October 2003) (TC II) [63].

<sup>222</sup> *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) [404].

<sup>223</sup> *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) [454].

of communications protected by privilege as envisaged in the Court's legal framework would not be accessed by the Prosecution.<sup>224</sup>

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<sup>224</sup> [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 \(8 March 2018\) \(AC\) \[455\].](#)

## E. Call Data Records

### Definition

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Call Data Records (CDRs) are defined as metadata that do not contain the content of any communications, but solely provide information about them, such as the source and destination phone numbers, date and time of phone calls and text messages, the type of communication, the duration of phone calls, the IMEI number<sup>225</sup> of the handset relevant to the communications, and the cell sectors<sup>226</sup> engaged at the beginning and end of a call.<sup>227</sup>

Call Sequence Tables (CSTs) are spreadsheets or database tables which organise and present relevant information from the CDRs into an intelligible and readable format without altering the content of the CDRs.<sup>228</sup>

#### **E.1. The relevant data should be extracted from Call Data Records and presented in a readable format as Call Sequence Tables.**

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Keywords: extraction; format

Call Data Records (CDRs) are themselves voluminous and, without extraction of the relevant data into a readable format, meaningless.<sup>229</sup> The STL Trial Chamber in *Ayyash et al* declined to admit CDRs given that they were so voluminous and unwieldy, comprising billions of entries, and unreadable in their raw form as long strings of numbers and symbols.<sup>230</sup>

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<sup>225</sup> Every mobile telephone handset has a unique International Mobile Station Equipment Identity (IMEI) number: *Prosecutor v Ayyash et al* ([Decision on Prosecution Rule 154 Motion for the Admission of Documents Relating to Telephone Subscriber Records from the Alpha Company](#)) STL-11-01/T/TC (3 May 2016) (TC) [2], fn 9.

<sup>226</sup> Cell sectors refer to longitudinal and latitudinal coordinates of cell tower locations and provide an indication of the approximate location where a mobile telephone handset was used for each phone call. Cell identity and cell sector names identify the cell sector used for each phone call: *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) [12], fn 6.

<sup>227</sup> *Prosecution v Ayyash et al* ([Judgment](#)) TL-11-01/T/TC (18 August 2020) (TC) [373]; *Prosecutor v Ayyash et al* ([Decision on Appeal by Counsel for Mr Oneissi Against the Trial Chamber's Decision on the Legality of the Transfer of Call Data Records](#)) STL-11-01/T/AC (28 July 2015) (AC) [3]. See the [STL Primer on Telecommunications Evidence](#) for an accessible overview of the technical terms and concepts.

<sup>228</sup> *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) [4].

<sup>229</sup> *Prosecutor v Ayyash et al* ([Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution](#)) STL-11-01/T/TC (6 May 2015) (TC) [113].

<sup>230</sup> *Prosecution v Ayyash et al* ([Judgment](#)) TL-11-01/T/TC (18 August 2020) (TC) [375], [378].

Instead, the CDRs should be rendered intelligible through Call Sequence Tables (CSTs). The STL Prosecution in *Ayyash et al* produced a CST presenting a chronological sequence of calls relating to a target telephone number over a specified period of time, comprising relevant CDR information including: the other telephone number in contact with the target telephone number, the time and date of the call, the type of call and duration, the IMEI number<sup>231</sup> of the handset used by the target number, and the cell identity and cell sector name of the cell sector used by the target number at the start and end of the call.<sup>232</sup> In contrast to the CDRs, the STL Trial Chamber admitted the CSTs into evidence.<sup>233</sup>

## **E.2. The scope of the Prosecution's disclosure obligations includes all Call Data Records, available Call Sequence Tables, and related correspondence.**

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Keywords: disclosure

**Disclosure of CDRs and CSTs.** The Prosecution is only required to provide the entirety of the Call Data Records (CDRs\_) in its custody in the formats it received them in; they are not required to prepare and disclose all CDRs as harmonised, searchable, or analysed Call Sequence Tables (CSTs).<sup>234</sup> It is only required to disclose CSTs where available, in the format created as part of its analysis of the original raw CDRs. The MICT Single Judge in *Turinabo et al* distinguished the ICTR *Karemera et al*<sup>235</sup> and ICTY *Mladić*<sup>236</sup> cases where the Prosecution was additionally required to provide 'descriptive indices', as those cases concerned the disclosure of exculpatory material under Rule 68 of the [ICTR](#) and [ICTY](#) Rules of Procedure and Evidence,<sup>237</sup> whereas the Defence in the *Turinabo et al* case had not demonstrated that the material sought was prima facie exculpatory.<sup>238</sup>

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<sup>231</sup> Every mobile telephone handset has a unique International Mobile Station Equipment Identity (IMEI) number: *Prosecutor v Ayyash et al* ([Decision on Prosecution Rule 154 Motion for the Admission of Documents Relating to Telephone Subscriber Records from the Alpha Company](#)) STL-11-01/T/TC (3 May 2016) (TC) [2], fn 9.

<sup>232</sup> *Prosecutor v Ayyash et al* ([Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution](#)) STL-11-01/T/TC (6 May 2015) (TC) [2].

<sup>233</sup> *Prosecution v Ayyash et al* ([Judgment](#)) TL-11-01/T/TC (18 August 2020) (TC) [376].

<sup>234</sup> *Prosecutor v Turinabo et al* ([Decision on Jean de Dieu Ndagijimana's Urgent Motion for Disclosure of Harmonised Call Data Records](#)) MICT-18-116-PT (2 September 2019) (Single Judge) 2.

<sup>235</sup> *Prosecutor v Karemera et al* ([Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations](#)) ICTR-98-44-AR73.7 (30 June 2006) (AC) [10], [15].

<sup>236</sup> *Prosecutor v Mladić* ([Decision on Defence interlocutory appeal against the Trial Chamber's decision on EDS disclosure methods](#)) IT-09-92-AR73.2 (28 November 2013) (AC) [27].

<sup>237</sup> Cf. Rule 73 of the [IRMCT Rules of Procedure and Evidence](#), Article 67(2) of the [Rome Statute](#).

<sup>238</sup> *Prosecutor v Turinabo et al* ([Decision on Jean de Dieu Ndagijimana's Urgent Motion for Disclosure of Harmonised Call Data Records](#)) MICT-18-116-PT (2 September 2019) (Single Judge) 2-3, fn 12.

**Disclosure of Related Documents.** Pursuant to Rule 71(B) of the [IRMCT Rules of Procedure and Evidence](#), the Prosecutor shall permit the Defence to inspect any books, documents, photographs, and tangible objects in the Prosecutor's custody or control which are material to the preparation of the defence or intended for use at trial.<sup>239</sup> This establishes the scope of the Prosecutor's disclosure obligations. The MICT Single Judge in *Turinabo et al* held that in addition to the CDRs, the following related documents fell within the scope of the disclosure obligation: correspondence with the Rwandan authorities in relation to the identification and transmission of intercepts, including requests for assistance from the Rwandan authorities, written follow-ups, the responses thereto, and the clearance letter through which the Rwandan authorities consented to the disclosure of the call logs, as these documents could be relevant to the Defence's investigation regarding the origin, nature, or the timing of the call logs and thus assist their preparation.<sup>240</sup>

**Material Outside Scope of Disclosure Obligation.** Pursuant to Rule 76(A) of the [IRMCT Rules of Procedure and Evidence](#), reports, memoranda, or other internal documents prepared by a party in connection with the investigation, preparation, or presentation of the case are not subject to disclosure obligations.<sup>241</sup> The MICT Single Judge in *Turinabo et al* decided that internal notes and mission reports concerning the intercepted communications were not subject to disclosure where the Defence has not demonstrated that any of the information sought might prima facie be exculpatory.<sup>242</sup>

### **E.3. Call Data Records and Call Sequence Tables can be used in relation to other communications evidence or relied upon in their own right.**

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**Keywords:** [relevance](#); [corroboration](#)

Call Data Records (CDRs) and Call Sequence Tables (CSTs) (collectively, 'call data') may be tendered in relation to other communications evidence. For example, they may be tendered together with intercepted communications to provide the metadata associated with those intercepted communications. The call data can be used to corroborate or discount other

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<sup>239</sup> Cf. Rule 77 of the [ICC Rules of Procedure and Evidence](#). The provisions mirror each other closely.

<sup>240</sup> *Prosecutor v Turinabo et al (Decision on Requests for Disclosure of Information Arising from Interviews with Investigator Tomasz Blaszczyk)* MICT-18-116-PT (7 May 2020) (Single Judge) 4-5, 7.

<sup>241</sup> Cf. Rule 81(1) of the [ICC Rules of Procedure and Evidence](#). The provisions mirror each other closely.

<sup>242</sup> *Prosecutor v Turinabo et al (Decision on Requests for Disclosure of Information Arising from Interviews with Investigator Tomasz Blaszczyk)* MICT-18-116-PT (7 May 2020) (Single Judge) 6. The disclosure of exculpatory evidence is governed by Rule 73 of the [IRMCT Rules of Procedure and Evidence](#), cf Article 67(2) of the [Rome Statute](#).

communications evidence. The ICC Trial Chamber in *Bemba et al* found that call data reinforced and confirmed the accuracy of the intercepted communications as they were consistent with each other.<sup>243</sup> Conversely, the Defence in *Nzabonimpa et al* before the MICT sought to use call data to discount the reliability of intercepted communications by highlighting discrepancies between the durations of the intercepted communications and the durations of the phone calls indicated in the call data.<sup>244</sup>

CDRs and CSTs can also be relied upon in their own right to support factual assertions.<sup>245</sup> For example, call data can demonstrate that a number of target telephones were organised and operated as a closed group in a closed network, which in turn supports charges of co-perpetration or conspiracy.<sup>246</sup> The STL Prosecution in *Ayyash et al* relied upon CSTs to show that groups of target telephones were used for the planning and preparation of the alleged attack and assassination of former Prime Minister Hariri and other related acts.<sup>247</sup>

**E.4. The reliability of Call Sequence Tables depends on the authenticity of the underlying Call Data Records and must be proven through the presentation of expert witnesses.**

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Keywords: probative value; reliability; expert witnesses; authenticity

**Reliability of Underlying CDRs.** Call Data Records (CDRs) are the primary material on which Call Sequence Tables (CSTs) are based. Thus, before assessing the probative value of the CSTs, the Court must be satisfied with the reliability of the underlying CDRs.<sup>248</sup> This may not require the admission into evidence of the CDRs themselves; the coded nature of CDRs means that

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<sup>243</sup> *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) [218], [224].

<sup>244</sup> *Prosecutor v Nzabonimpa et al* ([Judgment](#)) MICT-18-116-T (25 June 2021) [43], fn 145. However, this was unsuccessful as the Single Judge accepted expert evidence that the discrepancies were unlikely to have arisen from manipulation or fabrication and could have been due to differences in the recording method: [57].

<sup>245</sup> *Prosecutor v Ayyash et al* ([Decision on the Prosecution Motions for the Admission of the Call Sequence Tables Related to the Five Colour-Coded Mobile Telephone Groups and Networks](#)) STL-11-01/T/TC (31 October 2016) (TC) [44].

<sup>246</sup> *Prosecutor v Ayyash et al* ([Decision on the Prosecution Motions for the Admission of the Call Sequence Tables Related to the Five Colour-Coded Mobile Telephone Groups and Networks](#)) STL-11-01/T/TC (31 October 2016) (TC) [44].

<sup>247</sup> *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) [4].

<sup>248</sup> *Prosecutor v Ayyash et al* ([Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution](#)) STL-11-01/T/TC (6 May 2015) (TC) [68].

their content is of no practical utility in its raw form.<sup>249</sup> Instead, the tendering party should provide contextual evidence on its chain of custody, including evidence on the creation, storage, and retrieval of the CDRs.<sup>250</sup> The CDRs themselves may also have inherent indicia of authenticity, such as the corporate watermarks of the telecommunications provider.<sup>251</sup> For example, some of the CDRs tendered in *Bemba et al* had a 'kpn Group Belgium' watermark.<sup>252</sup>

**Reliability of CSTs.** The tendering party must also provide contextual evidence about the CSTs, particularly on how they were produced.<sup>253</sup> Tendered CSTs must be accompanied by witness statements or testimony about who prepared the CSTs and in what manner.<sup>254</sup> In *Ayyash et al*, STL Prosecution analysts described the process of creating the CSTs from the CDRs, including the method used, the peer review process, and the correction of errors in the CSTs; and a Prosecution administrator testified about receiving, storing, and processing raw call data and the design, implementation, maintenance, and repair of a database used for the analysis of the CDRs.<sup>255</sup>

When the call data is tendered together with, and in relation to, intercepted communications, the two categories of evidence are mutually reinforcing and confirm the accuracy of the other.<sup>256</sup> The ICC Trial Chamber in *Bemba et al* held that it was not necessary for the Prosecution to provide further testimonial evidence on the authenticity of the call data<sup>257</sup> in addition to the evidence already tendered, which included call data with inherent indicia of authenticity, such as the presence of the corporate watermarks of the

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<sup>249</sup> *Prosecution v Ayyash et al* ([Judgment](#)) TL-11-01/T/TC (18 August 2020) (TC) [375]; *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].

<sup>250</sup> *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].

<sup>251</sup> *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].

<sup>252</sup> *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], fn 232.

<sup>253</sup> *Prosecution v Ayyash et al* ([Judgment](#)) TL-11-01/T/TC (18 August 2020) (TC) [378]; *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].

<sup>254</sup> *Prosecutor v Ayyash et al* ([Judgment](#)) STL-11-01/T/TC (18 August 2020) (TC) [379].

<sup>255</sup> *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) [88].

<sup>256</sup> *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) [218].

<sup>257</sup> *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].

telecommunications provider or self-identification at the start of intercepted calls;<sup>258</sup> intercepted communications which matched the corresponding call data;<sup>259</sup> expert testimony on the origins of the CDRs;<sup>260</sup> and a case record containing information confirming the authenticity and chain of custody of the CDRs.<sup>261</sup>

**E.5. The collection and transfer of Call Data Records 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.**

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Keywords: prejudice; privacy; data collection; data transfer

Pursuant to Article 69(7) of the [Rome Statute](#), evidence obtained by means of a violation of internationally recognised human rights shall not be admissible if the admission would be antithetical to and would seriously damage the integrity of the proceedings. The collection and transfer of Call Data Records (CDRs) may infringe the right to privacy but would not constitute a violation of the right if it is provided for by law, necessary, and proportionate.<sup>262</sup> This Guideline refers to the collection or transfer of the CDRs for prosecution; CDRs are routinely and legally generated and retained by telecommunications companies in the normal course of business for billing and systems management purposes.<sup>263</sup>

**Lawful Basis.** There must be a lawful basis for the collection and transfer of the CDRs. Where this concerns the transmission of a request for cooperation from the Prosecutor to the relevant national authority, the Court will distinguish between two distinct legal issues: first, the authority to transmit the request for cooperation to the relevant national authority, and

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<sup>258</sup> *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].

<sup>259</sup> *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].

<sup>260</sup> *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) [221].

<sup>261</sup> *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].

<sup>262</sup> *Prosecutor v Bemba et al* ([Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible](#)) ICC-01/05-01/13-1432 (30 October 2015) (TC VII) [14], see fn 20 for references to European Court of Human Rights jurisprudence; *Prosecutor v Ayyash et al* ([Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution](#)) STL-11-01/T/TC (6 May 2015) (TC) [108].

<sup>263</sup> *Prosecutor v Ayyash et al* ([Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution](#)) STL-11-01/T/TC (6 May 2015) (TC) [2].

second, the national authority's subsequent authorisation to carry out the requested collection.<sup>264</sup> The former is based on the Prosecutor's powers with respect to investigations under Article 54(3) of the [Rome Statute](#) or the Court's authority to make requests to States Parties for cooperation under Article 87(1) of the [Rome Statute](#), whereas the latter is regulated by the domestic law applicable to the national authority.<sup>265</sup>

Other legal grounds are available. For example, the ICC Appeals Chamber in *Bemba et al* held that the legal basis for the collection of Detention Centre call data was Regulation 174 of the [Regulations of the Registry](#) concerning the monitoring of telephone calls of persons detained at the ICC Detention Centre.<sup>266</sup> The STL Trial Chamber in *Ayyash et al* held that the legal basis for the transfer of CDRs was the legal framework of cooperation between the STL and the Lebanese authorities under UN Security Council Resolutions [1595](#) and [1757](#) read with Article 48(1) of the [UN Charter](#), Article 15(1) of the Agreement annexed to [UN Security Council Resolution 1757](#), Rules 14 and 61 of the [STL Rules of Procedure and Evidence](#), the Memoranda of Understanding between the STL and the Lebanese authorities, and Lebanese law on intercepted communications.<sup>267</sup>

**Necessity.** The collection of the CDRs must be necessary for the case. It would not be necessary if other reasonable measures were available to obtain the information.<sup>268</sup> The ICC Trial Chamber in *Bemba et al* held that the collection of the CDRs were necessary as they 'may be of essence for the Prosecution to be able to shed further light on the relevant facts'.<sup>269</sup> Similarly, the STL Trial Chamber in *Ayyash et al* held that the transfer of CDRs were necessary as without the CDRs, the Prosecutor could not have identified and established the relevant

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<sup>264</sup> *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) [452].

<sup>265</sup> *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) [453], [481].

<sup>266</sup> *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) [374].

<sup>267</sup> *Prosecutor v Ayyash et al* ([Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution](#)) STL-11-01/T/TC (6 May 2015) (TC) [100]-[101], fns 156-158.

<sup>268</sup> *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].

<sup>269</sup> *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].

Call Sequence Tables (CSTs) with which to construct the case and file the indictments against the accused.<sup>270</sup>

**Proportionality.** The proportionality of the collection of the CDRs is assessed with reference to a number of factors. In *Bemba et al*, the collection of CDRs was held by the ICC Trial Chamber to be proportionate because they only concerned non-privileged calls and not calls that were protected by attorney-client privilege.<sup>271</sup> In concluding that the transfer of CDRs was proportionate, the STL Trial Chamber in *Ayyash et al* considered the gravity of the attack under investigation, the overall unstable security situation, and the fact that the investigation was conducted pursuant to a UN Security Council Resolution under Chapter VII of the UN Charter;<sup>272</sup> and it noted that access to the CDRs was strictly limited to individuals who had professional and ethical obligations of confidentiality, thus minimising the intrusion to any right to privacy.<sup>273</sup>

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<sup>270</sup> *Prosecutor v Ayyash et al* ([Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution](#)) STL-11-01/T/TC (6 May 2015) (TC) [103], [109].

<sup>271</sup> *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].

<sup>272</sup> *Prosecutor v Ayyash et al* ([Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution](#)) STL-11-01/T/TC (6 May 2015) (TC) [103].

<sup>273</sup> *Prosecutor v Ayyash et al* ([Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL's Prosecution](#)) STL-11-01/T/TC (6 May 2015) (TC) [104].

## F. Audio Recordings

### Definition

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Audio recordings are recordings ‘made on any disc, tape or other device on which sounds are recorded so as to be capable of being reproduced’.<sup>274</sup> For the purposes of these Guidelines, audio recordings are not intercepted.

**F.1. Instead of excerpts, audio recordings should be submitted in their entirety.**

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Keywords: procedure; excerpts

Submission of full recordings, transcripts, and translations assist judges in contextualising the segments of the recording identified by the party seeking admission as being most relevant.<sup>275</sup> The ICC Trial Chamber in *Bemba* refused to admit the audio recording of a monologue attributed to the Secretary-General of the Movement for the Liberation of the Congo 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’.<sup>276</sup>

**Excerpts.** If a party seeks to tender excerpts, additional excerpts may be tendered to assist judges in contextualising the segments sought to be admitted. The ICC Trial Chamber in *Bemba* held that an excerpt of a Radio France Internationale (RFI) broadcast could be admitted only if the Trial Chamber were ‘provided with sufficient information in order to verify [that] this brief excerpt actually emanates from RFI or one of its reports or correspondents’.<sup>277</sup>

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<sup>274</sup> ‘Audio recording’ (*Law Insider*) <<https://www.lawinsider.com/dictionary/audio-recording>> accessed 21 January 2022.

<sup>275</sup> *Prosecutor v Ntaganda* ([Decision on second Defence request for admission of evidence from the bar table](#)) ICC-01/04-02/06-136 (21 February 2018) (TC VI) [10].

<sup>276</sup> *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].

<sup>277</sup> *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].

**F.2. Audio recordings of media broadcasts are relevant if they refer to events that took place during the time period relevant to the charges and are contemporaneous with the events.**

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**Keywords:** [relevance](#); [media broadcasts](#); [contemporaneity](#)

Audio recordings of media broadcasts should be contemporaneous to the events they purport to demonstrate. The ICC Trial Chamber in *Bemba* found that audio recording CAR-OTP-0031-0099 (a Radio France Internationale programme concerning the situation in the Central African Republic (CAR) dated 5 December 2002) was relevant to the case as it referred to ‘events that allegedly took place in the CAR during the time period relevant to the charges’ and it was contemporaneous with the events.<sup>278</sup>

**F.3. Portions of audio recordings containing opinion evidence are not admissible.**

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**Keywords:** [relevance](#); [opinion evidence](#); [admissibility](#)

Segments of an audio recording containing opinion evidence are not admissible, although the remainder of the information in the recording may nevertheless be deemed relevant. The SCSL in *Taylor* partially admitted Clip 14 (an audio recording of a BBC interview with a reporter about 3000 Sierra Leonean refugees fleeing from the northern regions of Sierra Leone) and excluded the segments consisting of the reporter’s own opinion rather than the objective facts.<sup>279</sup>

**Accounts of Persons Interviewed.** Audio recordings containing the accounts of persons interviewed may be considered for limited purposes (such as corroborating other evidence), to be determined on a case-by-case basis. The ICC Trial Chamber in *Bemba* held that recording

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<sup>278</sup> *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].

<sup>279</sup> *Prosecutor v Taylor* ([Decision on Prosecution Motion for Admission of BBC Radio Broadcasts](#)) SCSL-03-01-T-745 (25 February 2009) (TC II) [27]. The following portions constituted opinion evidence: ‘(i) when speaking of refugees being taken to clinics, the report (Cillah) says “I mean, where they’re giving treatment and sustain treatment just to get them relaxed and refreshed;” (ii) when reporting of the abduction of a number of young men and women, Cillah ventures this opinion: “I mean these obviously are going to be retrained to fight on the side of the rebels;” (iii) speaking of people killed in the attacks, Cillah says “it would appear that particularly in Port Loko, these rebels, they targeted senior functionaries of government or otherwise senior supporters of the ruling SLPP party;” (iv) answering a question about people fleeing into Guinea from Sierra Leone, Cillah says “it would appear that these refugees are now stopping at the last Sierra Leonean town of Kambia and adopting a wait-and-see attitude as to whether they should come into Guinean territory or go back to their homes”.’

CAR-OTP-0031-0099 (a Radio France Internationale programme concerning the situation in the Central African Republic dated 5 December 2002) could 'serve to corroborate other pieces of evidence and might be examined when assessing the prosecution's allegation that the conduct described in the charges was widely broadcast which, according to the prosecution, may have implications with regard to the accused's alleged knowledge of the crimes charged.'<sup>280</sup> In light of the envisioned limited usage of the information contained in the recording, the ICC Trial Chamber was of the view that there was no reason to believe that the admission of this recording would have a prejudicial effect on a fair trial, and admitted it into evidence.<sup>281</sup> Similarly, the ICC Trial Chamber found that recording CAR-OTP-0031-0104 (an audio recording of four tracks of a news programme and one interview) could also be admitted for the limited purpose of corroborating 'other pieces of evidence'.<sup>282</sup>

**F.4. Audio recordings can be admitted into evidence if prima facie authenticity is demonstrated by providing information about the date, the author, the source, and/or the chain of custody.**

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Keywords: relevance; probative value; prejudice; reliability; chain of custody

Prima facie authenticity must be demonstrated before audio recordings can be admitted into evidence. The ICC Trial Chamber in *Bemba* noted that 'unless the [Radio France Internationale (RFI) audio recording] bears sufficient indicia that it is what it purports to be (in this case, an RFI transmission), the prosecution must also provide information on its source, originality and integrity'.<sup>283</sup> Since this information was absent, the probative value of the recording 'was outweighed by its potentially prejudicial effect on a fair trial' and its admission was rejected.<sup>284</sup>

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<sup>280</sup> *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) [101].

<sup>281</sup> *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]-[124].

<sup>282</sup> *Prosecutor v Bemba* (Public Redacted Version of "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012) ICC-01/05-01/08-2299-Red (8 October 2012) (TC III) [125]-[126].

<sup>283</sup> *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].

<sup>284</sup> *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].

**Open Source Audio Recordings of Media Broadcasts.** The ICC Trial Chamber in *Bemba* held that where the audio recording of an interview lacks a date and contains no questions, the tendering party must provide sufficient information to identify the recorded voice and ‘to confirm the date, circumstances and context in which the recording was created’.<sup>285</sup> In the absence of such information, the ICC Trial Chamber found that it could not afford probative value to audio recording CAR-DEF-0001-0830, which the Prosecution alleged was a monologue of the Secretary-General of the Movement for the Liberation of the Congo.<sup>286</sup>

Moreover, in the context of the ICTY proceedings against *Mladić*, and pursuant to Rule 89(D) of the [ICTY Rules of Procedure and Evidence](#),<sup>287</sup> ‘[the] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial’. Nevertheless, open source audio recordings may be admitted if counsel show with sufficient clarity and specificity the relevance and probative value of these documents, and how they fit into the case.<sup>288</sup> In *Mladić*, the ICTY Prosecution requested the admission of open source local and international radio news reports from the bar table.<sup>289</sup> The Defence objected to their admission on the grounds that they originated from an open source and as such the author was unknown, rendering the Defence unable to challenge the content of the material, and that it was unclear whether the source heard the information from others.<sup>290</sup> The ICTY Trial Chamber found that the general Defence submissions in relation to the origin of these documents were insufficient to successfully challenge their probative value, or preclude admission pursuant to Rule 89(D) of the Rules. Having considered the documents in this category, the Chamber was satisfied that the Prosecution had shown with sufficient clarity and specificity the relevance and probative value of each of these documents, and how they fit into its case.<sup>291</sup>

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<sup>285</sup> *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].

<sup>286</sup> *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], [84].

<sup>287</sup> cf Article 69(4) of the [Rome Statute](#).

<sup>288</sup> *Prosecutor v Mladić* ([Decision on Prosecution Motion for Admission of Documents from the Bar Table \(Municipalities Component\)](#)) IT-09-92 (11 February 2014) (TC) [9].

<sup>289</sup> *Prosecutor v Mladić* ([Decision on Prosecution Motion for Admission of Documents from the Bar Table \(Municipalities Component\)](#)) IT-09-92 (11 February 2014) (TC) [1].

<sup>290</sup> *Prosecutor v Mladić* ([Decision on Prosecution Motion for Admission of Documents from the Bar Table \(Municipalities Component\)](#)) IT-09-92 (11 February 2014) (TC) [7].

<sup>291</sup> *Prosecutor v Mladić* ([Decision on Prosecution Motion for Admission of Documents from the Bar Table \(Municipalities Component\)](#)) IT-09-92 (11 February 2014) (TC) [8].

**F.5. Insufficient authentication goes to the weight of audio recordings rather than their admissibility.**

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Keywords: [relevance](#); [probative value](#); [hearsay](#); [admissibility](#)

Pursuant to Rule 92 *bis* of the [SCSL Rules of Procedure and Evidence](#), a Chamber may, in lieu of oral testimony, admit information including written statements and transcripts that do not go to proof of the acts and conduct of the accused. Such information should be 'relevant to the purpose for which it is submitted and its reliability should be susceptible of confirmation'.<sup>292</sup> Audio recordings that are insufficiently significant, cumulative and/or hailing from anonymous or hearsay sources may nevertheless be admitted. Consequently, the Defence in *Taylor* argued before the SCSL that audio recordings of BBC radio broadcasts were inadmissible.<sup>293</sup> However, the SCSL Trial Chamber admitted the audio evidence under Rule 92 *bis* and held that the Defence objection went to weight and not admissibility.<sup>294</sup>

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<sup>292</sup> Rule 92 *bis* of the [SCSL Rules of Procedure and Evidence](#).

<sup>293</sup> *Prosecutor v Taylor* ([Decision on Prosecution Motion for Admission of BBC Radio Broadcasts](#)) SCSL-03-01-T-745 (25 February 2009) (TC II) [7].

<sup>294</sup> *Prosecutor v Taylor* ([Decision on Prosecution Motion for Admission of BBC Radio Broadcasts](#)) SCSL-03-01-T-745 (25 February 2009) (TC II) [27]-[28].